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# Rules and Regulations

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Tuesday, April 17, 2007

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

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

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 550

**RIN 3206–AK74**

### Pay Administration (General)

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management is issuing final regulations on compensatory time off for time spent in a travel status away from the official duty station when such time is not otherwise compensable.

**DATES:** The regulations are effective May 17, 2007.

**FOR FURTHER INFORMATION CONTACT:** Vicki Draper by telephone at (202) 606–2858, by fax at (202) 606–0824, or by e-mail at *pay-performance-policy@opm.gov.*

**SUPPLEMENTARY INFORMATION:** On January 27, 2005, the Office of Personnel Management (OPM) published interim regulations (70 FR 3855) in 5 CFR part 550, subpart N, to implement section 203 of the Federal Workforce Flexibility Act of 2004 (Pub. L. 108–411, October 30, 2004), hereafter referred to as ''the Act.'' Section 203 of the Act amended 5 U.S.C. chapter 55, subchapter V, by adding a new section 5550b, which established a new form of compensatory time off for time spent by an employee in a travel status away from the employee's official duty station when such time is not otherwise compensable. The 60-day comment period for the interim regulations ended on March 28, 2005. During the comment period, OPM received comments from 16 Federal agencies, 7 unions, and 81 individuals, all of which are addressed in this final rule. In addition, in March 2006, we issued additional guidance, including questions and answers, to address many of the comments we received on the interim regulations. We encourage agencies and employees to review these materials on OPM's Web site at *http://www.opm.gov/oca/pay/HTML/compensatory_time.asp*. We will continue to provide additional guidance on the administration of compensatory time off for travel, as necessary.

#### Effective Date

Two individuals suggested the new provision be applied retroactively to cover previous travel times that were not compensable under title 5, United States Code. Section 203(c) of the Act provided that the new form of compensatory time off for travel would take effect on the earlier of (1) the effective date of the implementing regulations or (2) the 90th day after the date of the law's enactment (January 28, 2005). The interim regulations became effective on January 28, 2005, and apply prospectively from that date.

#### Covered Employees

Several commenters requested clarification on the categories of employees covered by the new compensatory time off provision, while others objected to omissions of certain categories of employees in OPM's regulations at 5 CFR 550.1402. Because the law authorizing the new compensatory time off provision is in 5 U.S.C. chapter 55, subchapter V, the new provision applies to an ''employee'' as defined in 5 U.S.C. 5541(2), who is employed in an ''Executive agency,'' as defined in 5 U.S.C. 105, without regard to whether the employee is exempt from or covered by the overtime pay provisions of the Fair Labor Standards Act of 1938 (FLSA), as amended. OPM cannot broaden coverage to include additional employee groups. The definition includes employees in senior-level (SL) and scientific or professional (ST) positions, but not members of the Senior Executive Service, Senior Foreign Service, Foreign Service officers, or prevailing rate (wage grade) employees.

The compensatory time off for travel provision also does not apply to employees of Non-Appropriated Fund Instrumentalities (NAFI). NAFI employees are not covered by the laws administered by OPM, with a few narrow exceptions, which are listed in 5 U.S.C. 2105(c). Although title 38 employees are not specifically excluded from the definition of ''employee'' in 5 U.S.C. 5541(2), the title 38 employment system is administered by the Department of Veterans Affairs (VA) under its own legal authority and any determinations as to coverage under 5 U.S.C. 5541(2) would be made by VA. A commenter noted that the Department of Justice (DOJ) has determined the compensatory time off for travel statute does not apply to attorneys at DOJ. Congress recently enacted legislation (Pub. L. 109–425, December 20, 2006) which provides that attorneys at DOJ shall be eligible for compensatory time off for travel under section 5550b of title 5, United States Code.

Employees who are on intermittent work schedules are not eligible to earn and use compensatory time off for travel because they do not have a scheduled tour of duty for leave purposes. Under 5 CFR 550.1406(b), compensatory time off for travel may be used by an employee when the employee is granted time off from his or her scheduled tour of duty established for leave purposes. Finally, a part-time employee may be entitled to compensatory time off for travel if the travel time does not qualify as compensable hours of work under 5 U.S.C. 5542(b)(2)(B) and 5 CFR 550.112(g)(2) and meets the other requirements in 5 CFR part 550, subpart N.

#### Definitions

Many commenters recommended the addition or revision of certain definitions in § 550.1403. One agency recommended adding a definition of *accrued compensatory time off,* which is used in § 550.1406. We agree and have added a definition to § 550.1403. In addition, we have added a definition of *authorized agency official* to mean the head of the agency or an official who is authorized to act for the head of the agency in the matter concerned.

Two individuals recommended that OPM define *time the employee would have spent in normal home-to-work or work-to-home commuting*. We do not believe this is necessary, since agencies may use procedures already in place for deducting commuting time from travel hours as required by 5 CFR 550.112(j)(2) and 5 CFR 551.422(b). One agency recommended that OPM establish a minimum commute time for an employee whose residence is considered his or her official duty

station. We are not adopting this recommendation because an employee whose residence is his or her official duty station does not spend time commuting to work.

Two individuals recommended revising the definition of *official duty station* to be consistent with the term *official station* as defined in the Federal Travel Regulation (41 CFR 300–3.1) issued by the General Services Administration. *Official duty station* in § 550.1403 means the geographic area surrounding an employee's regular work site that is the same as the area designated by the employing agency for the purpose of determining whether travel time is compensable for the purpose of determining overtime pay, consistent with the regulations in 5 CFR 550.112(j) and 551.422(d). The term *official station* prescribes the geographic limits of an employee's permanent work station for the purpose of determining the employee's entitlement to subsistence allowances (per diem). We are not adopting the recommendation because the geographic area an agency designates for the purpose of determining whether an employee is entitled to overtime pay for a period of travel may be different than the geographic area covered by *official station* as defined in 41 CFR 300–3.1.

One agency recommended that the definition of *travel status* be stated exactly as it is in § 550.1404(b), and one individual recommended clarifying the definition. We do not believe it is necessary to revise the definition because it refers directly to § 550.1404(b).

**Compensable Travel Time**

Several commenters recommended clarifying whether travel under certain circumstances is *compensable*. Under § 550.1403, *compensable* refers to periods of time that are creditable as hours of work for the purpose of determining a specific pay entitlement, even when that work time may not actually generate additional compensation because of applicable pay limitations. One agency and an individual recommended clarifying whether an employee who receives administratively uncontrollable overtime (AUO) pay under 5 U.S.C. 5545(c)(2) is eligible to receive compensatory time off for travel. An employee receiving AUO pay may be entitled to compensation for travel time during (1) nonovertime hours, (2) AUO hours (i.e., irregular or occasional overtime hours), or (3) regularly scheduled overtime hours—if the travel hours meet one of the conditions in 5 CFR 550.112(g) or 5 CFR 551.422, as applicable. If an AUO employee has other qualifying travel time that does not meet the applicable conditions to be treated as compensable hours of work, such travel time may be used to earn compensatory time off under 5 CFR part 550, subpart N.

One agency recommended clarifying an employee is not eligible for compensatory time off for travel when the time spent traveling has been compensated under the FLSA. Overtime hours compensated under the FLSA clearly meet the definition of *compensable* in § 550.1403. Therefore, we believe no clarification in the regulations is necessary. One union recommended clarifying that a class of accommodations, such as business class, does not influence whether the travel time is *compensable*. We agree. Allowing an employee to upgrade his or her travel to business class does not eliminate his or her eligibility to earn compensatory time off for travel.

One individual and one agency recommended clarifying whether an employee is eligible to earn compensatory time off for any portion of a period of travel under 5 CFR 550.112(g)(2) which may not be compensable because of the biweekly cap on premium pay. One union and one agency recommended that such an employee should be eligible. We disagree. Even though an employee may not be paid overtime pay for all of his or her travel hours because of the biweekly premium pay cap, all of the travel time is still considered to be compensable under 5 CFR 550.112(g)(2). Under these circumstances, therefore, the employee has been compensated fully under the law for all of the travel hours; the employee may not earn compensatory time off for any portion of such travel.

**Earning Compensatory Time Off for Travel**

Two unions and one individual recommended an employee should be able to earn compensatory time off when he or she travels while performing union representational duties. We are not adopting this recommendation. The term *travel* is defined at 5 CFR 550.1403 to mean officially authorized travel—i.e., travel for work purposes that is approved by an authorized agency official or otherwise authorized under established agency policies. The term ''travel for work purposes'' is intended to mean travel for agency-related work purposes. The Federal Labor Relations Authority (FLRA) has held that the performance of representational duties does not involve the performance of work as used in the phrase ''technology of performing work'' under 5 U.S.C. 7106(b)(1). *See AFGE, Council 214, AFL–CIO,* 31 FLRA 1259, 1261–62 (1988). The FLRA has similarly held that the performance of representational activities does not involve ''work'' within the meaning of 5 U.S.C. 7106(a)(2)(B). *See AAFES, Dallas,* 53 FLRA at 24. Finally, the FLRA also has determined that, under 5 U.S.C. chapter 43, job performance encompasses the performance of agency-assigned duties and does not include duties performed on behalf of a union. *See United States Department of Health and Human Services., Soc. Sec. Admin., Office of Hearings & Appeals,* 48 FLRA 357, 364 (1993). Thus, employees who travel while performing union activities are not entitled to earn compensatory time off because they are traveling for the benefit of the union and not for agency-related work purposes. We have revised the definition of *travel* in § 550.1403 to clarify that time spent traveling in connection with union activities is not creditable for the purpose of earning compensatory time off for travel.

One union and four individuals objected to an employee not being entitled to compensatory time off for travel when he or she is required to travel on a Federal holiday (or ''in lieu of'' holiday) during his or her basic (non-overtime) hours. Although most employees do not receive holiday premium pay for time spent traveling on a holiday (or an ''in lieu of'' holiday), an employee continues to be entitled to pay for the holiday in the same manner as if the travel were not required. Thus, an employee may not earn compensatory time off for travel during basic (non-overtime) holiday hours because the employee is entitled to his or her rate of basic pay for those hours. Compensatory time off for travel may be earned by an employee only for time spent in a travel status away from the employee's official duty station when such time is not otherwise compensable.

Some commenters requested clarification regarding an employee's *travel status* as described in § 550.1404(b). Under § 550.1404(b), creditable travel time for the purpose of earning compensatory time off for travel includes the time an employee actually spends traveling between the official duty station and a temporary duty station, or between two temporary duty stations, and the usual waiting time that precedes or interrupts such travel (subject to certain exclusions). One union recommended revising § 550.1404(b)(1) to include situations where an employee may depart from his or her residence. We do not believe this is necessary, since travel to and from

home is addressed in § 550.1404(c). One agency recommended clarifying compensatory time off for travel requires travel orders and it is not appropriate when travel is within an employee's normal commuting area. We are not adopting these recommendations. Agencies are already required to process travel orders for officially authorized travel. In addition, § 550.1404(a) already requires an employee to travel away from (i.e., outside the limits of) his or her official duty station in order to earn compensatory time off.

Under § 550.1404(b)(1), time spent at a temporary duty station between arrival and departure is not time in a travel status. One individual recommended clarifying whether the arrival and departure are from the temporary duty worksite or lodging. We agree and have revised § 550.1404(b)(1) to clarify arrival and departure times. Time in a travel status ends when the employee arrives at the temporary duty worksite or his or her lodging in the temporary duty station, wherever the employee arrives first. Time in a travel status resumes when an employee departs from the temporary duty worksite or his or her lodging in the temporary duty station, from whichever the employee departs last.

One agency recommended clarifying whether travel in connection with a permanent change of station (PCS) is considered time spent in a *travel status,* and one individual recommended that it should be. Although PCS travel is officially authorized travel, it is not travel between an official duty station and a temporary duty station or between two temporary duty stations. Therefore, it is not considered time in a travel status for the purpose of earning compensatory time off for travel. The law applies to travel ''away from the official duty station of the employee,'' not travel to a new official duty station. We believe that the regulation limiting application to temporary duty travel is consistent with the law and the intent of Congress. We have revised § 550.1404(b)(1) to clarify that travel time in connection with an employee's PCS is not time in a travel status for the purpose of earning compensatory time off.

Six individuals requested clarification of how travel is calculated when an employee travels between different time zones. We have added a new paragraph (e) to § 550.1404 to provide clarification regarding the calculation of an employee's travel time when the employee's travel involves two or more time zones. Under 5 CFR 550.1404(b)(1), time in a travel status includes the time an employee ''actually spends traveling'' and the usual waiting time that precedes or interrupts the travel, subject to certain exclusions as specified in section 550.1404 of the regulations. When an employee's travel involves two or more time zones, the time zone from the point of first departure must be used to determine how many hours (i.e., elapsed time) the employee actually spent in a travel status for the purpose of accruing compensatory time off.

We received a number of comments on § 550.1404(b)(1) concerning the employing agency's sole and exclusive discretion to determine what is creditable as ''usual waiting time.'' One agency, one union, and two individuals objected to providing agencies with this authority. The agency recommended establishing an upper and lower range of what is considered acceptable ''usual waiting time.'' The union recommended including examples of ''usual waiting times.'' The two individuals suggested defining ''usual waiting time'' to include the time it takes to get service at ticket counters, security, baggage claim, and transportation counters or using waiting times determined by the airlines or travel agencies. One individual commented that there may be different determinations of ''usual waiting time'' within an agency. We are not adopting any of these recommendations. The concept of ''usual waiting time'' is currently used in determining overtime hours of work under title 5 and the FLSA, and agencies are knowledgeable and experienced in applying this concept. In addition, we believe it is appropriate to give agencies the flexibility to make this determination.

Several commenters recommended removing § 550.1404(b)(2), which states that bona fide meal periods during actual travel time or waiting time are not creditable as time spent in a travel status. An agency stated it was absurd to subtract bona fide meal periods from creditable travel time but allow time periods for making telephone calls, dozing, chatting, wandering through terminals, etc., to be considered creditable travel time. Another agency commented that the results of making distinctions between employees who choose to eat at a terminal restaurant and employees who choose to eat while walking to or waiting at the gate are so anomalous that consistent application of the regulation cannot be expected. OPM included this limitation in the interim regulations because it is consistent with the requirement to subtract bona fide meal periods from an employee's creditable overtime hours of work under 5 CFR 550.112(m) and 551.432(c). However, we agree that agencies should not try to make distinctions in the employee's activities during waiting time. Further, we agree it is not efficient or cost-effective to try to track employees' bona fide meal periods during travel time or waiting time solely for the purpose of crediting compensatory time off for travel, and we have removed § 550.1404(b)(2) accordingly.

Many commenters requested clarification of, or objected to, § 550.1404(b)(3), which states that extended waiting time is not creditable as time in a travel status. Under § 550.1404(b)(3), if an employee experiences an extended (i.e., not usual) waiting time between the periods of actual travel during which the employee is free to rest, sleep, or otherwise use the time for his or her own purposes, the extended waiting time is not creditable as time in a travel status. Three agencies recommended providing guidance on a range of acceptable hours for ''extended waiting time,'' how much discretion an agency has in determining extended waiting times, or where to draw the line between ''usual'' and ''extended'' waiting times. Another agency recommended permitting an employee to earn compensatory time off for situations beyond the control of the employee, though not a large amount of compensatory time off. Three agencies and a union recommended revising § 550.1404(b)(3) to limit extended waiting time to any period during which an employee must obtain overnight lodging. We are not adopting any of these recommendations. Under § 550.1404(b)(1), determinations regarding what is creditable as usual waiting time are within the sole and exclusive discretion of the agency. The concept of excluding extended waiting time is currently used in determining creditable overtime hours of work under title 5 and the FLSA, and agencies are experienced in applying this limitation. Agencies should not establish a policy to credit compensatory time off for travel beyond the usual waiting time applied under title 5 and the FLSA.

We received several comments about subtracting commuting time from creditable travel time under § 550.1404(c)(1) and § 550.1404(d). Under § 550.1404(c)(1), an agency must deduct the hours the employee would have spent in normal home-to-work or work-to-home commuting from travel between the employee's home and a temporary duty station. Under § 550.1404(d), if a transportation terminal (such as an airport) is located within the limits of the employee's official duty station, the employee's

travel time to and from the airport (outside regular working hours) is considered to be equivalent to commuting time and is not creditable time in a travel status. If the airport is located outside the limits of the employee's official duty station, the travel time to and from the airport (outside regular working hours) is creditable time in a travel status, but it is subject to an offset for the time the employee would have spent in normal home-to-work or work-to-home commuting.

Several commenters objected to deducting normal commuting time on non-workdays as required by § 550.1404(d). An agency recommended deleting § 550.1404(d) entirely. Another agency and a union recommended revising § 550.1404(d) to make travel to and from a transportation terminal within an employee's official duty station official travel time rather than equivalent commuting time. The union also objected to subtracting an employee's normal commuting time under § 550.1404(c)(1). One individual recommended making an exception for employees who reside outside the local commuting area or to limit the amount of normal commuting time the agency deducts for such employees. We are not adopting any of these recommendations. The requirement in OPM's regulations in § 550.1404(c) and (d) regarding the deduction of normal commuting time is consistent with the requirement to deduct normal commuting time from an employee's travel time in determining creditable overtime hours of work under 5 CFR 550.112(j)(2) and 5 CFR 551.422(b).

An individual expressed concern regarding how § 550.1404(c) might be applied by his agency. In particular, he was concerned his agency might define ''official duty station'' to encompass an unreasonably large area so that an employee could not be credited for travel from home to a temporary duty station. It is true that, under the regulations, travel to a temporary duty station within an employee's official duty station is not creditable for the purpose of accruing compensatory time off for travel. However, as explained in an earlier paragraph regarding comments on the definition of ''official duty station,'' an agency is required to use the same geographic area that is used for determining whether travel time is compensable under the overtime pay provisions. (See 5 CFR 550.112(j) and 551.422(d).) Thus, agency discretion is limited. We have no information indicating that the agencies have defined ''official duty station'' for overtime pay purposes in an unreasonable way. Therefore, we decline to make any change in the regulations in this regard.

In the case of an employee who is offered one mode of transportation and who is permitted to use an alternative mode of transportation, or who travels at a time or by a route other than that selected by the agency, the agency must determine the estimated amount of time in a travel status the employee would have had if the employee had used the mode of transportation offered by the agency or traveled at the time or by the route selected by the agency under § 550.1404(c)(2). As recommended by an agency, we made a minor editorial correction to § 550.1404(c)(2) and replaced ''traveled at the time and by the route selected by the agency'' with ''traveled at the time *or* by the route selected by the agency'' [emphasis added].

One agency and an individual asked if compensatory time off for travel may be authorized when the employee returns a day earlier than planned. In such cases, the agency must credit an employee with the lesser of the estimated time in travel status the employee would have had if the employee had traveled on the day selected by the agency, or the employee's actual travel hours on a day other than that selected by the agency.

One individual commented an alternative mode of transportation may save the agency money and recommended imposing a daily limit on the amount of compensatory time off for travel rather than crediting the lesser travel time. We do not agree. The cost of travel may influence how an agency schedules an employee's travel, but it does not have any impact on an employee's entitlement to compensatory time off for travel.

Another individual asked if crediting the lesser travel time when an employee uses an alternative mode of transportation discriminates against employees with documented special needs and/or disabilities, such as a fear of flying, by not allowing the employee to earn compensatory time off for travel for the extra time spent traveling using the alternative mode of transportation. The regulatory requirement in § 550.1404(c)(2) regarding how to credit time when an employee uses an alternative mode of transportation, or travels at another time or by a route other than that selected by the agency, is consistent with the same requirement in determining creditable overtime hours of work under 5 CFR 551.422(c). In addition, an alternative mode of transportation or alternative route or time period may influence an agency's authorization of official travel but does not have an impact on an employee's entitlement to compensatory time off for travel. Therefore we have not changed the regulation.

Two agencies recommended clarifying whether an agency may change an employee's work schedule for travel purposes. An agency may not adjust the regularly scheduled administrative workweek that normally applies to an employee (part-time or full-time) solely for the purpose of including planned travel time that would not otherwise be considered compensable hours of work. One individual recommended clarifying whether time spent traveling would be creditable as credit hours or compensatory time off for travel for an employee who is authorized to earn credit hours under an alternative work schedule. Credit hours are hours an employee elects to work, with supervisory approval, in excess of the employee's basic work requirement under a flexible work schedule. Under certain conditions, an agency may permit an employee to earn credit hours by performing productive and essential work while in a travel status. See OPM's Handbook on Alternative Work Schedules at *http://www.opm.gov/oca/worksch/HTML/Cred_hrs.htm#travel* for the conditions that must be met. If those conditions are met and the employee does earn credit hours for travel, the time spent traveling would be compensable and the employee would not be eligible to earn compensatory time off for travel. If the conditions are not met, the employee would be eligible to earn compensatory time off for travel.

One agency, one union, and one individual expressed concerns about the provision in § 550.1405(a) which allows the employing agency to credit an employee's earned compensatory time off in increments of one-tenth of an hour (6 minutes) or one-quarter of an hour (15 minutes). The agency recommended mandating the use of either 6-minute or 15-minute increments, rather than providing the choice, for payroll consistency. The union recommended permitting agencies to continue their established minimum charges to leave rather than modifying the payroll systems. The requirement to credit and use compensatory time off for travel in increments of 6 or 15 minutes is consistent with OPM's standardized policy for charging annual and sick leave in the same increments. In addition, agency time and attendance and payroll processing systems have already been modified to accommodate this change as a result of the interim

regulations issued in January 2005 on compensatory time off for travel.

Under § 550.1405(b), an employee must comply with his or her agency's procedures for requesting credit of the employee's compensatory time off and file such requests within the time period specified by the agency. An agency recommended adding a requirement that an employee's request for credit of compensatory time off for travel may be denied if the request is not filed within the time periods established by agency policy or guidelines. We agree and have added this requirement to § 550.1405(b). One union recommended that an agency should approve a request to earn compensatory time off for travel at the same time the travel authorization is issued. Another agency recommended setting a specific time period within which employees must submit requests for credit of compensatory time off for travel. We are not adopting these recommendations. We do not believe it is necessary to limit an agency's discretionary authority to prescribe such procedures and time limitations in its internal policies.

An agency recommended modification of OPM Form 71, *Request for Leave or Approved Absence*, or develop a new form, for employee requests to earn or use compensatory time off for travel. We do not believe it is necessary or desirable to mandate the use of a Governmentwide form for this purpose. However, an agency may choose to develop a form as part of its internal policies and procedures for requesting and using compensatory time off for travel.

Three agencies recommended establishing a limit on the number of hours of compensatory time off for travel an employee may earn. Establishing a cap on the amount of compensatory time off for travel an employee may earn would require a legislative change. A union and an individual recommended not limiting compensatory time off to domestic travel. These regulations are not limited to domestic travel; OPM's regulations apply to both domestic and foreign travel.

**Using Compensatory Time Off for Travel**

Under § 550.1406(a), an employee must request permission from his or her supervisor to schedule the use of his or her accrued compensatory time off in accordance with agency-established policies and procedures. One agency recommended requiring agencies to charge compensatory time off for travel on a first-in, first-out basis. We agree and have revised § 550.1406(b) to require agencies to charge compensatory time off in the chronological order in which it was earned, with compensatory time off earned first being charged first. One individual recommended compensatory time off for travel should be redeemable at the rate of 1.5 times the number of hours spent traveling. No legal authority exists to permit an employee to be absent from his or her scheduled tour of duty on the basis of 1.5 hours for each hour of creditable travel time. In addition, the hour-for-hour rule in the interim regulation is consistent with the policy for earning and using compensatory time off in lieu of overtime pay under 5 CFR 550.114 and 551.531.

Under § 550.1406(b), earned compensatory time off may be used when an employee is granted time off from his or her scheduled tour of duty for leave purposes. One agency and two individuals requested clarification of how the use of earned compensatory time off for travel relates to ''use-or-lose'' annual leave. (''Use or lose'' annual leave is accrued annual leave in excess of the maximum leave ceilings (i.e., 30, 45, or 90 days) that is subject to forfeiture at the end of the leave year.) Section 6304(d) of title 5, United States Code, prescribes the conditions under which an employee's forfeited annual leave may be restored to an employee. There is no legal authority to restore an employee's forfeited annual leave because the employee elected to use earned compensatory time off for travel instead of using his or her excess annual leave.

**Forfeiting Unused Compensatory Time Off for Travel**

We received several comments on § 550.1407(a)(1), which requires employees to forfeit unused compensatory time off if it is not used by the end of the 26th pay period after the pay period during which it was credited, except as provided in § 550.1407(a)(2) (e.g., when an employee separates or is placed in a leave without pay status to perform service in the uniformed services with restoration rights or who has suffered an on-the-job injury with entitlement to injury compensation under 5 U.S.C. chapter 81 and who later returns to service.). Two agencies recommended clarifying whether the forfeiture of unused compensatory time off occurs within 26 pay periods after it has been earned or credited to their payroll account. We agree and have revised § 550.1407(a)(1) to clarify that an employee must use his or her accrued compensatory time off within 26 pay periods after it is earned or forfeit such compensatory time off.

One agency recommended giving agencies discretionary authority to provide a time limit for an employee to use compensatory time off for travel in the same way agencies are allowed to provide time limitations for the use of other compensatory time off. Another agency recommended establishing a specific date for using earned compensatory time off for travel. A union recommended an employee be allowed to use his or her earned compensatory time off for travel from the date earned until the end of the next leave year. Two individuals expressed concerns that agencies would not allow their employees to use their earned compensatory time for travel within 26 pay periods. One union and an individual recommended establishing a longer period of time, such as 52 pay periods, before requiring forfeiture of compensatory time off for travel. Several commenters recommended providing agencies discretionary authority to extend the time limit for using earned compensatory time off for travel in emergency situations or when employees are required to complete mission-critical assignments.

While the use of compensatory time off for travel is subject to agency work demands, we believe 26 pay periods is a sufficient amount of time for most employees to use their earned compensatory time off. However, we believe exceptions may be warranted in exceptional situations, for example, during emergency situations, to complete mission-critical assignments, or when employees are deployed to perform work directly related to a military operation. Therefore, we have added a new paragraph (e) to § 550.1407 to permit an authorized agency official, at his or her sole and exclusive discretion, to extend the time limit for using earned compensatory time off for travel if an employee's failure to use the compensatory time off within 26 pay periods is due to an exigency of the service beyond the employee's control.

Section 550.1407(a)(2) extends the period for using earned compensatory time off for travel for an employee who separates from Federal service or is placed in a leave without pay status to perform service in the uniformed services with restoration rights or who has suffered an on-the-job injury with entitlement to injury compensation under 5 U.S.C. chapter 81 and who later returns to service in the same (or successor) agency. In these circumstances, the employee must use his or her earned compensatory time off by the end of the 26th pay period following the pay period in which the employee returns to duty. One agency

objected to allowing the 26 pay periods to start over from the beginning upon an employee's return to duty. We believe it is reasonable to provide an employee, under these circumstances, a full 26 pay periods following his or her return to duty within which to use earned compensatory time off for travel.

An agency recommended allowing agencies to consider unused compensatory time off when determining an employee's separation date. We are not adopting this recommendation. An agency has the authority under § 550.1406(a) to approve or disapprove an employee's request to use his or her accrued compensatory time off in accordance with agency-established policies and procedures.

Two individuals objected to the provision in § 550.1408 which prohibits an individual from receiving payment under any circumstances for any unused compensatory time off for travel that he or she earned. However, the law explicitly prohibits payment for unused compensatory time off. (See 5 U.S.C. 5550b(b).)

**E.O. 12866, Regulatory Review**

The Office of Management and Budget has reviewed this rule in accordance with E.O. 12866.

**Regulatory Flexibility Act**

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

**List of Subjects in 5 CFR Part 550**

Administrative practice and procedure, Claims, Government employees, Wages.

Office of Personnel Management.

**Linda M. Springer,**

*Director.*

■ Accordingly, the interim rule amending 5 CFR part 550, which was published at 70 FR 3855 on January 27, 2005, is adopted as final with the following changes:

## PART 550—PAY ADMINISTRATION (GENERAL)

■ 1. The authority citation for part 550 continues to read as follows:

**Authority:** 5 U.S.C. 5304 note, 5305 note, 5541(2)(iv), 5545a(h)(2)(B) and (i), 5547(b) and (c), 5548, and 6101(c); sections 407 and 2316, Pub. L. 105–277, 112 Stat. 2681–101 and 2681–828 (5 U.S.C. 5545a); E.O. 12748, 3 CFR, 1992 Comp., p. 316.

### Subpart N—Compensatory Time Off for Travel

■ 2. Revise the first sentence of § 550.1401 to read as follows:

**§ 550.1401 Purpose.**

This subpart contains OPM regulations implementing 5 U.S.C. 5550b, which establishes a separate type of compensatory time off. * * *

■ 3. In § 550.1403, add the definitions of *accrued compensatory time off* and *authorized agency official* and revise the definition of *travel* to read as follows:

**§ 550.1403 Definitions.**

* * * * *

*Accrued compensatory time off* means the compensatory time off earned by an employee that has not been used or forfeited.

*Authorized agency official* means the head of the agency or an official who is authorized to act for the head of the agency in the matter concerned.

* * * * *

*Travel* means officially authorized travel—i.e., travel for work purposes that is approved by an authorized agency official or otherwise authorized under established agency policies. Time spent traveling in connection with union activities is excluded.

* * * * *

■ 4. In § 550.1404, revise paragraph (b)(1), remove paragraph (b)(2), redesignate paragraph (b)(3) as paragraph (b)(2), revise the first sentence of paragraph (c)(2), and add paragraph (e) to read as follows:

**§ 550.1404 Creditable travel time.**

* * * * *

(b)(1) *Travel status.* Time in a travel status includes the time an employee actually spends traveling between the official duty station and a temporary duty station, or between two temporary duty stations, and the usual waiting time that precedes or interrupts such travel, subject to the exclusion specified in paragraph (b)(2) of this section and the requirements in paragraph (c), (d) and (e) of this section. Time spent at a temporary duty station between arrival and departure is not time in a travel status. Time in a travel status ends when the employee arrives at the temporary duty worksite or his or her lodging in the temporary duty station, wherever the employee arrives first. Time in a travel status resumes when an employee departs from the temporary duty worksite or his or her lodging in the temporary duty station, from whichever the employee departs last. Travel time in connection with an employee's permanent change of station is not time in a travel status. Determinations regarding what is creditable as ''usual waiting time'' are within the sole and exclusive discretion of the employing agency.

* * * * *

(c) * * *

(2) In the case of an employee who is offered one mode of transportation and who is permitted to use an alternative mode of transportation, or who travels at a time or by a route other than that selected by the agency, the agency must determine the estimated amount of time in a travel status the employee would have had if the employee had used the mode of transportation offered by the agency or traveled at the time or by the route selected by the agency. * * *

* * * * *

(e) *Travel involving two or more time zones.* When an employee's travel involves two or more time zones, the time zone from the point of first departure must be used to determine how many hours the employee actually spent in a travel status for the purpose of accruing compensatory time off.

■ 5. In § 550.1405, paragraph (b) is revised to read as follows:

**§ 550.1405 Crediting compensatory time off.**

* * * * *

(b) An employee must comply with his or her agency's procedures for requesting credit of compensatory time off under this section. Employees must file such requests within the time period required by the agency. An employee's request for credit of compensatory time off for travel may be denied if the request is not filed within the time period required by the agency.

■ 6. In § 550.1406, revise the section heading and paragraph (b) to read as follows:

**§ 550.1406 Use of accrued compensatory time off.**

* * * * *

(b) Compensatory time off may be used when the employee is granted time off from his or her scheduled tour of duty established for leave purposes. An employee must use earned compensatory time off under this subpart in increments of one-tenth of an hour (6 minutes) or one-quarter of an hour (15 minutes). Agencies must charge compensatory time off in the chronological order in which it was earned, with compensatory time off earned first being charged first.

■ 7. In § 550.1407, revise paragraph (a)(1) and add a new paragraph (e) to read as follows:

**§ 550.1407 Forfeiture of unused compensatory time off.**

(a) *After 26 pay periods.* (1) Except as provided in paragraphs (a)(2) and (e) of this section, an employee must use accrued compensatory time off by the end of the 26th pay period after the pay period during which it was earned. If an employee fails to use the compensatory time off within 26 pay periods after it was earned, he or she must forfeit such compensatory time off.

* * * * *

(e) *Exception due to an exigency.* If an employee fails to use his or her compensatory time earned under § 550.1404(a) by the end of the 26th pay period after the pay period during which it was earned due to an exigency of the service beyond the employee's control, an authorized agency official, at his or her sole and exclusive discretion, may extend the time limit for using such compensatory time off for travel for up to an additional 26 pay periods.

[FR Doc. E7–7266 Filed 4–16–07; 8:45 am]

BILLING CODE 6325–39–P

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 890

**RIN 3206–AI62**

### Waiver of Requirements for Continued Coverage During Retirement

**AGENCY:** Office of Personnel Management.

**ACTION:** Final Rule.

**SUMMARY:** Under current Federal Employees Health Benefits (FEHB) Program regulations, the Office of Personnel Management (OPM) may waive the eligibility requirements for health benefits coverage as an annuitant for an individual when, in its sole discretion, it determines that it would be against equity and good conscience not to allow a person to be enrolled in the FEHB Program as an annuitant. The regulations state that an individual's failure to satisfy eligibility requirements must be due to exceptional circumstances. They also list specific situations where a waiver will not be granted by OPM such as when an individual's retirement is based on a disability or an involuntary separation, or when an individual was misadvised by his/her employing office. This final regulation eliminates these specific situations from the regulation. This final regulation provides OPM with more flexibility when granting waivers.

**EFFECTIVE DATE:** May 17, 2007.

**ADDRESSES:** This document is available for viewing at the U.S. Office of Personnel Management, 1900 E Street, NW., Washington DC 20415. Send all comments to Michael Kaszynski, Insurance Policy, U.S. Office of Personnel Management, 1900 E Street, NW., Room 3415, Washington DC 20415.

**FOR FURTHER INFORMATION CONTACT:** Michael Kaszynski, Policy Analyst, at 202–606–0004.

**SUPPLEMENTARY INFORMATION:** Under 5 U.S.C. 8905(b), OPM may waive the eligibility requirements for health benefits coverage as an annuitant for an individual when, in its sole discretion, it determines that it would be against equity and good conscience not to allow a person to be enrolled in the FEHB Program as an annuitant. Under 5 CFR 890.108, an individual's failure to satisfy eligibility requirements must be due to exceptional circumstances. An individual requesting a waiver must provide OPM with evidence that (1) the individual intended to have FEHB coverage as an annuitant (retiree); (2) the circumstances that prevented the individual from meeting the requirements of 5 U.S.C. 8905(b) were beyond the individual's control; and (3) the individual acted reasonably to protect his or her right to continue coverage into retirement.

Section 890.108 lists specific situations where a waiver will not be granted by OPM such as when an individual's retirement is based on a disability or an involuntary separation, or an individual was misadvised by his/her employing office. This final regulation eliminates these specific situations from 5 CFR 890.108 to provide more flexibility to the waiver process.

On August 7, 2006, a proposed regulation was published in the **Federal Register** at 71 FR 44592. We received no comments on the proposed rule. We have made no changes to this rule from its proposed version.

### Collection of Information Requirement

This final rule does not impose information collection and recordkeeping requirements that meet the definition of the Paperwork Reduction Act of 1995's term ''collection of information'' which means obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on ten or more persons, other than agencies, instrumentalities, or employees of the United States; or answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

### Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies with revenues of $11.5 million or less in any one year. This final rulemaking affects FEHB Program health insurance eligibility requirements which do not impact the dollar threshold. Therefore, I certify that this final regulation will not have a significant economic impact on a substantial number of small entities.

### Regulatory Impact Analysis

We have examined the impact of this final rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the RFA (September 16, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995, (Pub. L. 104–4), and Executive Order 13132. Executive Order 12866 (as amended by Executive Order 13258, which merely assigns responsibility of duties) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with economically significant effects ($100 million or more in any one year). This rule is not considered a major rule, as defined in section 804(2) of title 5, United States Code, because we estimate its impact will only affect federal government employment offices. Any resulting economic impact would not be expected to exceed the dollar threshold.

### Executive Order 12866, Regulatory Review

This final rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

**List of Subjects in 5 CFR Part 890**

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professionals, Hostages, Iraq, Kuwait, Lebanon, Military personnel, Reporting and recordkeeping requirements, Retirement.

Office of Personnel Management.

**Linda M. Springer,**

*Director.*

■ For the reasons set forth in the preamble, OPM is amending 5 CFR part 890 as follows:

## PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

■ 1. The authority citation for part 890 continues to read as follows:

**Authority:** 5 U.S.C. 8913; § 890.803 also issued under 50 U.S.C. 403p, 22 U.S.C. 4069c and 4069c–1; subpart L also issued under sec. 599C of Pub. L. 101–513, 104 Stat. 2064, as amended; § 890.102 also issued under sections 11202(f), 11232(e), 11246 (b) and (c) of Pub. L. 105–33, 111 Stat. 251; and section 721 of Pub. L. 105–261, 112 Stat. 2061, unless otherwise noted.

■ 2. Section 890.108 is revised to read as follows:

### § 890.108 Will OPM waive requirements for continued coverage during retirement?

(a) Under 5 U.S.C. 8905(b), OPM may waive the eligibility requirements for health benefits coverage as an annuitant for an individual when, in its sole discretion, it determines that due to exceptional circumstances it would be against equity and good conscience not to allow a person to be enrolled in the FEHB Program as an annuitant.

(b) The individual's failure to satisfy the eligibility requirements must be due to exceptional circumstances. An individual requesting a waiver must provide OPM with evidence that:

(1) The individual intended to have FEHB coverage as an annuitant (retiree);

(2) The circumstances that prevented the individual from meeting the requirements of 5 U.S.C. 8905(b) were beyond the individual's control; and

(3) The individual acted reasonably to protect his or her right to continue coverage into retirement.

[FR Doc. E7–7267 Filed 4–16–07; 8:45 am]

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## DEPARTMENT OF HOMELAND SECURITY

## 8 CFR Parts 103, 204, 214, 245, 245a

**[CIS No. 2287–03]**

**RIN 1615–AB13**

## Removal of the Standardized Request for Evidence Processing Timeframe

**AGENCY:** U.S. Citizenship and Immigration Services, DHS.

**ACTION:** Final rule.

**SUMMARY:** This rule amends Department of Homeland Security regulations to provide flexibility to U.S. Citizenship and Immigration Services in setting the time allowed to applicants and petitioners to respond to a Request for Evidence or to a Notice of Intent to Deny. This rule also describes the circumstances under which U.S. Citizenship and Immigration Services will issue a Request for Evidence or Notice of Intent to Deny before denying an application or petition, but United States Citizenship and Immigration Services will continue generally to provide petitioners and applicants with the opportunity to review and rebut derogatory information of which he or she is unaware. This rule also clarifies when petitioners and applicants may submit copies of documents in lieu of originals.

In addition to these changes, this rule removes obsolete references to legacy agencies, and it removes obsolete language relating to certain legalization and agricultural worker programs.

**DATES:** This final rule is effective June 18, 2007.

**FOR FURTHER INFORMATION CONTACT:** Rodger Pitcairn, Program and Regulations Development, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3000, Washington, DC 20529, telephone (202) 272–8427.

**SUPPLEMENTARY INFORMATION:**

I. Background
II. Comments Received in Response to the Proposed Rule
A. Standards and Timeframes for RFE and NOID Responses
B. Not Issuing at Least One RFE; Making Decisions on the Record
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D. Relationship to Premium Processing Regulations
E. Substitution of Form DS–2019; Submitting Copies
F. Application of the Rule
G. Use of the Term ''Biometrics Capture''
H. Technical Correction to Final Rule
III. Statutory and Regulatory Reviews

### I. Background

An applicant or petitioner seeking immigration benefits from U.S. Citizenship and Immigration Services (USCIS) must establish eligibility for such benefits. 8 CFR 103.2(b)(1). A Request for Evidence (RFE) is a notice issued by USCIS to an applicant or petitioner seeking immigration benefits requesting initial or additional evidence to establish eligibility. *Id.*, 103.2(b)(8). Currently, USCIS must issue an RFE when evidence is missing from an application or petition. *Id.* In addition, USCIS must provide twelve weeks for an applicant or petitioner to respond to an RFE. *Id.*

A Notice of Intent to Deny (NOID) is a written notice issued by USCIS to an applicant or petitioner that USCIS has made a preliminary decision to deny the application or petition. A NOID may be based on evidence of ineligibility or on derogatory information known to USCIS, but not known to the petitioner or applicant. USCIS cannot, however, issue a NOID based on missing initial evidence if an RFE has not first been issued. The NOID provides the applicant or petitioner with an opportunity to inspect and rebut the evidence forming the basis of the decision to deny the petition or application. An applicant or petitioner usually is provided thirty days to respond to the evidence.

On November 30, 2004, USCIS published a proposed rule to remove absolute requirements for, and fixed times to respond to, RFEs and NOIDs. 69 FR 69549. USCIS received thirteen comments from individuals, community-based groups that assist nonimmigrants and immigrants pursue applicants for benefits, law firms, and a national association representing immigration attorneys. This final rule adopts the proposed rule with minor changes as discussed below.

### II. Comments Received in Response to the Proposed Rule

This final rule addresses requirements that are procedural in nature and does not alter the substantive rights of applicants or petitioners for immigration benefits. This final rule, therefore, is exempt from notice and comment requirements under 5 U.S.C. 553(b)(A), and could have been promulgated without public notice and comment. USCIS' decision to promulgate a proposed rule does not alter the authority to promulgate this rule as a final rule. For example, the proposed rule contained a presumptive thirty-day minimum time frame for responses, but, after considering the

comments and the further development of the program, this final rule does not include a specific presumptive minimum time frame for responses. *See Hurson Assoc. Inc.*, v. *Glickman*, 229 F.3d 277 (D.C. Cir. 2000) (rule eliminating face-to-face process in agency review of requests for approval was procedural and not subject to notice-and-comment rulemaking); *JEM Broadcasting* v. *FCC*, 22 F.3d 320 (D.C. Cir. 1994) (challenge to the ''hard look'' rules is untimely; elimination of opportunity to correct errors in application was procedural rule not subject to notice and comment); *see also Public Citizen* v. *Department of State*, 276 F.3d 634 (D.C. Cir. 2002) (cut-off policy was procedural and exempt from notice and comment provisions). USCIS, however, values public comment on the proposed timeframes for RFEs and NOIDs and accordingly solicited public comment on the proposed rule. The comments provided to USCIS have been valuable in considering the changes promulgated in this final rule and are discussed below.

*A. Standards and Timeframes for RFE and NOID Responses*

In the proposed rule, USCIS suggested eliminating the current twelve-week standard timeframe for all applicants and petitioners to respond to an RFE in favor of a more flexible approach that would tailor the timeframes to the evidence requested and circumstances. The proposed rule would have set a new minimum response window of ''generally no less than 30-day[s].'' The proposed rule would have made similar changes for responding to the NOID. USCIS asked for comments on specific timeframes for various kinds of applications and petitions and evidence.

No commenters suggested specific timeframes for each circumstance and case type, but two commenters suggested expanding the current twelve-week standard to give applicants and petitioners sixteen weeks to respond for cases involving asylum claimants and refugees. Another commenter suggested a general sixty-day timeframe for NOIDs. USCIS did not propose to extend the current twelve-week maximum, and will not do so in its final rule. The flexible timeframes will apply to all applicants and petitioners to whom RFEs are issued.

Several commenters focused on the proposed shift from a twelve-week standard for responding to all RFEs to flexible timeframes. Five pointed to the fact that the Department of Labor (DOL) has fixed timeframes for responding to their RFEs. USCIS evaluates petitions and applications in a far wider variety of contexts than DOL and for a far broader array of benefits and services. This fact requires greater processing flexibility. Accordingly, USCIS declines to adopt the standards used by DOL.

Two commenters recommended that the current twelve-week RFE response period remain a standard because it is a predictable baseline. One also pointed out that the twelve-week standard actually gives a degree of flexibility because applicants and petitioners can choose to respond more quickly, often in far less than twelve weeks.

Some commenters focused on the proposed minimum response time. One objected to the idea that USCIS would ''generally'' give not less than thirty days to respond, and suggested an actual thirty-day minimum. Eight commenters considered thirty days to be too short. Several commenters pointed out that it can take more than thirty days to get certified copies of tax returns from the Internal Revenue Service (IRS). Five commenters noted that it is often difficult to obtain documents from foreign countries. Several pointed specifically to problems refugees and asylum claimants can experience getting documents from the country from which they fled. One commenter suggested that providing a minimum of 45 days to respond would be unreasonable for most applicants and petitioners.

USCIS recognizes the value of a predictable timeframe for responding to an RFE or NOID, and did not intend to make this an unpredictable, discretionary process with timeframes determined by individual adjudication officers. USCIS will set clear timeframes and standards for submission of different kinds of evidence in different circumstances. This rulemaking was designed to give USCIS flexibility to set the timeframes for responding to RFEs as a matter of agency practice and procedure and to more specifically set a reasonable time based upon the nature of the information requested. The timeframes would be set out in internal guidance to adjudicators. As many practitioners are aware, this guidance is, as a general matter, publicly disclosed. At this time, USCIS foresees no reason why this guidance would not be publicly disclosed after it is developed or whenever it is adjusted.

Important processing steps (such as background checks) may need to be repeated if processing extends beyond certain timeframes. Repeating these steps would significantly delay an eventual acquisition of a benefit. Longer timeframes can actually work against a timely response because applicants and petitioners given almost three months to respond may delay responding simply because they consider that additional time in the United States to be a benefit.

Recognizing that the majority of applications and petitions are eventually approved, USCIS does not want to arbitrarily restrict a reasonable opportunity to submit material to prove eligibility. USCIS recognizes that documents from certain countries other than the United States are occasionally difficult to obtain; thus, the timeframe flexibility will take into account these situations. Nevertheless, most applicants and petitioners can provide required documents in fewer than twelve weeks. USCIS also provides information explaining how to acquire benefits through many sources such as the agency's Web site, application forms, call centers, brochures, and field offices. Applicants and petitioners can easily follow the instructions provided by these resources and obtain all required documents before filing for immigration benefits. Applicants and petitioners who submit completed applications or petitions will minimize the need for RFE and facilitate faster decision by USCIS. CIS has found that in some cases, the standard twelve week timeframe serves to encourage applicants or petitioners to submit incomplete applications or petitions, relying on the RFE process to prompt them to submit the missing documents. The RFE process and the ensuing delays slows down the processing. Certain applicants and petitioners are also exploiting the RFE process to deliberately delay the processing and thus prolong their stay in the United States. A flexible RFE timeframe will therefore encourage the applicants and petitioners to file complete applications and petitions because they risk missing the timeframe and be denied the benefits sought to do otherwise.

USCIS continues to believe a more flexible standard is necessary and appropriate to improve adjudication processes, USCIS services, and the administration and enforcement of immigration laws. The final rule maintains the current twelve-week standard as a ceiling on the response time to be provided, and sets a maximum of thirty days to respond to a NOID. USCIS intends to issue policy guidance setting clear standards for when a timeframe less than these maximums will be afforded prior to the effective date of the rule.

With respect to minimum timeframes, the commenters' concerns should be allayed in part by the fact the final rule does not, as one commenter feared, let individual adjudicators determine when to offer less than thirty days to respond to a NOID and how long to give in such

instances. Further, USCIS' goal is to establish a single set of guidelines and standards that will cover not only requests by mail, but also requests for materials made by USCIS during an interview. When information is requested during an interview, the individual USCIS offices now set timelines for the submission of missing or required evidence, often providing less than thirty days for the applicant or petitioner to respond. This shorter response time has been very effective both for the agency and for applicants and petitioners. To ensure that USCIS uses consistent standards across the board, the final rule removes the proposed thirty-day guideline in favor of the more specific timelines USCIS will set in its field guidance.

Some of the timeframes mentioned by the commenters are not accurate. For example, the IRS may take up to sixty calendar days to process a request for an exact copy of a previously filed and processed tax return. IRS Form 4506 (revised April 2006). The fee for an exact copy of a previously filed and processed tax return at the present time is $39. The IRS can, however, provide a transcript of the processed return within ten business days, currently at no charge. IRS Form 4506T (revised April 2006). Thus, USCIS acknowledges that it can take more than thirty days for applicants or petitioners to obtain certified copies of processed tax returns. However, USCIS permits applicants or petitioners to submit transcripts of processed tax returns; therefore, USCIS believes that applicants and petitioners will be able to submit transcripts of processed tax returns even if response times to RFEs or NOIDs are as short as thirty days.

USCIS also recognizes the variety of times required to respond to a document request. A copy of a State driver's license may easily be provided within ten days, while a standard foreign government document, such as a current passport that is certified by the issuing government, may require a longer timeframe. None of these timeframes, however, restrict the applicant's or petitioner's ability to file all of the obviously necessary and relevant documents with the original application.

Several commenters who argued in favor of retaining the twelve-week standard opportunity to respond to an RFE also asserted that USCIS should create a new process allowing extension of the twelve-week response for any good cause. Several other commenters suggested such a new continuance process should be put in place if USCIS reduces the current twelve-week standard. One of these commenters stated the agency should consider an extension of up to thirty days where foreign documents are to be submitted. Another posited that adjudicators should have the discretion to set longer response times.

The current twelve-week standard as a maximum limit has proven effective and efficient to USCIS and its applicants and petitioners. This twelve-week maximum will remain the standard response timeframe in many instances. Creating a new process to seek continuances to submit evidence where the twelve-week cycle remains unchanged or where USCIS sets shorter response times based on the evidence requested and circumstances would defeat the purpose of increasing the efficiency and responsiveness of case processing. Such a process would also often result in aliens being allowed to remain in the United States for lengthy periods while they try to acquire evidence that should have been filed with their application or that is necessary to establishing their eligibility for the benefit sought. Accordingly, USCIS declines to adopt any additional procedures.

*B. Not Issuing at Least One RFE; Making Decisions on the Record*

Ten commenters suggested the proposed regulation would not increase efficiency. Four suggested that USCIS would use the rule as an inappropriate tool to reduce its backlog. Three pointed out the positive aspects of the current RFE process and the opportunity it creates to emphasize evidence already in the record that the adjudicator may not have fully considered, to clear up misunderstandings, and to clarify issues and facts. One commenter suggested that at least unrepresented applicants and petitioners should always be given an opportunity to correct problems through the RFE process. Others recommended that the rule mandate at least one RFE where there is any type of deficiency.

USCIS agrees that the RFE and NOID procedures play valuable roles. However, there is no need for an RFE or NOID process if the evidence initially submitted is sufficient to make a decision of either eligibility or ineligibility. The applicant or petitioner is responsible for providing evidence sufficient for USCIS to adjudicate the application or petition. 8 CFR 103.2(b)(1). USCIS is not responsible for advising the applicant or petitioner of the evidence that the applicant or petitioner should submit with each particular case beyond providing general filing guidance via form instructions and regulations.

Several commenters focused on the proposed change that would allow denial of applications and petitions filed without the required initial evidence instead of sending an RFE. One commenter pointed out similarities to a previously proposed rule. 56 FR 61201 (Dec. 2, 1991). The commenter further noted that the previous rulemaking resulted in the current RFE process that USCIS now seeks to amend. 59 FR 1455 (January 11, 1994).

USCIS recognizes this similarity. When the proposed rule was issued in 1991, the application and petition forms frequently did not clearly identify the evidence required to be filed. In response to comments received in connection with the 1991 proposed rule regarding the forms, the final rule did not contain the automatic denial process.

Since the 1991 proposed rule, INS and now USCIS have revised the immigration benefit forms and instructions to list the initial evidence that applicants or petitioners need to file. The forms, with instructions in a growing number of languages, are available on paper and on USCIS' Web site. Given that the forms provide complete information regarding evidentiary requirements, USCIS believes that the twelve-week standard RFE requirement for missing initial evidence is obsolete and filings should be complete at the beginning of the process.

Recognizing the concern expressed, however, USCIS currently intends to limit the application of its discretionary authority to deny an application or petition for lack of initial evidence without an RFE to cases that are filed with little more than a signature and the proper fee, and therefore are substantially incomplete or where the applicant or petitioner has failed to demonstrate a basis for eligibility for the benefit sought (e.g. an application for adjustment of status as an immediate relative), where no information or evidence of a covered relationship is provided. These skeletal applications, or applications that are filed alleging eligibility for a benefit based upon having filed a separate benefit application which has since been denied or of which USCIS has no record, clearly do not establish eligibility. DHS wishes to make clear that an applicant or petitioner is responsible for demonstrating eligibility for the benefit sought and that clearly deficient applications or petitions will not be permitted. As with RFEs, USCIS intends to issue additional internal

guidance through policy memoranda, including a stipulated timeframe for responding to an RFE based on missing initial evidence. In such a case, even within the context of continuing an opportunity to respond to an RFE, giving a second opportunity to provide evidence need not result in deferring case processing for a full twelve weeks.

Eight commenters expressed concerns that inexperienced staff given added discretion might make too many errors; be unaware of relevant business practices, regulations and law; and write RFEs with excessive boilerplate requests for unnecessary evidence. One commenter objected to the idea that USCIS would deny cases simply because an applicant or petitioner did not submit every piece of evidence requested in an RFE, pointing out that the current regulations lets applicants and petitioners request a decision on the record. Conversely, another commenter suggested that the proposed rule at 8 CFR 103.2(b)(13)(i) would remove explicit USCIS authority to summarily deny a case as abandoned for failure to submit initial and additional requested evidence by a required date. Therefore, the commenter requested that USCIS reinstate that explicit authority under 8 CFR 103.2(b)(13)(i).

The final rule retains the current process for requesting a decision on the record. If an applicant or petitioner requests a decision on the record, USCIS will decide the case based on the record. This process has been in effect for more than a decade. The process struck a careful balance between giving a controlled process for requesting evidence and giving applicants and petitioners the opportunity to object and ask for a decision on the record. This balance is also essential to ensuring that the adjudicator will be able to deny the application or petition on the record, if additional evidence is needed, but the requested evidence is not received. An applicant's or petitioner's failure to respond to an RFE can close off a material line of inquiry or can effectively stop further processing towards granting an application or petition, and may be considered a factor in evaluating whether an applicant or petitioner has proven eligibility for the benefit sought. This final rule incorporates this concept and also clarifies USCIS' authority to summarily deny a case as abandoned for failure to reply to an RFE or a NOID by a required date. The final rule also allows USCIS to deny an application or petition if the applicant or petitioner fails to provide requested materials, such as photographs, necessary to complete processing and issuing resultant documentation.

One commenter thought that this rule would unfairly burden applicants and petitioners due to the ''failure to appear'' provisions in 8 CFR 103.2(b)(13). To avoid this result, USCIS has modified the final rule. The rule now allows for exceptions where there is evidence, such as a prompt change of address or rescheduling request, that the agency concludes warrants excusing the failure to appear.

Several commenters expressed concern with the proposed elimination of 8 CFR 245.18(i), which requires USCIS to issue a NOID to a physician who does not ''comply with the requirements of paragraphs (f) and (g).'' After further analysis, the final rule retains the provision and simply removes the timeframes for the applicant's or petitioner's response to the NOID in favor of the timeframes USCIS will set for RFEs and NOIDs.

Another commenter highlighted that NOIDs are currently required by regulation to provide the benefit seeker with an opportunity to know and address otherwise unknown adverse information on which a decision is to be made. This final rule maintains the general requirement for a NOID prior to any denial based upon derogatory information of which the petitioner or applicant is unaware. 8 CFR 103.2(b)(16)(i).

*C. Uniform Application of the 'Preponderance of Evidence' Standard*

One commenter approved of the ''preponderance of the evidence'' standard as proposed at 8 CFR 103.2(b)(8)(i). The commenter, however, objected to the proposed language in 8 CFR 103.2(b)(8)(ii), which allows USCIS to deny an application or petition, request more evidence, or notify the applicant or petitioner of its intent to deny if the ''evidence submitted does not fully establish eligibility.'' The commenter stated,

> [c]onflating the preponderance standard with a ''full eligibility'' standard merges two irreconcilable concepts, *unless it is clear that a preponderance of the evidence does, indeed, establish full eligibility.* The regulation would be more acceptable if the language were changed to delete the ''fully establish eligibility'' language, and if language were added to state that the only cases that may be denied without an RFE are ones in which there is *clear evidence of ineligibility.*

(Emphases in original).

In response to these comments, USCIS has modified 8 CFR 103.2(b)(8)(i) to remove the phrase, ''the preponderance of'' and to modify 8 CFR 103.2(b)(8)(ii) to remove the word ''fully.'' USCIS is implementing these modifications because it believes that it would be inappropriate to apply a single standard in 8 CFR 103.2(b)(8)(i) and (ii) to all USCIS adjudications. Furthermore, these modifications clarify that adjudications can involve different evidentiary standards or burdens. Under current regulations, some applications or petitions must demonstrate a preponderance of the evidence, while other applications or petitions require clear and convincing evidence, to establish eligibility.

*D. Relationship to Premium Processing Regulations*

One commenter asserted that if applied to premium processing requests, the proposed rule would contravene the existing premium processing service regulations at 8 CFR 103.2(f). In making this statement, the commenter interpreted the current premium processing regulations to require USCIS to issue an RFE or NOID before denying any application or petition for which premium processing services have been requested. USCIS appreciates this comment and, to clarify the applicability of this regulation, 8 CFR 103.2(f) has been modified to include ''denial'' in the list of appropriate actions.

*E. Substitution of Form DS–2019; Submitting Copies*

One commenter noted that the proposed rule at 8 CFR 103.2(b)(4) refers to the obsolete Form IAP–66, and suggesting the reference be updated to the DS–2019 which replaced the IAP–66. This correction has been incorporated in the final rule.

The same commenter also requested that applicants be permitted to submit a copy of DS–2019 rather than the original, and suggested clarification with respect to when originals must be filed. The final rule clarifies that although copies of other documents may be submitted, those designed or produced for the purpose of evidence with a USCIS application, such as the DS–2019, must be submitted in the original.

As a general rule, applicants and petitioners should be allowed to keep originals unless the originals are required by regulation to be submitted. If there is reason to question the authenticity of the original document for which a photocopy has been submitted, USCIS may then request the original document. In cases where an applicant or a petitioner submits original documents when not required, due to the cost involved in returning

such documents as a matter of course, USCIS will retain the documents and make them part of the record. In such cases, applicants or petitioners who wish to have their original documents returned to them may submit a written request to the office that originally requested the records.

*F. Application of the Rule*

USCIS' ability to issue shorter RFE and NOID response times will apply to any RFE or NOID issued on or after the effective date of this rule even if the application or petition was filed before the effective date of this regulation. USCIS' discretion to deny cases for lack of required initial evidence without first issuing an RFE, however, will only extend to petitions and applications that are filed on or after the effective date of this regulation.

*G. Use of the Term ''Biometrics Capture''*

USCIS received no comments concerning the use of the term ''biometrics capture,'' rather than ''fingerprinting'' in section 103.2(b)(13)(ii) of the proposed rule. USCIS believes, however, that an explanation of why that term has been adopted in the final would be beneficial to the public. While the term, ''biometrics capture'' includes fingerprints, it is in fact meant to be a more inclusive term. Biometrics capture can include such things as the capture of a digital photograph or a digital signature. As technology evolves and data collection requirements change, USCIS may change the biometrics information it collects or the methods used for such collection. Any changes made to the capture of biometrics will be reflected in the instructions of the affected form type and/or request for appearance for biometrics capture.

*H. Technical Correction to the Final Rule*

Amendment 3.a. of the proposed rule revised the terms ''the Service'' or ''Service'' to read ''USCIS'' wherever they appeared in certain subparagraphs of section 103.2. On May 23, 2006, USCIS published an interim final rule in the **Federal Register** which, among other things, changed any reference to ''the Service'' to read ''USCIS'' in section 103.2.(f)(2). 71 FR 29571. Accordingly, the proposed revision to section 103.2(f)(2) is no longer necessary and has been withdrawn from the final rule.

**III. Regulatory Requirements**

*A. Regulatory Flexibility Act*

DHS has reviewed this rule in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), and, by approving it, DHS certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Although some petitions may be submitted by small entities, namely United States employers seeking nonimmigrant or immigrant labor, this rule is intended to be more flexible in setting time limits for RFEs or NOIDs, thereby reducing the timeframe for adjudicating these petitions without imposing costs on the entities. USCIS recognizes that this change may have a small impact on small business practices or productivity due to the change in timeframes for responses to RFEs or NOIDS. However, USCIS believes that these changes ultimately will benefit affected small businesses, namely because the reduction in adjudication timeframes will allow United States employers to receive the benefit sought at an earlier date (i.e. the ability to hire temporary or permanent foreign employees).

*B. Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

*C. Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

*D. Executive Order 12866*

DHS considers this rule to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, it was submitted to the Office of Management and Budget for review.

DHS has assessed both the costs and the benefits associated with this final rule. There are minimal costs to USCIS associated with instructing adjudicators about the options for dealing with deficient applications and petitions. Instructions may take the form of policy memoranda, amendments to the Adjudicator's Field Manual, or local office training modules. USCIS estimates that any costs will be absorbed in the current program general expenses that cover issuing instructions and training.

There are a number of benefits to both USCIS and the public. USCIS will reduce the number of RFEs and NOIDs and the cycle time for responses to such notices, thereby reducing the pending backlog of cases. The public will receive fewer and more specific RFE or NOID notices, and will benefit from more timely approval of applications and petitions.

The cost to the public is minimal. Currently, if an RFE or NOID is issued, the applicant incurs the cost of burden hours to comply with the RFE and the cost of resubmitting the response. The procedure remains generally the same, though the processing flow and decision points have changed to improve overall adjudication efficiency.

*E. Executive Order 13132 (Federalism)*

This rule 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. Therefore, in accordance with section 6 of Executive Order 13132, DHS has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*F. Executive Order 12988 Civil Justice Reform*

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

*G. Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting or recordkeeping requirements inherent in a rule. This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

**List of Subjects**

*8 CFR Part 103*

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Privacy, Reporting and recordkeeping requirements, Surety bonds.

*8 CFR Part 204*

Administrative practice and procedure, Immigration, Reporting and recordkeeping requirements.

*8 CFR Part 214*

Administrative practice and procedure, Aliens, Employment, Reporting and recordkeeping requirements.

*8 CFR Part 245*

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

*8 CFR Part 245a*

Aliens, Immigration, Reporting and recordkeeping requirements.

■ Accordingly, Chapter I of Title 8 of the Code of Federal Regulations is proposed to be amended as follows:

## PART 103—POWERS AND DUTIES; AVAILABILITY OF RECORDS

■ 1. The authority citation for part 103 continues to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356; 31 U.S.C. 9701; Public Law 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

■ 2. Section 103.2 is amended by:
■ a. Revising the term ''INS office or Service Center'' to read ''USCIS office'' in paragraph (a)(6);
■ b. Revising the term ''Service Center'' to read ''service center'' wherever that term appears in the last sentence of paragraph (a)(7)(i);
■ c. Revising paragraph (b)(1);
■ d. Revising paragraph (b)(4);
■ e. Revising paragraph (b)(5);
■ f. Revising paragraph (b)(8);
■ g. Revising paragraph (b)(11);
■ h Removing the term ''initial'' in paragraph (b)(12), first sentence;
■ i. Revising paragraph (b)(13);
■ j. Revising term ''regional commissioner'' to read ''USCIS Director or his or her designee'' in paragraph (b)(16)(iii);
■ k. Revising the term ''regional commissioner'' to read ''USCIS Director or his or her designee'' in the second sentence, and the term ''regional commissioner's'' to read ''USCIS Director's or his or her designee's'' in the third sentence in paragraph (b)(16)(iv);
■ l. Revising paragraph (b)(17);
■ m. Removing and reserving paragraphs (c) and (d);
■ n. Revising paragraph (f)(1).

The revisions read as follows:

### § 103.2 Applications, petitions, and other documents.

* * * * *

(b) * * *

(1) *Demonstrating eligibility at time of filing.* An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

* * * * *

(4) *Submitting copies of documents.* Application and petition forms, and documents issued to support an application or petition (such as labor certifications, Form DS 2019, medical examinations, affidavits, formal consultations, letters of current employment and other statements) must be submitted in the original unless previously filed with USCIS. Official documents issued by the Department or by the former Immigration and Naturalization Service need not be submitted in the original unless required by USCIS. Unless otherwise required by the applicable regulation or form's instructions, a legible photocopy of any other supporting document may be submitted. Applicants and petitioners need only submit those original documents necessary to support the benefit sought. However, original documents submitted when not required will remain a part of the record.

(5) *Request for an original document.* USCIS may, at any time, request submission of an original document for review. The request will set a deadline for submission of the original document. Failure to submit the requested original document by the deadline may result in denial or revocation of the underlying application or benefit. An original document submitted in response to such a request, when no longer required by USCIS, will be returned to the petitioner or applicant upon completion of the adjudication. If USCIS does not return an original document within a reasonable time after completion of the adjudication, the petitioner or applicant may request return of the original document by submitting a properly completed and signed Form G–884 to the adjudicating USCIS office.

* * * * *

(8) *Request for Evidence; Notice of Intent to Deny*—(i) *Evidence of eligibility or ineligibility.* If the evidence submitted with the application or petition establishes eligibility, USCIS will approve the application or petition, except that in any case in which the applicable statute or regulation makes the approval of a petition or application a matter entrusted to USCIS discretion, USCIS will approve the petition or application only if the evidence of record establishes both eligibility and that the petitioner or applicant warrants a favorable exercise of discretion. If the record evidence establishes ineligibility, the application or petition will be denied on that basis.

(ii) *Initial evidence.* If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

(iii) *Other evidence.* If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for ineligibility; request more information or evidence from the applicant or petitioner, to be submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the application or petition and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS.

(iv) *Process.* A request for evidence or notice of intent to deny will be in writing and will specify the type of evidence required, and whether initial evidence or additional evidence is required, or the bases for the proposed denial sufficient to give the applicant or petitioner adequate notice and sufficient information to respond. The request for evidence or notice of intent to deny will indicate the deadline for response, but in no case shall the maximum response period provided in a request for evidence exceed twelve weeks, nor shall the maximum response time provided in a notice of intent to deny exceed thirty days. Additional time to respond

to a request for evidence or notice of intent to deny may not be granted.

* * * * *

(11) *Responding to a request for evidence or notice of intent to deny.* In response to a request for evidence or a notice of intent to deny, and within the period afforded for a response, the applicant or petitioner may: submit a complete response containing all requested information at any time within the period afforded; submit a partial response and ask for a decision based on the record; or withdraw the application or petition. All requested materials must be submitted together at one time, along with the original USCIS request for evidence or notice of intent to deny. Submission of only some of the requested evidence will be considered a request for a decision on the record.

* * * * *

(13) *Effect of failure to respond to a request for evidence or a notice of intent to deny or to appear for interview or biometrics capture*—(i) *Failure to submit evidence or respond to a notice of intent to deny.* If the petitioner or applicant fails to respond to a request for evidence or to a notice of intent to deny by the required date, the application or petition may be summarily denied as abandoned, denied based on the record, or denied for both reasons. If other requested material necessary to the processing and approval of a case, such as photographs, are not submitted by the required date, the application may be summarily denied as abandoned.

(ii) *Failure to appear for biometrics capture, interview or other required in-person process.* Except as provided in 8 CFR 335.6, if USCIS requires an individual to appear for biometrics capture, an interview, or other required in-person process but the person does not appear, the application or petition shall be considered abandoned and denied unless by the appointment time USCIS has received a change of address or rescheduling request that the agency concludes warrants excusing the failure to appear.

* * * * *

(17) *Verifying claimed permanent resident status*—(i) *Department records.* The status of an applicant or petitioner who claims that he or she is a permanent resident of the United States or was formerly a permanent resident of the United States will be verified from official Department records. These records include alien and other files, arrival manifests, arrival records, Department index cards, Immigrant Identification Cards, Certificates of Registry, Declarations of Intention issued after July 1, 1929, Permanent Resident Cards (Form I–551), Alien Registration Receipt Cards (Form I–151), other registration receipt forms (Forms AR–3, AR–3a, and AR–103, provided that such forms were issued or endorsed to show admission for permanent residence), passports, and reentry permits. An official record of a Department index card must bear a designated immigrant visa symbol and must have been prepared by an authorized official of the Department in the course of processing immigrant admissions or adjustments to permanent resident status. Other cards, certificates, declarations, permits, and passports must have been issued or endorsed to show admission for permanent residence. Except as otherwise provided in 8 CFR part 101, and in the absence of countervailing evidence, such official records will be regarded as establishing lawful admission for permanent residence.

(ii) *Assisting self-petitioners who are spousal-abuse victims.* If a self-petitioner filing a petition under section 204(a)(1)(A)(iii), 204(a)(1)(A)(iv), 204(a)(1)(B)(ii), or 204(a)(1)(B)(iii) of the Act is unable to present primary or secondary evidence of the abuser's status, USCIS will attempt to electronically verify the abuser's citizenship or immigration status from information contained in the Department's automated or computerized records. Other Department records may also be reviewed at the discretion of the adjudicating officer. If USCIS is unable to identify a record as relating to the abuser, or the record does not establish the abuser's immigration or citizenship status, the self-petition will be adjudicated based on the information submitted by the self-petitioner.

* * * * *

(c) Reserved.

(d) Reserved.

* * * * *

(f) *Requests for Premium Processing Service*—(1) *Filing information.* A petitioner or applicant requesting Premium Processing Service shall submit Form I–907 with the appropriate fee to the Director of the service center having jurisdiction over the application or petition. Premium Processing Service guarantees 15 calendar day processing of certain employment-based petitions and applications. The 15 calendar day processing period begins when USCIS receives Form I–907, with the fee, at the designated address contained in the instructions to the form. USCIS will refund the fee for Premium Processing Service, but continue to process the case, unless within 15 calendar days of receiving the application or petition and Form I–907, USCIS issues and serves on the petitioner or applicant an approval notice, a denial notice, a notice of intent to deny, a request for evidence, or opens an investigation relating to the application or petition for fraud or misrepresentation.

* * * * *

**§ 103.2 [Amended]**

■ 3. Section 103.2 is further amended by:

■ a. Revising the terms ''the Service'' or ''Service'' to read ''USCIS'' wherever those terms appear in the following paragraphs:

■ i. Paragraph (a)(7)(i), in the first sentence and the first time it appears in the last sentence;

■ ii. Paragraph (b)(2)(ii), in the last sentence;

■ iii. Paragraph (b)(2)(iii);

■ iv. Paragraph (b)(3);

■ v. Paragraph (b)(6);

■ vi. Paragraph (b)(7);

■ vii. Paragraph (b)(9), in the introductory text;

■ viii. Paragraph (b)(10);

■ ix. Paragraph (d)(2);

■ x. Paragraph (e)(1);

■ xi. Paragraph (e)(2);

■ xii. Paragraph (e)(3), in the introductory text;

■ xiii. Paragraph (e)(3)(iii);

■ xiv. Paragraph (e)(4)(i);

■ xv. Paragraph (e)(4)(iii), in the introductory text;

■ xvi. Paragraph (e)(4)(iii)(C);

■ xvii. Paragraph (e)(4)(iv), in the second sentence;

■ xviii. Paragraph (f)(3), the first and last time the term appears in the last sentence;

■ xix. Paragraph (f)(4), the first time the term appears in the first sentence;

■ xx. Paragraph (f)(4), the first time the term appears in the second sentence; and

■ xxi. Paragraph (f)(4), in the third sentence.

■ b. Revising the term ''Service's'' to read ''USCIS' '' in the following paragraphs:

■ i. Paragraph (b)(15);

■ ii. Paragraph (e)(3)(iii); and

■ iii. Paragraph (e)(4)(iii)(C).

## PART 204—IMMIGRANT PETITIONS

■ 4. The authority citation for part 204 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1186a, 1255, 1641; 8 CFR part 2.

**§ 204.1 [Amended]**

■ 5. Section 204.1 is amended by removing paragraph (h).

**§ 204.2 [Amended]**

■ 6. Section 204.2 is amended by:
■ a. Removing paragraph (c)(3)(ii) and by redesignating paragraph (c)(3)(iii) as (c)(3)(ii);
■ b. Removing paragraph (e)(3)(ii) and by redesignating paragraph (e)(3)(iii) as (e)(3)(ii).

## PART 214—NONIMMIGRANT CLASSES

■ 7. The authority citation for part 214 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1185 (pursuant to Executive Order 13323, published January 2, 2004), 1186a, 1187, 1221, 1281, 1282, 1301–1305; 1372; 1379; 1731–32; sec. 643, Pub. L. 104–208; 110 Stat. 3009–708; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901, note, and 1931, note, respectively.

**§ 214.2 [Amended]**

■ 8. Section 214.2 is amended by:
■ a. Removing paragraph (h)(10)(ii) and by redesignating paragraph (h)(10)(iii) as (h)(10)(ii);
■ b. Removing paragraph (k)(10)(iii);
■ c. Removing paragraph (l)(8)(i) and by redesignating paragraphs (l)(8)(ii) and (l)(8)(iii) as (l)(8)(i) and (l)(8)(ii) respectively;
■ d. Revising paragraph (o)(7); and
■ e. Revising paragraph (p)(9).
The revisions read as follows:

**§ 214.2 Special requirements for admission, extension, and maintenance of status.**

* * * * *

(o) * * *

(7) The petitioner shall be notified of the decision, the reasons for the denial, and the right to appeal the denial under 8 CFR part 103.

* * * * *

(p) * * *

(9) The petitioner shall be notified of the decision, the reasons for the denial, and the right to appeal the denial under 8 CFR part 103. There is no appeal from a decision to deny an extension of stay to the alien or a change of nonimmigrant status.

* * * * *

■ 9. Section 214.11 is amended by revising paragraph (k)(2) to read as follows:

**§ 214.11 Alien victims of severe forms of trafficking in persons.**

* * * * *

(k) * * *

(2) *Determination by USCIS.* An application for T–1 status under this section will not be treated as a bona fide application until USCIS has provided the notice described in paragraph (k)(3) of this section. In the event that an application is incomplete or if the application is complete but does not present sufficient evidence to establish prima facie eligibility for each required element of T nonimmigrant status, USCIS will follow the procedures provided in 8 CFR 103.2(b) for requesting additional evidence, issuing a notice of intent to deny, or adjudicating the case on the merits.

* * * * *

■ 10. Section 214.15 is amended by revising paragraph (d) to read as follows:

**§ 214.15 Certain spouses and children of lawful permanent residents.**

* * * * *

(d) *The definition of ''pending petition.''* For purposes of this section, a pending petition is defined as a petition to accord a status under section 203(a)(2)(A) of the Act that was filed with USCIS under section 204 of the Act on or before December 21, 2000, and has not been adjudicated. In addition, the petition must have been properly filed according to 8 CFR 103.2(a), and if, subsequent to filing, USCIS returns the petition to the applicant for any reason or makes a request for evidence or issues a notice of intent to deny under 8 CFR 103.2(b), the petitioner must comply with the request within the time period set by USCIS. If USCIS denies a petition but the petitioner appeals that decision, the petition will be considered pending until the administrative appeal is decided by USCIS. A petition rejected by USCIS as not properly filed is not considered to be pending.

* * * * *

## PART 245—ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE

■ 11. The authority citation for part 245 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1182, 1255; sec. 202, Pub. L. 105–100, 111 Stat. 2160, 2193; sec. 902, Pub. L. 105–277, 112 Stat. 2681; 8 CFR part 2.

■ 12. Section 245.18 is amended by revising paragraph (i) to read as follows:

**§ 245.18 How can physicians with approved Forms I–140 that are serving in medically underserved areas or at a Veterans Affairs facility adjust status?**

* * * * *

(i) *What if the physician does not comply with the requirements of paragraphs (f) and (g) of this section?* If an alien physician does not submit (in accordance with paragraphs (f) and (g) of this section) proof that he or she has completed the service required under 8 CFR 204.12(a), USCIS shall serve the alien physician with a written notice of intent to deny the alien physician's application for adjustment of status and, after the denial is finalized, to revoke approval of the Form I–140 and national interest waiver. The written notice shall require the alien physician to provide the evidence required by paragraph (f) or (g) of this section. If the alien physician fails to submit the evidence within the allotted time, USCIS shall deny the alien physician's application for adjustment of status and shall revoke approval of the Form I–140 and of the national interest waiver.

* * * * *

## PART 245a—ADJUSTMENT OF STATUS TO THAT OF PERSONS ADMITTED FOR LAWFUL TEMPORARY OR PERMANENT RESIDENT STATUS UNDER SECTION 245A OF THE IMMIGRATION AND NATIONALITY ACT

■ 13. The authority citation for part 245a continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1255a and 1255a note.

■ 14. Section 245a.20 is amended by revising paragraph (a)(2) to read as follows:

**§ 245a.20 Decisions, appeals, motions, and certifications.**

(a) * * *

(2) *Denials.* The alien shall be notified in writing of the decision of denial and of the reason(s) therefore. An applicant affected under this part by an adverse decision is entitled to file an appeal on Form I–290B Notice of Appeal to the Administrative Appeals Office (AAO), with the required fee specified in 8 CFR 103.7(b)(1). Renewal of employment authorization issued pursuant to 8 CFR 245a.13 will be granted until a final decision has been rendered on appeal or until the end of the appeal period if no appeal is filed. After exhaustion of an appeal, an alien who believes that the grounds for denial have been overcome may submit another application with fee, provided that the application is submitted on or before June 4, 2003.

* * * * *

**§ 245a.33 [Amended]**

■ 15. Section 245a.33 is amended by removing the second sentence of paragraph (b).

Dated: March 27, 2007.

**Michael Chertoff,**

*Secretary.*

[FR Doc. E7–7228 Filed 4–16–07; 8:45 am]

BILLING CODE 4410–10–P

## DEPARTMENT OF AGRICULTURE

### Grain Inspection, Packers and Stockyards Administration

### 9 CFR Part 202

**RIN 0580–AA97**

## Rules of Practice Governing Proceedings Under the Packers and Stockyards Act

**AGENCY:** Grain Inspection, Packers and Stockyards Administration, USDA.

**ACTION:** Final rule.

**SUMMARY:** This document amends Chapter 2 of Title 9 CFR to provide Supplemental Rules of Practice that will provide a mechanism for settling cases without the institution of formal proceedings.

**EFFECTIVE DATE:** April 17, 2007.

**FOR FURTHER INFORMATION CONTACT:** S. Brett Offutt, Director, Policy and Litigation Division, P&SP, GIPSA, 1400 Independence Ave., SW., Washington, DC 20250, (202) 720–7363, *s.brett.offutt@usda.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background

The Grain Inspection, Packers and Stockyards Administration (GIPSA) of the U.S. Department of Agriculture (USDA) administers the Packers and Stockyards Act of 1921, as amended and supplemented (7 U.S.C. 181–229) (P&S Act). The P&S Act is a statute that provides comprehensive regulation of the marketing of livestock, meat and poultry in interstate commerce. Its principal purposes are to enforce fair trade practices and financial protections, and to take action against certain anticompetitive practices in the livestock, meat and poultry industries.

Under the Administrative Regulations of the Department of Agriculture (7 CFR Part 1), any hearing to assess a civil penalty for violations of the P&S Act must be conducted in accordance with the ''Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes'' as contained in Subpart H of Part 1, Subtitle A, 7 CFR.

Chapter 2, Title 9 CFR contains regulations issued pursuant to the P&S Act. This document adds new sections to Part 202 to provide Supplemental Rules of Practice to provide a mechanism for settling cases without the institution of formal proceedings.

Under the existing rules of practice, persons alleged to be in violation of the P&S Act may be served with an administrative complaint and may ultimately be required to appear in a hearing before a United States Department of Agriculture Administrative Law Judge. Legal fees and other expenses related to this administrative process, and suspensions and/or civil penalties that may result from a finding of violation of the P&S Act, may be costly. This rule provides supplemental rules of practice to allow both GIPSA and the violator to resolve proceedings in a more timely and less costly manner.

### Executive Order 12866 and Regulatory Flexibility Act

The Office of Management and Budget (OMB) designated this rule as not significant for the purposes of Executive Order 12866. This final rule implements additional Supplemental Rules of Practice relating to circumstances arising in connection with proceedings under the P&S Act. These new Supplemental Rules of Practice provide a mechanism for settling cases without the institution of formal administrative proceedings. The rule allows the Administrator discretion to enter into stipulation agreements with persons believed to be in violation of the P&S Act. The stipulations will occur before a formal administrative complaint is issued and will include payment of a civil penalty. Agreeing to the stipulation will be voluntary on the violator's part. If the violator does not agree, the Administrator retains the right to proceed through formal administrative proceedings.

For example, if our investigation reveals a person to be inaccurately weighing livestock in violation of the P&S Act, we will provide notice of the violation and opportunity for a hearing. The notice will also give the violator the option to settle the case by paying a specified penalty. If the case were to go through the formal adjudicatory procedures, we could ask the administrative law judge to impose a penalty of $11,000 per violation. By entering a stipulation agreement, the alleged violator would pay a discounted civil penalty that is substantially less and would save the expense of litigation. The government would also save the expense of litigation. If the violator elects not to accept the stipulation, we would still have opportunity to pursue enforcement through the formal adjudicatory process.

To ensure that stipulations remain an effective tool for achieving compliance with the P&S Act, we will adopt internal procedures that generally do not allow repeat violators an opportunity to agree to stipulated monetary penalties. In most cases, repeat violators and those violators whose conduct results in substantial economic harm to other persons will not be offered stipulations, but would be subject to having a formal administrative complaint filed against them. Our procedures to use stipulations for less serious violations will ensure that these stipulations will promote efficiency and cost savings while still providing an additional deterrent against violations of the P&S Act.

This rule is not a rule as defined by the Regulatory Flexibility Act (5 U.S.C. 601–612). Therefore, this rule is exempt from the requirements of that Act.

### Executive Order 12988

This rule has been reviewed under E.O. 12988, Civil Justice Reform. This action is not intended to have retroactive effect. This rule will not pre-empt State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule.

### Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) does not apply to this rule because the rule does not seek answers to identical questions or impose reporting, recordkeeping, or third party disclosure requirements on 10 or more persons, and the information collected is not used for general statistical purposes.

### E-Government Act Compliance

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

### Effective Date

This rule (1) relates to internal agency management, and (2) improves the administration of programs regulated by the Packers and Stockyards Act because it affords more timely and less costly resolution of cases brought by USDA. No useful purpose would be served by delaying the effective date of implementing the use of stipulation agreements. Therefore, as allowed in 5 U.S.C. 553, it is found upon good cause that notice and other public procedure with respect to this rule change are impracticable and contrary to the public interest, and good cause is found for making this rule effective less than 30 days after publication in the **Federal Register**.

**List of Subjects in 9 CFR Part 202**

Administrative practice and procedure, Stockyards.

■ For the reasons set forth in the preamble, GIPSA amends 9 CFR part 202 as follows:

## PART 202—RULES OF PRACTICE GOVERNING PROCEEDINGS UNDER THE PACKERS AND STOCKYARDS ACT

■ 1. Revise the authority citation for part 202 to read as follows:

**Authority:** 7 U.S.C. 228(a); 7 CFR 2.22 and 2.81.

■ 2. Immediately following § 202.123 add a new undesignated center heading and §§ 202.200 and 202.210 to read as set forth below:

### Rules of Practice Applicable to All Other Proceedings

**§ 202.200 Scope and applicability of rules of practice.**

The Uniform Rules of Practice for the Department of Agriculture promulgated in Subpart H of Part 1, Subtitle A, Title 7, Code of Federal Regulations, are the Rules of Practice applicable to adjudicatory, administrative proceedings under the Packers and Stockyards Act, as amended (7 U.S.C. 181 *et seq.*). In addition, the Supplemental Rules of Practice set forth in this part shall be applicable to such proceedings.

**§ 202.210 Stipulations.**

(a) The Administrator may enter into a stipulation with any person operating subject to the Packers and Stockyards Act, as amended (P&S Act), prior to issuing a complaint that seeks a civil penalty against that person.

(1) The Administrator will give the person notice of an alleged violation of the P&S Act or regulations and provide an opportunity for a hearing;

(2) The person has the option to expressly waive the opportunity for a hearing and agree to pay a specified civil penalty within a designated time;

(3) The Administrator will agree to settle the matter by accepting payment of the specified civil penalty within a designated time;

(4) If the person does not agree to the stipulation, or does not pay the penalty within the specified time, the Administrator may issue an administrative complaint citing the alleged violation; and

(5) The civil penalty that the Administrator proposed in a stipulation agreement has no bearing on the civil penalty amount that may be sought in a formal administrative proceeding against the same person for the same alleged violation.

(b) [Reserved].

**James E. Link,**

*Administrator, Grain Inspection, Packers and Stockyards Administration.*

[FR Doc. E7–7041 Filed 4–16–07; 8:45 am]

BILLING CODE 3410–KD–P

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 72

**RIN 3150–AI03**

### List of Approved Fuel Storage Casks: Standardized NUHOMS® System, Revision 9, Confirmation of Effective Date

**AGENCY:** Nuclear Regulatory Commission

**ACTION:** Direct final rule: Confirmation of effective date.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is confirming the effective date of April 17, 2007, for the direct final rule that was published in the **Federal Register** on February 1, 2007 (72 FR 4615). This direct final rule amended the NRC's regulations to revise the Transnuclear, Inc., Standardized NUHOMS® System listing to include Amendment No. 9 to Certificate of Compliance (CoC) No. 1004.

**DATES:** *Effective Date:* The effective date of April 17, 2007, is confirmed for this direct final rule.

**ADDRESSES:** Documents related to this rulemaking, including comments received, may be examined at the NRC Public Document Room, located at One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. These same documents may also be viewed and downloaded electronically via the rulemaking Web site (*http://ruleforum.llnl.gov*). For information about the interactive rulemaking Web site, contact Ms. Carol Gallagher (301) 415–5905; e-mail *CAG@nrc.gov*.

**FOR FURTHER INFORMATION CONTACT:** Jayne M. McCausland, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 415–6219, e-mail *jmm2@nrc.gov*.

**SUPPLEMENTARY INFORMATION:** On February 1, 2007 (72 FR 4615), the NRC published a direct final rule amending its regulations in 10 CFR part 72 to revise the Transnuclear, Inc., Standardized NUHOMS® System listing within the ''List of Approved Spent Fuel Storage Casks'' to include Amendment No. 9 to CoC No. 1004. This amendment revises Technical Specifications 1.2.1 and 1.2.14 to add the Framatome-ANP, Version 9x9–2 fuel assemblies as approved contents for storage in the NUHOMS–61BT dry shielded canister. In the direct final rule, NRC stated that if no significant adverse comments were received, the direct final rule would become final on April 17, 2007. The NRC did not receive any comments that warranted withdrawal of the direct final rule. Therefore, this rule will become effective as scheduled.

Dated at Rockville, Maryland, this 11th day of April, 2007.

For the Nuclear Regulatory Commission.

**Michael T. Lesar,**

*Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration.*

[FR Doc. E7–7262 Filed 4–16–07; 8:45 am]

BILLING CODE 7590–01–P

## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

### 12 CFR Part 563e

**[No. 2007–16]**

**RIN 1550–AC08**

### Community Reinvestment Act Rule—Interagency Uniformity; Correction

**AGENCY:** Office of Thrift Supervision, Treasury (OTS).

**ACTION:** Final rule; correction.

**SUMMARY:** OTS is correcting an inadvertent omission and incorrect word in a final rule that appeared in the **Federal Register** of March 22, 2007 (72 FR 13429). That final rule reestablishes uniformity between OTS's Community Reinvestment Act (CRA) regulations and those of the other federal banking agencies.

**DATES:** Effective July 1, 2007.

**FOR FURTHER INFORMATION CONTACT:** Celeste Anderson, Senior Project Manager, Compliance and Consumer Protection, (202) 906–7990; Richard Bennett, Counsel, Regulations and Legislation Division, (202) 906–7409, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:** In the final rule FR Doc. E7–5188 appearing on page 13429 in the **Federal Register** of Thursday, March 22, 2007, the following corrections are made:

**§ 563.28 [Corrected]**

■ 1. On page 13435, in the third column, in § 563e.28 Assigned ratings, in paragraph (c)(1), in the first sentence, ''or any affiliate'' is corrected to read ''or in any assessment area by any affiliate''.

**Appendix A to Part 563e—Ratings [Corrected]**

■ 2. On page 13436, in the second column, in Appendix A to Part 563e—Ratings, in paragraph (d)(3)(ii)(B), in the second sentence, ''a bank's performance'' is corrected to read ''a savings association's performance''.

Dated: April 11, 2007.

By the Office of Thrift Supervision.

**Deborah Dakin,**

*Senior Deputy Chief Counsel.*

[FR Doc. E7–7226 Filed 4–16–07; 8:45 am]

**BILLING CODE 6720–01–P**

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2005–21624; Directorate Identifier 2005–NE–17–AD; Amendment 39–15028; AD 2005–13–25R1]**

**RIN 2120–AA64**

## Airworthiness Directives; Turbomeca S.A. Arriel 2B Turboshaft Engines

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

**ACTION:** Final rule; request for comments.

**SUMMARY:** The FAA is revising an existing airworthiness directive (AD) for Turbomeca S.A. Arriel 2B turboshaft engines with Modification TU62A incorporated. That AD currently requires initial and repetitive inspections, cleaning, lubrication, and checks for proper operation of the HMU acceleration controller axle. This AD requires the same actions, but removes engines incorporating TU132 from the applicability and adds an optional terminating action for the repetitive actions required in AD 2005–13–25. This AD results from the engine manufacturer releasing a service bulletin to introduce modification TU132. We are issuing this AD to prevent loss of control of engine fuel flow in manual control mode or mixed control mode, which can lead to engine overspeed, and in-flight engine shutdown resulting in a forced autorotation landing or accident.

**DATES:** Effective May 22, 2007. The Director of the Federal Register previously approved the incorporation by reference of Alert Mandatory Service Bulletin (ASB) No. A292 73 2814, Update No. 1, dated January 11, 2005, on July 11, 2005 (70 FR 36480, June 24, 2005). The Director of the Federal Register approved the incorporation by reference of ASB No. A292 73 2814, Update No. 2, dated December 15, 2006, as of May 22, 2007.

We must receive any comments on this AD by June 18, 2007.

**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 Turbomeca S.A., 40220 Tarnos, France; telephone 33 05 59 74 40 00, fax 33 05 59 74 45 15, for the service information identified in this AD.

**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:** On June 16, 2005, the FAA issued AD 2005–13–25, Amendment 39–14162 (70 FR 36480, June 24, 2005). That AD requires initial and repetitive inspections, cleaning, lubrication, and checks for proper operation of the hydromechanical unit (HMU) acceleration controller axle on engines that incorporate modification TU62A. That AD was the result of several reports of the HMU acceleration controller axle sticking that resulted in engine overspeed and in-flight engine shutdown or uncommanded in-flight engine shutdown. That condition, if not corrected, could result in loss of control of engine fuel flow in manual control mode or mixed control mode, which can lead to engine overspeed, and in-flight engine shutdown resulting in a forced autorotation landing or accident.

### Actions Since We Issued AD 2005–13–25

Since we issued that AD, the manufacturer introduced modification TU132, which includes a new P3 cover with a self-lubricating coating and a reduced centering length in the P3 cover. The European Aviation Safety Authority (EASA) which is the airworthiness authority for the European Union, recently notified us that Turbomeca S.A. has introduced modification TU132 to eliminate the cause of an unsafe condition on Turbomeca S.A. Arriel 2B turboshaft engines. This AD requires inspecting and lubricating the P3 cover and HMU acceleration control axle on HMUs that are not modified to TU132. We are issuing this AD to prevent loss of control of engine fuel flow in the manual control mode or mixed control mode, which can lead to engine overspeed, and in-flight engine shutdown resulting in a forced autorotation landing or accident.

### Relevant Service Information

We have reviewed and approved the technical contents of Turbomeca Alert Mandatory Service Bulletin (ASB) No. A292 73 2814, Update No. 2, dated December 15, 2006. That ASB describes procedures for inspecting, lubricating, and checking for proper operation of the HMU acceleration controller axle. The EASA issued AD 2007–0026, dated February 1, 2007, in order to ensure the airworthiness of these Arriel 2B turboshaft engines in the European Union.

### Bilateral Airworthiness Agreement

This engine model is manufactured in France, 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. Under this bilateral airworthiness agreement, the EASA has kept the FAA informed of the situation described above. We have examined the findings of the EASA, 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.

### FAA's Determination and Requirements of This AD

The unsafe condition described previously is likely to exist or develop on other Turbomeca S.A. Arriel 2B turboshaft engines of the same type design. We are issuing this AD to prevent loss of control of engine fuel flow in the manual control mode or

mixed control mode, which can lead to engine overspeed, and in-flight engine shutdown resulting in a forced autorotation landing or accident. This AD requires initial and repetitive inspections, cleaning, lubrication, and checks for proper operation of the HMU acceleration controller axle. You must use the service information described previously to perform the actions required by this AD.

### FAA's Determination of the Effective Date

Since we are reducing the applicability of this AD, a situation exists that allows the immediate adoption of this AD. We have found that notice and opportunity for public comment before issuing this AD are unnecessary.

### Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to send us any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES**. Include ''AD Docket No. FAA–2005–21624; Directorate Identifier 2005–NE–17–AD'' in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the rule 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 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 AD, any comments received, and any final disposition in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone (800) 647–5227) is located 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.

### 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 the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary at the address listed under **ADDRESSES**.

### List of Subjects in 14 CFR Part 39

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

### Adoption of the Amendment

■ Under the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (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 39–14162 70 FR 36480, June 24, 2005, and by adding a new airworthiness directive, Amendment 39–15028, to read as follows:

**2005–13–25R1 Turbomeca S.A.:** Amendment 39–15028. Docket No. FAA–2005–21624; Directorate Identifier 2005–NE–17–AD.

#### Effective Date

(a) This airworthiness directive (AD) becomes effective May 22, 2007.

#### Affected ADs

(b) This AD revises AD 2005–13–25, Amendment 39–14162.

#### Applicability

(c) This AD applies to Turbomeca S.A. Arriel 2B turboshaft engines with Modification TU62A incorporated, but do not have Modification TU132. These engines are installed on, but not limited to, Eurocopter AS350B3 helicopters.

#### Unsafe Condition

(d) This AD results from the engine manufacturer releasing a service bulletin to introduce modification TU132. We are issuing this AD to prevent loss of control of engine fuel flow in manual control mode or mixed control mode, which can lead to engine overspeed, and in-flight engine shutdown resulting in a forced autorotation landing or accident.

#### 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.

#### Hydromechanical Units (HMUs) Without Modification TU132

(f) Within 20 operating hours after July 11, 2005, the AD's original effective date, inspect, clean, lubricate, and check for proper operation of the HMU acceleration controller axle. Use paragraph 2 of Instructions to be Incorporated of Turbomeca Alert Mandatory Service Bulletin No. A292 73 2814, Update No. 1, dated January 11, 2005, or Update No. 2, dated December 15, 2006, to do these actions.

(g) Thereafter, repeat the actions specified in paragraph (f) of this AD within every 210 operating hours.

#### Optional Terminating Action

(h) Modifying the HMU to Modification TU132, terminates the repetitive inspection requirements specified in paragraph (g) of this AD. Turbomeca Service Bulletin No. 292 73 2132, dated May 31, 2006, contains information on modifying the HMU to Modification TU132.

**Alternative Methods of Compliance**

(i) 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**

(j) The EASA airworthiness directive 2007–0026, dated February 1, 2007, also addresses the subject of this AD.

**Material Incorporated by Reference**

(k) You must use Turbomeca Alert Mandatory Service Bulletin (ASB) No. A292 73 2814, Update No. 1, dated January 11, 2005; or ASB No. A292 73 2814, Update No. 2, dated December 15, 2006, to perform the actions required by this AD. The Director of the Federal Register previously approved the incorporation by reference of ASB No. A292 73 2814, Update No. 1, dated January 11, 2005, on July 11, 2005 (70 FR 36480; June 24, 2005). The Director of the Federal Register approved the incorporation by reference of ASB No. A292 73 2814, Update No. 2, dated December 15, 2006, in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Turbomeca S.A., 40220 Tarnos, France; telephone 33 05 59 74 40 00, fax 33 05 59 74 45 15, for a copy of this service information. You may review copies at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Burlington, Massachusetts, on April 9, 2007.

**Peter A. White,**

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

[FR Doc. E7–7115 Filed 4–16–07; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

## 18 CFR Parts 35 and 37

**[Docket Nos. RM05–17–000 and RM05–25–000; Order No. 890]**

## Preventing Undue Discrimination and Preference in Transmission Service

Issued April 11, 2007.

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**ACTION:** Order granting extension of compliance action dates.

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) is extending certain deadlines for compliance actions required by Order No. 890, the final rule issued in this proceeding on February 16, 2007.

**DATES:** The date by which transmission providers must implement certain reforms adopted in Order No. 890 is hereby extended by 60 days, to July 13, 2007, as set forth in Appendix A of this order.

**FOR FURTHER INFORMATION CONTACT:** W. Mason Emnett (Legal Information), Office of the General Counsel—Energy Markets, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6540.

**SUPPLEMENTARY INFORMATION:** Before Commissioners: Joseph T. Kelliher, Chairman; Suedeen G. Kelly, Marc Spitzer, Philip D. Moeller, and Jon Wellinghoff.

### Order Granting Extension of Compliance Action Dates

1. On March 21, 2007, Tampa Electric Company (Tampa Electric) together with Florida Power & Light Company (FPL) filed a motion for extension of deadlines relating to the implementation of additional functionality for the Open Access Same-Time Information System (OASIS) and the posting of new transmission-related metrics as outlined in Order No. 890.[1] On March 29, 2007, Tampa Electric and FPL supplemented their motion with a preliminary assessment of technical work required to implement the additional OASIS functionality and the posting of new transmission-related metrics.

2. On March 23, 2007, the Edison Electric Institute (EEI) filed a motion requesting that the Commission extend to 120 days from publication of Order No. 890 in the **Federal Register** all deadlines currently set as less than 120 days as applied to transmission providers that are not members of an Independent System Operator (ISO) or Regional Transmission Organization (RTO). On March 29, 2007, EEI filed a second motion to extend the filing deadline for ISO and RTO transmission providers' ''strawman'' proposals detailing compliance with each of the nine planning principles adopted in Order No. 890.

3. On April 3, 2007, E.ON U.S. LLC (E.ON) filed a motion stating its support of EEI's request to allow utilities not participating in an ISO or RTO an additional 60 days to comply with the non-rate terms and conditions set out in Order No. 890, but requesting a 90-day extension for submission of its Federal Power Act (FPA) section 206 compliance filing due to E.ON's particular circumstances.

4. Finally, on April 9, 2007, Portland General Electric Company (PGE) filed a motion seeking an extension of deadlines associated with the optional filing under FPA section 205 regarding previously-approved variations from the *pro forma* Open Access Transmission Tariff (OATT).

5. For the reasons outlined below, the Commission grants in part the March 23, 2007, motion of EEI and denies the March 29, 2007, motion of EEI, as well as the subsequent motions of E.ON and PGE. Accordingly, the joint motion of Tampa Electric and FPL, as supplemented, is rejected as moot.

### I. Background

6. On February 16, 2007, the Commission issued Order No. 890 on Preventing Undue Discrimination and Preference in Transmission Service in these dockets.[2] In Order No. 890, the Commission amended its regulations and the *pro forma* OATT, adopted in Order No. 888,[3] to ensure that transmission services are provided on a basis that is just, reasonable and not unduly discriminatory or preferential. The Commission designed Order No. 890 to: (1) Strengthen the *pro forma* OATT to ensure that it achieves its original purpose of remedying undue discrimination; (2) provide greater specificity to reduce opportunities for undue discrimination and facilitate the Commission's enforcement; and (3) increase transparency in the rules applicable to planning and use of the transmission system.

7. Order No. 890 established a number of compliance requirements with corresponding deadlines, each necessary to achieve its stated goals. Among other things, transmission providers that have not been approved as ISOs or RTOs, and whose transmission facilities are not under the control of an ISO or RTO, were directed to submit, within 60 days after publication of Order No. 890 in the **Federal Register**, *i.e.*, May 14, 2007, filings under section 206 of the FPA that contain the non-rate terms and

[1] *Preventing Undue Discrimination and Preference in Transmission Service,* Order No. 890, 72 FR 12266 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007), *reh'g pending* (Order No. 890).

[2] *Id.*

[3] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g,* Order No. 888–A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g,* Order No. 888–B, 81 FERC ¶ 61,248 (1997), *order on reh'g,* Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC,* 225 F.3d 667 (D.C. Cir. 2000) (*TAPS v. FERC*), *aff'd sub nom. New York v. FERC,* 535 U.S. 1 (2002).

conditions set forth in the order.[4] Within 75 days of publication, *i.e.*, May 29, 2007, all transmission providers must post a ''strawman'' proposal for compliance with each of the nine planning principles adopted in Order No. 890.[5] The Commission also requested that the North American Electric Reliability Corporation (NERC) and the North American Energy Standards Board (NAESB) file, within 90 days from publication, *i.e.*, June 13, 2007, a joint status report that contains a work plan for completion of business practices and standards related to calculation of Available Transfer Capability (ATC).[6] NAESB was further requested to file a status report and work plan for the completion of the OASIS functionality or uniform business practices related to reforms adopted in Order No. 890.[7] The Commission required each transmission provider to develop, within 90 days from publication, *i.e.*, June 13, 2007, its own OASIS functionality or business practices necessary to implement certain reforms ordered in Order No. 890 pending completion of the NERC and NAESB processes.[8] Finally, the Commission required transmission providers to comply with a number of new regulations by Order No. 890's effective date of May 14, 2007.

8. In addition to these compliance obligations, the Commission provided an optional 205 procedure for transmission providers seeking to maintain previously-approved variations from the Order No. 888 *pro forma* OATT that were affected by the reforms adopted in Order No. 890. To the extent a transmission provider wishes to maintain these previously-approved variations, the Commission stated that the transmission provider would have to demonstrate that the relevant tariff provisions continue to be consistent with or superior to the *pro forma* OATT as modified by Order No. 890. The Commission provided that such demonstrations could be made in an FPA section 205 filing submitted within 30 days after publication of Order No. 890 in the **Federal Register**, *i.e.*, April 16, 2007. The Commission stated that each applicant should request that these proposed tariff provisions be made effective as of the date of the transmission provider's section 206 compliance filing.[9]

[4] Order No. 890 at P 139.

[5] *Id.* at P 135.

[6] *Id.* at P 223.

[7] *Id.* at P 141.

[8] *Id.*

[9] *Id.* at P 139.

**II. Motions for Extension**

9. Tampa Electric and FPL seek extension of compliance deadlines related to the implementation of additional OASIS functionality and the posting of new transmission-related metrics. As explained in their motion, Tampa Electric and FPL currently use FLOASIS, the OASIS for transmission providers in Florida. Tampa Electric and FPL state that they are currently negotiating an agreement with a new host, Open Access Technology International, Inc. (OATI), and anticipate that their new OASIS system will not be operational until July 1, 2007. If forced to meet the deadlines set forth in Order No. 890, Tampa Electric and FPL contend that they would be required to develop new software and manual processes on the current FLOASIS, which would become obsolete once they switch to the new OATI-hosted OASIS platform.

10. EEI, on behalf of transmission providers not affiliated with an ISO or RTO, seeks in its March 23, 2007, motion an extension of certain of the compliance requirements in Order No. 890 involving deadlines set at less than 120 days from publication of the order in the **Federal Register**. This would include: the FPA section 206 compliance filing requirement, the ''strawman'' proposal deadline, and the deadlines set for the NERC and NAESB status reports. EEI contends that the volume and nature of the compliance requirements set forth in Order No. 890 render these corresponding deadlines infeasible. To support its argument, EEI describes in detail many of the steps it believes are necessary for completion of the compliance requirements, such as the development of new software or modifications to existing software.

11. In addition, EEI states particular concern regarding the time needed to develop software upgrades necessary to implement conditional firm service and planning redispatch. EEI also contends the current compliance schedule does not allow sufficient time to ensure that the new software and processes will not harm reliability. EEI therefore requests reconsideration of the Commission's decision to make reforms involving NERC and NAESB activities effective in advance of associated development of business practices and standards. EEI requests the Commission abandon its requirement that transmission providers implement reforms on an individual basis prior to issuance of the final NERC and NAESB rules.

12. EEI also requests the Commission delay other compliance deadlines until the Commission issues further clarification of Order No. 890. Specifically, EEI contends that without additional guidance from the Commission regarding revising transmission rates to reflect capacity benefit margin (CBM) set-aside, and prior to the issuance of the final NERC and NAESB standards, there may be significant inconsistencies in rate design among utilities, which could lead to hearing and settlement proceedings. EEI also states that transmission providers that make firm system sales need further clarification regarding the manner in which network resources should be designated and that, in the absence of such guidance, the Commission should not penalize transmission providers for their attempts to implement Order No. 890.

13. EEI further asks that the Commission clarify that the changes to Schedule 4 and Schedule 9 regarding imbalance charges need not become effective until the billing cycle immediately following the effective date of the revised *pro forma* OATT. EEI argues that requiring transmission providers to bill in two different billing methods for the same service over the course of a month would create the need for a complex software workaround.

14. In conjunction with its various requests, EEI proposes to organize a public conference on or about May 14, 2007, for participants to discuss progress made in their compliance efforts and any obstacles that have arisen.

15. On March 29, 2007, EEI filed a second motion on behalf of transmission providers that are members of an ISO or RTO, requesting a similar extension for filing of the ''strawman'' proposals for those entities. EEI contends in this motion that it is not feasible for ISOs and RTOs, and their transmission-owning members, to obtain robust input from a broad range of stakeholders in time to meet the current 75-day deadline. According to EEI, this deadline will be particularly challenging for most ISOs, RTOs and transmission owners because of the time required to coordinate planning obligations.

16. Answers to the EEI motions were filed by the American Public Power Association, National Rural Electric Cooperative Association, Transmission Access Policy Study Group, and Transmission Dependent Utility Systems (together the APPA Joint Commenters), the Mid-Continent Power Pool (MAPP) on behalf of its public utility members, Puget Sound Energy, Inc. (Puget), and the Electric Power Supply Association (EPSA). MAPP and Puget state full support of EEI's March

23, 2007, motion, reiterating many of the arguments made by EEI. While the APPA Joint Commenters do not object to the extensions of time requested by EEI, they request that the Commission provide at least 45 days to comment on transmission providers' compliance filings if the requested extensions are granted. In support of their request, the APPA Joint Commenters contend that consolidation of the 60-day, 75-day, and 90-day deadlines into a single 120-day deadline will impose increased burdens on interested parties reviewing those previously-staggered filings and postings. EPSA states its support of the APPA Joint Commenters' request.

17. The APPA Joint Commenters also express particular concern with two elements of the EEI motions. First, they argue that the Commission should only grant an extension of the requirement to complete software modifications on a case-by-case basis and, even then, only on a showing of clear and convincing need. Second, the APPA Joint Commenters argue that, if the Commission grants EEI's request to delay posting of the ''strawman'' proposals, the associated technical conferences should also be delayed in order to maintain a 15- to 45-day period for stakeholder review of the ''strawman'' postings.

18. On April 3, 2007, E.ON filed a motion supporting EEI's request to allow utilities not participating in an ISO or RTO an additional 60 days to comply with the non-rate terms and conditions set out in Order No. 890. E.ON contends, however, that it is different from most stand-alone utilities because it must coordinate compliance efforts with the Southwest Power Pool, the independent transmission organization for E.ON's transmission system, as well as the Tennessee Valley Authority, which serves as the reliability coordinator for E.ON's transmission system. E.ON therefore requests a 90-day extension to submit its FPA section 206 compliance filing, rather than the 60-day extension requested by EEI.

19. On April 9, 2007, PGE filed a motion requesting an extension of the deadline to submit FPA section 205 filings relating to previously-approved variations from the *pro forma* OATT. To the extent the Commission grants EEI's request for an extension of the date to submit the FPA section 206 compliance filings, PGE requests that the Commission also generically extend the date of the FPA section 205 filings by 60 days. PGE further requests that, as to its own FPA section 205 filing, the Commission permit it to delay that filing until after the Commission issues its order on rehearing in this proceeding.

## III. Commission Determination

20. The Commission partially grants EEI's request and extends the date on which reforms adopted in Order No. 890 would have otherwise been effective by 60 days, *i.e.*, to July 13, 2007, except as provided for below. Specifically, all transmission providers that have not been approved as ISOs or RTOs, and whose transmission facilities are not under the control of an ISO or RTO, are required to submit FPA section 206 compliance filings that contain the non-rate terms and conditions set forth in Order No. 890 within 120 days of publication of the order in the **Federal Register**, *i.e.*, July 13, 2007. Similarly, transmission providers must take all other actions necessary to implement the reforms adopted in Order No. 890, except as provided for below, on or before July 13, 2007, unless a later compliance date was otherwise specified in the order.[10]

21. With regard to the requirement for transmission providers to post ''strawman'' proposals for compliance with the nine planning principles adopted in Order No. 890, we deny EEI's requests for extension and retain the requirement that such postings be made within 75 days of publication of the order in the **Federal Register**, *i.e.*, May 29, 2007. The ''strawman'' proposals are necessary to facilitate the technical conferences that the Commission has scheduled in June 2007 to encourage discussion as to how transmission providers ultimately intend to fulfill their planning requirements. Due to the delay in **Federal Register** publication, the ''strawman'' posting date is more than 100 days after Order No. 890 was issued, which is consistent with EEI's assertion that the Commission typically provides 90 to 120 days for RTO and ISO efforts that require stakeholder participation.[11] In any event, the ''strawman'' proposals are only one aspect of the compliance process. The actual Attachment K compliance filing deadline is not until October 11, 2007. Transmission providers will therefore have roughly four months to prepare their Attachment K filings after the Commission holds technical conferences to discuss the ''strawman'' proposals. We believe this is sufficient time to ensure timely compliance with the Attachment K filing deadline.

22. With regard to imbalance charges, however, we agree that it would be reasonable for a transmission provider to extend the date on which the imbalance-related provisions adopted in Schedule 4 and Schedule 9 become effective until the first day of the billing cycle following the effectiveness of the underlying imbalance-related reforms. Specifically, transmission providers submitting their imbalance provisions in section 206 filings on or before July 13, 2007, may specify that those provisions will become effective on the first day of the billing cycle following the filing date. We agree that this modest extension of the effectiveness of imbalance-related reforms will facilitate the implementation of those reforms.

23. The Commission is not convinced that EEI's remaining requests for extension or further generic modification of Order No. 890's compliance obligations are necessary. Although the Commission is aware of the challenges of compliance with Order No. 890, we are not persuaded that the related deadlines, as modified herein, are unreasonable or unclear. Order No. 890 is the result of a multi-year proceeding during which the Commission sought and received multiple rounds of comments from over 300 parties. The various compliance obligations in Order No. 890, including CBM-related modification of rates and implementation of interim workarounds pending development of final NERC and NAESB standards and business practices, were established after full consideration of these comments and the Commission's determination that related reforms are necessary to remedy the potential for undue discrimination.[12] EEI has not persuaded us that generic modification of those obligations pending final standards and practice development by NERC and

[10] Order No. 890 also requested NERC and NAESB to submit status reports within 90 days of publication of the order in the **Federal Register**, *i.e.*, June 13, 2007, containing work plans for developing standards and business practices associated with reforms adopted in Order No. 890. The limited extension of time granted here applies to actions to be taken by transmission providers and, thus, the NERC and NAESB filing deadlines remain unchanged.

[11] EEI March 29 Motion at 2.

[12] With specific regard to the CBM-related rate changes required in Order No. 890, we believe that EEI's concerns are misplaced. Order No. 890 expressly contemplated transmission providers proposing necessary changes to rate design to ensure that point-to-point customers do not pay a transmission charge that includes the cost of the CBM set-aside, provided that the subject of such rate filings be limited solely to the issue of CBM-related cost recovery. *See* Order No. 890 at P 263. Nothing in Order No. 890 precludes transmission providers from proposing modification of rates for other services (such as network service) as necessary to recover CBM-related costs previously paid by point-to-point customers and, therefore, it is not necessary to extend the deadline for those filings.

NAESB would be appropriate.[13] Any issues specific to a transmission provider's ability to comply with the requirements of Order No. 890, as modified herein, may be considered during the compliance process on a case-by-case basis. For similar reasons, we deny the APPA Joint Commenters' request to establish in advance of the compliance process the number of days parties will have to comment on compliance filings.

24. The Commission also denies E.ON's request to extend its FPA section 206 compliance filing deadline by 90 days instead of the 60-day extension requested by EEI, granted above. All transmission providers must coordinate their compliance efforts with personnel internal and external to their organizations. We recognize these efforts will be complicated but, as explained above, they are the logical outgrowth of this multi-year proceeding. E.ON fails to justify the need for differential treatment during the compliance process.

25. Finally, the Commission denies PGE's request to extend the FPA section 205 deadlines relating to previously-approved variations from the *pro forma* OATT. The optional section 205 procedure was established so that transmission providers would have an opportunity to demonstrate that any previously-approved variations continue to be consistent with or superior to the terms and conditions of the reformed *pro forma* OATT, thereby allowing those transmission providers to retain those variations during implementation of Order No. 890. It is not necessary, as PGE assumes, to extend the 30-day deadline for submission of the section 205 filings simply because we extend the deadline for the section 206 compliance filings above.[14] The purpose of each filing is distinct and PGE offers no reason as to why transmission providers may need additional time to prepare their section 205 filings, which relate only to tariff provisions the Commission has already reviewed and approved. Moreover, deferring the deadline for PGE's FPA section 205 filing until after our order on rehearing in this proceeding would not achieve PGE's stated goal of ensuring that its previously-approved deviations remain in effect during the compliance process.[15] In the section 206 compliance filing, each transmission provider must conform the non-rate terms and conditions of its OATT to the reformed non-rate terms and conditions of the *pro forma* OATT. Failure to request that previously-approved variations remain in place in advance of submitting the compliance filing will result in those provisions being eliminated during the compliance process.

26. In light of the extension of certain deadlines for compliance with Order No. 890 provided for above, the request for extension submitted by FPL and Tampa Electric is moot.

*The Commission Orders*

(A) The date on which the reforms adopted in Order No. 890 would have otherwise been effective is hereby extended by 60 days, *i.e.*, to July 13, 2007, except as otherwise provided in the body of this order.

(B) The request for extension submitted by FPL and Tampa Electric is dismissed as moot.

(C) The request for extensions submitted by E.ON and PGE are denied.

(D) The Secretary shall promptly publish a copy of this order in the **Federal Register**.

By the Commission.

**Kimberly D. Bose,**

*Secretary.*

## Appendix A: Summary of Compliance Filing Requirements

For a more detailed description of compliance obligations please refer to Order No. 890 paragraph number. For further information related to Order No. 890, such as electronic versions of the *pro forma* OATT showing tariff changes adopted in Order No. 890 in redline/strikeout format, and further information regarding docketing of compliance filings and specific filing instructions, please visit our Web site at the following location: *http://www.ferc.gov/industries/electric/indus-act/oatt-reform.asp.*

| Deadline (days after publication in the Fed. Reg.) | Compliance action | Order No. 890 paragraph No. |
|---|---|---|
| 30 (4/16/2007) | Optional Implementation FPA section 205 filings allowing transmission providers to propose previously approved variations from the *pro forma* OATT that have been affected by *pro forma* OATT reforms to remain in effect subject to a demonstration that such variations continue to be consistent with or superior to the revised *pro forma* OATT (non RTO/ISO transmission providers). Such optional filings must request a 90 day effective date to facilitate Commission review under section 205. | P 139 |
| 75 (5/29/2007) | Transmission Providers must post a "strawman" proposal for compliance with each of the nine planning principles adopted in Order No. 890. This may be posted on the Transmission Providers Web site or its OASIS site. | P 443 |
| 90 (6/13/2007) | NERC/NAESB status report and work plan for completion of ATC related business practices and standards. | P 223 |
| | NAESB status report and work plan for completion of OASIS functionality or uniform business practices (other than those related to ATC). | P 141 |
| 120 (7/13/2007) | Transmission Providers that have not been approved as ISOs or RTOs, and whose transmission facilities are not under the control of an ISO or RTO, must submit FPA section 206 filings that contain the non-rate terms and conditions set forth in Order No. 890. These filings need only contain the revised provisions adopted in Order No. 890. Transmission providers utilizing the optional implementation FPA section 205 filing described above, need only submit tariff sheets necessary to implement the remaining modifications required under the Order No. 890, *i.e.*, modifications related to tariff provisions that did not implicate previously-approved variations. | P 135 |
| 120 (7/13/2007) | Transmission Providers must submit redesigned transmission charges that reflect the Capacity Benefit Margin set-aside through a limited issue section 205 rate filing as part of their initial ATC related compliance filings. | P 263 |

[13] Although Order No. 890 directed NERC and NAESB to develop standards and business practices necessary to implement ATC-related reforms within 270 and 360 days of publication of the order in the **Federal Register**, respectively, it did not establish a specific timeframe for NAESB's development of business practices necessary for remaining reforms. Instead, NAESB was requested to submit a work plan within 90 days of publication of the order in the **Federal Register**, upon review of which the Commission will issue an order establishing further compliance deadlines as necessary. *See* Order No. 890 at P 141.

[14] As provided in Order No. 890, however, transmission providers should request that the tariff provisions proposed in their optional 205 filings be made effective as of the date the transmission provider submits its section 206 compliance filing, which must now be on or before July 13, 2007. *See id.* at P 139.

[15] *See* PGE Motion at 3.

| Deadline (days after publication in the Fed. Reg.) | Compliance action | Order No. 890 paragraph No. |
|---|---|---|
| 180 (9/11/2007) | Submit compliance filings with Attachment C (ATC) of the *pro forma* OATT | P 140 |
| 210 (10/11/2007) | ISOs and RTOs, and transmission providers located within an ISO/RTO footprint, submit FPA section 206 filings that contain the non-rate terms and conditions set forth in Order No. 890. These filings need only contain the revised provisions adopted in Order No. 890 or a demonstration that previously approved variations continue to be consistent with or superior to the revised *pro forma* OATT. | P 157<br>P 161 |
| 210 (10/11/2007) | Submit compliance filings with Attachment K (Planning) of the *pro forma* OATT or RTOs and ISOs file a demonstration that their planning processes are consistent with or superior to the planning principles in Order No. 890. | P 140<br>P 422 |
| N/A | N/A Transmission Providers must file a revised Attachment C to incorporate any changes to NERC's and NAESB's reliability and business practice standards to achieve consistency in ATC within 60 days of completion of the NERC and NAESB processes. | P 325 |
| N/A | After the submission of FPA section 206 compliance filings, transmission providers may submit FPA section 205 filings proposing rates for the services provided for in the tariff, as well as non-rate terms and conditions that differ from those set forth in Order No. 890 if those provisions are "consistent with or superior to" the *pro forma* OATT. | P 135 |

[FR Doc. E7–7229 Filed 4–16–07; 8:45 am]
**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### 18 CFR Part 381

**[Docket No. RM07–12]**

### Annual Update of Filing Fees

April 9, 2007.

**AGENCY:** Federal Energy Regulatory Commission, Department of Energy.

**ACTION:** Final rule; annual update of Commission filing fees.

**SUMMARY:** In accordance with 18 CFR 381.104, the Commission issues this update of its filing fees. This notice provides the yearly update using data in the Commission's Management, Administrative, and Payroll System to calculate the new fees. The purpose of updating is to adjust the fees on the basis of the Commission's costs for Fiscal Year 2006.

**EFFECTIVE DATE:** May 17, 2007.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Misiewicz, Office of the Executive Director, Federal Energy Regulatory Commission, 888 First Street, NE., Room 4R–03, Washington, DC 20426, 202–502–6240.

**SUPPLEMENTARY INFORMATION:** *Document Availability:* In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington DC 20426.

From FERC's Web site on the Internet, this information is available in the eLibrary (formerly FERRIS). The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field and follow other directions on the search page.

User assistance is available for eLibrary and other aspects of FERC's website during normal business hours. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

### Annual Update of Filing Fees

The Federal Energy Regulatory Commission (Commission) is issuing this notice to update filing fees that the Commission assesses for specific services and benefits provided to identifiable beneficiaries. Pursuant to 18 CFR 381.104, the Commission is establishing updated fees on the basis of the Commission's Fiscal Year 2006 costs. The adjusted fees announced in this notice are effective May 17, 2007. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, that this final rule is not a major rule within the meaning of section 251 of Subtitle E of Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. 804(2). The Commission is submitting this final rule to both houses of the United States Congress and to the Comptroller General of the United States.

The new fee schedule is as follows:

*Fees Applicable to the Natural Gas Policy Act:*

1. Petitions for rate approval pursuant to 18 CFR 284.123(b)(2). (18 CFR 381.403): $10,420.

*Fees Applicable to General Activities:*

1. Petition for issuance of a declaratory order (except under Part I of the Federal Power Act). (18 CFR 381.302(a)): $20,940.

2. Review of a Department of Energy remedial order:

*Amount in controversy:*

$0–9,999 (18 CFR 381.303(b)): $100.

$10,000–29,999 (18 CFR 381.303(b)): $600.

$30,000 or more (18 CFR 381.303(a)): $30,560.

3. Review of a Department of Energy denial of adjustment:

*Amount in controversy:*

$0–9,999 (18 CFR 381.304(b)): $100.

$10,000–29,999 (18 CFR 381.304(b)): $600.

$30,000 or more (18 CFR 381.304(a)) $16,020.

4. Written legal interpretations by the Office of General Counsel (18 CFR 381.305(a)): $6,000.

*Fees Applicable to Natural Gas Pipelines:*

1. Pipeline certificate applications pursuant to 18 CFR 284.224 (18 CFR 381.207(b)): $1,000*

*Fees Applicable to Cogenerators and Small Power Producers:*

1. Certification of qualifying status as a small power production facility (18 CFR 381.505(a)): $18,000.

2. Certification of qualifying status as a cogeneration facility (18 CFR 381.505(a)): $20,380.

The Commission is eliminating the fee for applications for exempt wholesale generator status.

* This fee has not been changed.

**List of Subjects in 18 CFR Part 381**

Electric power plants, Electric utilities, Natural gas, Reporting and recordkeeping requirements.

**Thomas R. Herlihy,**

*Executive Director.*

■ In consideration of the foregoing, the Commission amends part 381, Chapter I, Title 18, Code of Federal Regulations, as set forth below.

## PART 381—FEES

■ 1. The authority citation for part 381 continues to read as follows:

**Authority:** 15 U.S.C. 717–717w; 16 U.S.C. 791–828c, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352; 49 U.S.C. 60502; 49 App. U.S.C. 1–85.

**§ 381.302 [Amended]**

■ 2. In 381.302, paragraph (a) is amended by removing ''$19,890'' and adding ''$20,940'' in its place.

**§ 381.303 [Amended]**

■ 3. In 381.303, paragraph (a) is amended by removing ''$29,040'' and adding ''$30,560'' in its place.

**§ 381.304 [Amended]**

■ 4. In 381.304, paragraph (a) is amended by removing ''$15,230'' and adding ''$16,020'' in its place.

**§ 381.305 [Amended]**

■ 5. In 381.305, paragraph (a) is amended by removing ''$5,700'' and adding ''$6,000'' in its place.

**§ 381.403 [Amended]**

■ 6. Section 381.403 is amended by removing ''$9,900'' and adding ''$10,420'' in its place.

**§ 381.505 [Amended]**

■ 7. In 381.505, paragraph (a) is amended by removing ''$17,110'' and adding ''$18,000'' in its place and by removing ''$19,360'' and adding ''$20,380'' in its place.

## Subpart H of Part 381 [Removed]

■ 8. Subpart H of part 381 (consisting of § 381.801) is removed.

[FR Doc. E7–7190 Filed 4–16–07; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

## Office of Surface Mining Reclamation and Enforcement

## 30 CFR Part 938

**[PA–147–FOR]**

## Pennsylvania Regulatory Program

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

**ACTION:** Final rule; approval of amendment.

**SUMMARY:** We are removing five required amendments to the Pennsylvania regulatory program (the ''Pennsylvania program'') regulations under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) related to alternative reclamation plans; alternative postmining land use determinations; and bond forfeiture sites where reclamation is unreasonable, unnecessary, or impossible. Pennsylvania revised its program to be consistent with the corresponding Federal regulations and SMCRA.

We are also approving two of four additional requested changes (not required) to the Pennsylvania program. Pennsylvania revised its program at its own initiative to clarify ambiguities and initiate changes in its fee collection calculations. The two approved changes are in regard to a typographical reference error and the evaluation of bond forfeiture sites. We are deferring our decision on two changes in regard to the discontinuation of a $100 per acre reclamation fee.

**EFFECTIVE DATE:** April 17, 2007.

**FOR FURTHER INFORMATION CONTACT:** George Rieger, Chief, Pittsburgh Field Division, Telephone: (717) 782–4036, e-mail: *grieger@osmre.gov.*

**SUPPLEMENTARY INFORMATION:**

I. Background on the Pennsylvania Program
II. Submission of the Amendment
III. OSM's Findings
IV. Summary and Disposition of Comments
V. OSM's Decision
VI. Procedural Determinations

### I. Background on the Pennsylvania Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Pennsylvania program on July 30, 1982. You can find background information on the Pennsylvania program, including the Secretary's findings, the disposition of comments, and conditions of approval in the July 30, 1982, **Federal Register** (47 FR 33050). You can also find later actions concerning Pennsylvania's program and program amendments at 30 CFR 938.11, 938.12, 938.13, 938.15 and 938.16.

### II. Submission of the Amendment

By letter dated May 23, 2006 the Pennsylvania Department of Environmental Protection (PADEP) sent us an amendment to revise its program regulations at 25 Pennsylvania Code (Administrative Record No. PA 793.11) under SMCRA (30 U.S.C. 1201 *et seq.*).

Pennsylvania sent the amendment in response to five required program amendments codified in the Federal regulations at 30 CFR 938.16 (mm), (nn), (oo), (pp), and (qq), and to include four additional changes made at its own initiative. The required amendments pertain to alternative reclamation plans, alternative post mining land use determinations, and bond forfeiture sites where reclamation is unreasonable, unnecessary, or impossible and were required in a final rule notice published in the **Federal Register** on October 24, 1991 (56 FR 55080). The revisions that Pennsylvania proposed at its own initiative concern money received from reclamation fees and the evaluation of bond forfeiture sites.

We announced receipt of the proposed amendment in the August 28, 2006, **Federal Register** (71 FR 50868). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy (Administrative Record No. PA 793.17). The public comment period ended on September 27, 2006. We did not hold a public hearing or meeting because no one requested one. We received written comments from three Federal agencies and one environmental organization.

### III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment, except as noted below, which includes removing five required amendments to the Pennsylvania regulatory program. We

are removing the required program amendments at 30 CFR 938.16 (mm), (nn), (oo), (pp), and (qq). Any revisions that we do not specifically discuss below concern nonsubstantive wording, editorial, or re-numbering of section changes and are approved here without discussion.

*1. Required Amendment at 30 CFR 938.16 (mm). Alternative Reclamation Plans and Applicable Performance Standards*

This required program amendment concerns alternative reclamation plans and applicable performance standards. The required program amendment codified in the Federal regulations at 30 CFR 938.16(mm) requires Pennsylvania to amend 25 Pa. Code 86.187(b)(1) or otherwise amend its program by requiring that alternative reclamation plans comply with all applicable performance standards in accordance with 86.189(c)(2), (c)(3), or (c)(4), whichever is appropriate.

The amendment was required because section 86.187(b)(1) can be misinterpreted. Currently paragraph (b)(1) provides that the PADEP may prepare and implement an alternative reclamation plan where it determines that the original plan may be amended to decrease the cost of reclaiming the bond forfeiture site. Without more clarification, this paragraph can be interpreted to allow the PADEP to approve an alternative reclamation plan that would not require reclamation in accordance with the applicable performance standards in accordance with 86.189(c)(2), (c)(3), and (c)(4), whichever is appropriate.

Therefore, paragraph (1) of subsection 86.187(b) was not approved by OSM in an October 24, 1991, rulemaking to the extent that it would allow the implementation of an alternative reclamation plan that fails to require reclamation in accordance with the applicable performance standards mentioned above. See 56 FR 55083.

In response to this required amendment, Pennsylvania has amended 25 Pa. Code 86.187(b) by clarifying that an alternative reclamation plan must be completed pursuant to 86.187(c). The PADEP is also amending 25 Pa. Code 86.187(c) with this amendment to include the requirement that alternative reclamation plans must comply with all applicable performance standards in accordance with 86.189(c)(2), (c)(3), and (c)(4). See Finding 2 below.

We find that this clarification satisfies the required program amendment codified in the Federal regulations at 30 CFR 938.16(mm) and can be approved. Therefore, the required program amendment at 30 CFR 938.16(mm) can be removed.

*2. Required Amendments at 30 CFR 938.16 (nn). Bond Forfeiture Sites: Alternative Reclamation Plans and Alternative Postmining Land Use*

This required program amendment concerns bond forfeiture sites (alternative postmining land use determinations and alternative reclamation plans). The required program amendment codified in the Federal regulations at 30 CFR 938.16 (nn) requires Pennsylvania to submit a proposed amendment to 25 Pa. Code 86.187(c) and section 18(c) of the Pennsylvania Surface Mining Conservation and Reclamation Act (PA SMCRA) or otherwise amend its program to be no less effective than 30 CFR 816.133(a) and 817.133(a) by requiring that alternative postmining land use determinations for sites with forfeited bonds, under the Federal interim program or under Pennsylvania's permanent program, be made to ensure that all disturbed areas are restored to conditions that are capable of supporting either the uses they were capable of supporting before any mining, or higher or better uses.

The amendment was required because section 18(c) of PA SMCRA and 25 Pa. Code 86.187(c) currently allow an alternative reclamation plan that merely calls for reclaiming the land so that it is suitable for agriculture, forests, recreating wildlife or water conservation, without regard to whether the alternative postmining land use is equal to or higher than the premining landuse as required by 30 CFR 816.133(a) and 817.133(a).

Therefore, section 18(c) of PA SMCRA and paragraph (c) of section 86.187 were not approved by OSM in an October 24, 1991, rulemaking to the extent that they did not provide for all disturbed areas to be restored to conditions that are capable of supporting either the uses they were capable of supporting before any mining, or higher or better uses. See 56 FR 55084.

In response to this required amendment, Pennsylvania has amended 25 Pa. Code 86.187(c) by deleting language which allowed for alternate reclamation plans for bond forfeiture sites that would make the sites suitable, at a minimum, for agriculture, forests, recreation, wildlife or water conservation. The PADEP also added language to 86.187(c) that makes it clear that an alternate plan must comply with all applicable performance standards at 86.189(c)(2) through (c)(4), whichever is appropriate and ensure that all disturbed areas are restored to conditions that are capable of supporting either the uses they were capable of supporting before any mining or higher or better uses.

PADEP did not submit changes to section 18(c) of PA SMCRA. Nevertheless, we believe that section 18(c) can be interpreted in a manner that does not compromise the amended requirements of section 86.187(c), and therefore conclude that the statutory provision need not be amended. Should we later determine that the previously unapproved portion of section 18(c) is being interpreted to override the new requirements at § 86.187(c), such that the program is again less effective than the Federal regulations, we will take action to reinstate the disapproval of the offending portion of section 18(c).

For the foregoing reasons, we find that the amendment to 25 Pa. Code 86.187(c) satisfies the requirements of 30 CFR 938.16(nn) and can be approved. Therefore, the required program amendment codified in the Federal regulations at 30 CFR 938.16(nn) can be removed.

*3. Required Amendment at 30 CFR 938.16 (oo). Bond Forfeiture Sites: Alternative Postmining Land Use Determinations/Alternative Reclamation Plans*

This required program amendment concerns bond forfeiture sites (alternative postmining land use determinations and alternative reclamation plans). The required program amendment codified in the Federal regulations at 30 CFR 938.16(oo) requires Pennsylvania to delete 25 Pa. Code 86.189(c)(5) or otherwise amend its program to be no less effective than 30 CFR 816.133(a) and 817.133(a) by requiring that sites bonded during the Federal interim program or under Pennsylvania's permanent program be restored to conditions that are capable of supporting the uses they were capable of supporting before any mining or higher or better uses.

The amendment was required because 25 Pa. Code 86.189(c)(5) currently allows for an alternative reclamation plan to make the site suitable, at a minimum, for agriculture, forests, recreation, wildlife or water conservation. The Federal regulations at 30 CFR 816.133(a) and 817.133(a) require that all disturbed areas be restored to uses they were capable of supporting before any mining or to higher or better uses. The Pennsylvania provision lacks a requirement that a site be restored to a higher and better use.

Therefore, paragraph (c)(5) of subsection 86.187 was not approved by OSM in an October 24, 1991,

rulemaking to the extent that it did not provide for all disturbed areas to be restored to conditions that are capable of supporting either the uses they were capable of supporting before any mining, or higher or better uses. See 56 FR 55085. For the same reason, the Director did not approve the cross references to 86.189(c)(5) contained in 86.189(c)(2), (c)(3), and (c)(4).

In response to this required amendment, Pennsylvania has amended 25 Pa. Code 86.189 (c)(5) by deleting this paragraph which allowed for alternate reclamation plans for bond forfeiture sites that would make the sites suitable, at a minimum, for agriculture, forests, recreation, wildlife or water conservation. Federal regulations at 30 CFR 816.133(a) (relating to post mining land use) require that all disturbed areas be restored to uses they were capable of supporting before mining or to higher or better uses. The PADEP also deleted references to subsection (c)(5) at 86.189(c)(2), (c)(3), and (c)(4).

We find that the amendment to 25 Pa. Code 86.187(c)(2)–(5) satisfies the requirements of 30 CFR 938.16(oo) and can be approved. Therefore, the required program amendment codified in the Federal regulations at 30 CFR 938.16 (oo) can be removed.

*4. Required Amendment at 30 CFR 938.16 (pp): Bond Forfeiture Sites Where Reclamation Is Unreasonable, Unnecessary, or Impossible*

This required program amendment concerns bond forfeiture sites where reclamation is considered to be unreasonable, unnecessary, or impossible. The required program amendment codified in the Federal regulations at 30 CFR 938.16 (pp) requires that Pennsylvania delete 25 Pa. Code 86.190(a)(3).

The amendment is required because this section allows the landowner of a bond forfeiture site to prevent reclamation, rendering 25 Pa. Code 86.190 less effective than the Federal regulations at 30 CFR 800.50(b)(2). While Title V of SMCRA, 30 U.S.C. 1251–1279, contains no specific provisions authorizing the regulatory authority to compel a recalcitrant landowner to allow reclamation, the Federal regulations at 30 CFR 800.50(b)(2) are quite explicit in requiring the regulatory authority to use funds collected from the bond forfeiture to complete the reclamation plan for that site, recalcitrant landowners notwithstanding. Therefore, paragraph 86.190(a)(3) was not approved in an October 24, 1991, rulemaking. See 56 FR 55085–55086.

In response to this required amendment, Pennsylvania has deleted 25 Pa. Code 86.190(a)(3). We find that the deletion of 25 Pa. Code 86.190(a)(3) satisfies the requirements of 30 CFR 938.16(pp) and can be approved. Therefore, the required program amendment codified in the Federal regulations at 30 CFR 938.16 (pp) can be removed.

*5. Required Amendment at 30 CFR 938.16 (qq): Bond Forfeiture Sites Where Reclamation Is Unreasonable, Unnecessary, or Impossible*

This required program amendment concerns bond forfeiture sites where reclamation is considered to be unreasonable, unnecessary, or impossible. The required program amendment codified in the Federal regulations at 30 CFR 938.16 (qq) requires that Pennsylvania delete the words ''but are not limited to'' from the introductory paragraph of 25 Pa. Code 86.190(a).

The amendment was required because the introductory language of subsection (a) of section 86.190 currently includes the words ''but are not limited to,'' which are used to refer to the reasons justifying a determination that reclamation under the reclamation plan is unreasonable, unnecessary or physically impossible. Any such reasons which are not specifically contained in section 86.190 were not approved.

Currently, 25 Pa. Code 86.190(a) specifies parameters for determining when completion of the approved reclamation plan is unreasonable, unnecessary, or physically impossible. The reasons justifying such a determination include, but are not limited to the following: (1) The site has been re-permitted and re-bonded for mining and reclamation is required as a condition of the permit; (2) the site has been otherwise reclaimed; (3) the landowner refused to allow the site to be reclaimed and the site is not a hazard to public health, safety, and welfare or adjacent property. Subsection 86.190(a) also provides that if the reclamation plan cannot be completed, the bond amount will be made available for expenditure to reclaim other lands or restore water supplies affected by other surface mining operations for which the Department has forfeited bonds.

As we noted in an October 24, 1991, rulemaking notice, the introductory language of subsection (a) of section 86.190, concerning the use of funds for other sites where reclamation of the forfeited site is unreasonable, unnecessary or physically impossible, mirrors the language of subsection (b), section 18, of PA SMCRA. See 56 FR 55085. This provision of Pennsylvania law was approved by the Secretary, as part of Pennsylvania's original permanent program approval.

The reasons specified at section 86.190(a)(1), (a)(2), and (a)(3) for making a determination not to reclaim a site have not previously been approved by OSM. If as provided in paragraph (1) of subsection (a), the site has been re-permitted and re-bonded for mining with full reclamation of the entire area made a permit condition, then forfeited bond money from the original permit is not needed for reclamation of the site. Likewise, as provided in paragraph (2), forfeited bond money is not needed to reclaim the site if it has been otherwise reclaimed, as long as such reclamation was performed in compliance with the reclamation plan and in accordance with the performance standards of the Pennsylvania program. Therefore, while there are no specific Federal counterparts to paragraphs (1) and (2) of subsection (a) of section 86.190, we previously found that these provisions were not inconsistent with SMCRA and the Federal regulations and they were approved to the extent that full reclamation of the site in accordance with the reclamation plan and all applicable performance standards are required. The PADEP also amended § 86.190(a)(3) by deleting this section. See Finding 4. Because the basis for the Secretary's approval of 18(b) of PASMCRA had not changed, the Director approved the introductory paragraph of subsection 86.190 (a) in an October 24, 1991, rulemaking, except for the words ''but are not limited to.'' *Id.*

In response to this required amendment, Pennsylvania has amended 25 Pa. Code 86.190(a) to delete the words ''but are not limited to'' to make clear that any reasons other than those specifically provided in 25 Pa. Code 86.190(a) are not permissible. We find that the amendment to 25 Pa. Code 86.190(a) satisfies the requirements of 30 CFR 938.16(qq) and can be approved. Therefore, the required program amendment codified in the Federal regulations at 30 CFR 938.16 (qq) can be removed.

*6. Additional Change: 25 Pa Code 86.17(e)—Reclamation Fees*

Pennsylvania has amended this subsection to discontinue the collection of the $100 per acre reclamation fee from permittees under 25 Pa. Code 86.17(e). The reclamation fee is deposited in the Surface Mining Conservation and Reclamation Fund (Fund) as a supplement to forfeited bonds and is used for reclaiming mining

operations which have defaulted on their obligation to reclaim mined sites.

Because issues regarding the Fund's solvency had become apparent, PADEP revised its bonding requirements and is now requiring all mine permits to post a full cost reclamation bond. The PADEP believes that because all of its permittees are now subject to full cost bonding requirements, there is no longer a basis for maintaining the supplement (the per acre fee).

The issue of whether OSM acted within its discretion when it concluded that the Fund is no longer subject to the requirements of 30 CFR 800.11(e) is pending before the United States Court of Appeals for the Third Circuit in the matter of *Pennsylvania Federation of Sportsmen's Clubs* v. *Norton, (PFSC* v. *Norton*) No. 06–1780. The outcome of this case could affect whether OSM may approve the proposed change to 25 Pa. Code 86.17(e). Therefore, in the interest of judicial economy, we are deferring our decision on this proposed change until final disposition of the *PFSC* v. *Norton* matter.

*7. Additional Change: 25 Pa Code 86.187(a)(1)—Money Received From the Fees*

Pennsylvania has amended 25 Pa. Code 86.187(a)(1) to correct a typographical error. In paragraph (a)(1), reference was improperly made to 25 Pa. Code 86.17(b) (relating to permit and reclamation fees). The correct reference is to 25 Pa. Code 86.17(e). We find that the amended citation at 25 Pa. Code 86.187(a)(1) corrects a citation error and does not render the Pennsylvania program inconsistent with SMCRA or the Federal Regulations and can be approved.

*8. Additional Change: 25 Pa Code 86.188(b)(5) and (c)(3)—Evaluation of Bond Forfeiture Sites*

Pennsylvania has amended 25 Pa. Code 86.188 by deleting 25 Pa. Code 86.188(b)(5) and 86.188(c)(3) in order to make it clear that bond forfeiture funds posted for and still needed to complete reclamation of the specific site for which the bonds were forfeited will not be used for reclamation of other sites until reclamation of the forfeited site has been completed.

Currently, 25 Pa. Code 86.188(b) lists the categories in decreasing priority order to be used when the Department is considering bond forfeiture site reclamation. Subsection (b)(5) refers to ''other sites which need reclamation.'' Furthermore, section (c) lists the factors that the Department will consider in selecting sites for reclamation under 25 Pa. Code 86.189(b)(1). Subsection (c)(3) considers the availability of funds to accomplish the required reclamation of the site or that portion of the site which is threatening life, health, safety, other property or the environment.

As noted in an October 24, 1991, rulemaking notice, subsections (b) and (c) were not approved by OSM to the extent that they would allow bond forfeiture funds posted for and needed to complete reclamation of a specific site to be used for reclamation of other sites. See 56 FR at 55084. To the extent that these subsections provided only for a ranking of sites for reclamation without compromising the requirement that all sites for which bonds were posted be properly reclaimed, it was determined they were not inconsistent with section 509(a) of SMCRA and 30 CFR 800.50(b)(2) of the Federal regulations.

The PADEP is addressing the concerns expressed in the October 24, 1991, rulemaking and is deleting the subsections (b)(5) and (c)(3) to remove any doubt that the PADEP intends to maintain adequate bonding to have funds available for completion of reclamation should the bonds be forfeited. We find that the amended regulations at 25 Pa. Code 86.188(b) and (c) are not inconsistent with SMCRA or the Federal regulations and can be approved.

*9. Additional Change: 25 Pa Code 86.283(c)—Reclamation Fees for Remining Areas*

Pennsylvania has amended 25 Pa. Code 86.283(c) to remove a reference to the per acre reclamation fee for remining areas for mine operators approved to participate in the financial guarantees program. PADEP has submitted this amendment to create consistency with the proposed amendment to 86.17(e) that would delete the per-acre reclamation fee requirement. See Finding 6 above.

We are deferring our decision on the proposed amendment at 25 Pa. Code 86.283(c) for the same reason set forth above at Finding 6 in support of our deferral with respect to the proposed change at 86.17(e).

## IV. Summary and Disposition of Comments

*Public Comments*

We asked for public comments on the amendment (Administrative Record No. PA–793.17). We received comments from one organization, the Citizens for Pennsylvania's Future (PennFUTURE) (Administrative Record No. PA 793.18). PennFUTURE objected to the portion of the program amendment that would discontinue the collection of Pennsylvania's reclamation fee at 25 Pa. Code 86.17(e), and requested that we defer our decision on this proposed change until such time as the matter of *PFSC* v. *Norton* is decided by the United States Court of Appeals for the Third Circuit.

As we noted above in Finding 6 above, we are deferring our decision with respect to the proposed amendment to 86.17(e), as well as on an ancillary proposed change at 86.283(c) (See Finding 9 above). Because we are deferring our decision, we will not respond to PennFUTURE's comments in opposition to these amendments in this rulemaking. Instead, we will respond to the comments in a future rulemaking, wherein we will decide whether or not to approve the proposed changes to 86.17(e) and 86.283(c).

*Federal Agency Comments*

Under Federal regulations at 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Pennsylvania program (Administrative Record No. PA 793.12). The Mine Safety and Health Administration (MSHA), District 1, responded (Administrative Record No. PA 793.13) and stated that it did not have any comments or concerns regarding this request. The Natural Resources Conservation Service responded (Administrative Record No. PA 793.14) and stated that it did not have any comments regarding this request.

*Environmental Protection Agency (EPA) Concurrence and Comments*

Under Federal regulations at 30 CFR 732.17(h)(11)(i) and (ii), we are required to get a written concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

None of the revisions that Pennsylvania proposed to make in this amendment pertain to air or water quality standards. Therefore, we did not ask EPA to concur on the amendment.

On June 6, 2006, we requested comments on the amendment from EPA (Administrative Record No. PA 793.15). The EPA, Region III, responded and stated that it did not identify any inconsistencies with the Clean Water Act or any other statutes or regulations under its jurisdiction.

## V. OSM's Decision

Based on the above findings, we approve, with certain exceptions, the amendment Pennsylvania sent to us on May 23, 2006. We are removing the required program amendments codified in the Federal regulations at 30 CFR 938.16(mm), (nn), (oo), (pp), and (qq) and approving two additional changes to the Pennsylvania program. We defer decision on two provisions regarding the reclamation fees at 25 Pa. Code 86.17(e) and 86.283(c). See Findings 6 and 9, respectively.

To implement this decision, we are amending the Federal regulations at 30 CFR 938, which codify decisions concerning the Pennsylvania program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

## VI. Procedural Determinations

*Executive Order 12630—Takings*

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulations.

*Executive Order 12866—Regulatory Planning and Review*

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

*Executive Order 12988—Civil Justice Reform*

The Department of the Interior has conducted the reviews required by Section 3 of Executive Order 12988 and has determined that, to the extent allowable by law, this rule meets the applicable standards of Subsections (a) and (b) of that Section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under Sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

*Executive Order 13132—Federalism*

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA. Section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

*Executive Order 13175—Consultation and Coordination With Indian Tribal Government*

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on federally recognized Indian tribes and have determined that the rule does not have substantial direct effects 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. The basis for this determination is that our decision is on a State regulatory program and does not involve a Federal program involving Indian lands.

*Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy*

On May 18, 2001, the President issued Executive Order 13211, which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

*National Environmental Policy Act*

Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that a decision on proposed State regulatory program provisions does not constitute major Federal actions within the meaning of Section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(c)). A determination has been made that such decisions are categorically excluded from the NEPA process (516 DM 8.4.A).

*Paperwork Reduction Act*

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

*Regulatory Flexibility Act*

The Department of the Interior 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.*). The State amendment that is the subject of this rule is based on counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

*Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, geographic regions, or Federal, State, or local government agencies; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

*Unfunded Mandates*

This rule will not impose a cost of $100 million or more in any given year on any governmental entity or the private sector.

**List of Subjects in 30 CFR Part 938**

Intergovernmental relations, Surface mining, Underground mining.

Dated: February 23, 2007.

**H. Vann Weaver,**

*Acting Regional Director, Appalachian Region.*

■ For the reasons set out in the preamble, 30 CFR part 938 is amended as set forth below:

## PART 938—PENNSYLVANIA

■ 1. The authority citation for part 938 continues to read as follows:

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

■ 2. Section 938.15 is amended by adding a new entry in the table in chronological order by ''Date of final publication'' to read as follows:

**§ 938.15 Approval of Pennsylvania regulatory program amendments.**

* * * * *

| Original amendment submission date | Date of final publication | Citation/description |
|---|---|---|
| * | * | * |
| May 23, 2006 | April 17, 2007 | 25 Pa. Code: 86.187(a)(1), (b), (c); 86.188(b)(5) [deleted]; 86.188(c)(3) [deleted]; 86.189(c)(2) through (c)(4) [deleted reference to (c)(5)], 86.189 (c)(5) [deleted]; 86.190 (a) [the words ''but are not limited to'' are deleted]; 86.190(a)(3) [deleted]. |

**§ 938.16 [Amended]**

■ 3. Section 938.16 is amended by removing and reserving paragraphs (mm), (nn), (oo), (pp), (qq).

[FR Doc. E7–7227 Filed 4–16–07; 8:45 am]

**BILLING CODE 4310–05–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 300

**[Docket No. 070119012–7077–02; I.D. 031307B]**

**RIN 0648–AU78**

### Pacific Albacore Tuna Fisheries; Vessel List to Establish Eligibility to Fish for Albacore Tuna in Canadian Waters Under the U.S. Canada Albacore Tuna Treaty

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to develop a new vessel list at the beginning of each calendar year of U.S. vessels eligible to fish for albacore tuna in Canadian waters. The vessel list would revert to zero vessels on December 31 of each year, unless NMFS receives a notice for a vessel to be added to the list for the upcoming year, with the requisite information. This regulation would clarify that the vessel list will remain valid for a single calendar year. Updating the list every year will facilitate the United States' obligation to annually provide Canada a current list of U. S. vessels that are likely to fish albacore off the coast of Canada. The proposed rule is adopted without change.

**DATES:** This final rule will be effective May 17, 2007.

**ADDRESSES:** You may submit requests to be placed on the annual list of U.S. vessels eligible to fish for albacore tuna in Canadian waters, by any of the following methods:

- E-mail: *albacore.fish@noaa.gov*.
- Mail: Rodney R. McInnis, Regional Administrator, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213.
- Phone: (562)980–4024.
- Fax: (562) 980–4047.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to NMFS Southwest Region and by e-mail to *David_Rostker@omb.eop.gov*, or fax to (202) 395–7285.

**FOR FURTHER INFORMATION CONTACT:** Chris Fanning, Southwest Region, NMFS, (562) 980–4198 or (562) 980–4030.

**SUPPLEMENTARY INFORMATION:** On February 7, 2007, NMFS published a proposed rule (72 FR 5652) proposing to revise the methodology to create a vessel list for vessels eligible to fish for albacore tuna in Canadian waters. The proposed rule is adopted without change. The 1981 Treaty Between the Government of the United States of America and the Government of Canada on Pacific Coast Albacore Tuna Vessels and Port Privileges (Treaty), as amended in 2002, establishes a number of obligations for both countries to control reciprocal fishing in waters of one country by vessels of the other country. One obligation requires each country to annually provide to the other country a list of its fishing vessels that are expected to fish for Pacific albacore tuna off the coast of the other country during the upcoming fishing season, generally June through October each year.

As described in the 2004 final rule implementing amendments to the Treaty (69 FR 31531, June 4, 2004), and codified at 50 CFR 300.172, the list must include vessel and owner name, address, and phone number; USCG documentation number (or state registration if not documented); vessel operator (if different from the owner) and his or her address with phone number. Each U.S. vessel must be on the list for at least 7 days prior to engaging in fishing under the Treaty. This is intended to ensure that both countries have equal information as to eligible vessels. Canadian and U.S. enforcement officers need up-to-date lists of eligible vessels to adequately enforce the Treaty. Vessel owners who wish their vessels to remain on, or be added to the vessel list must contact NMFS (see **ADDRESSES**) and provide the required information. NMFS will notify fishermen via a confirmation letter or email of the date the request to be on the list was received and the date the vessel was placed on the list.

Before the 2006 fishing season (June through October), NMFS did not require owners of albacore fishing vessels that wanted their vessels to be on the list of U. S. vessels eligible to fish for albacore tuna in Canadian waters under the Treaty, to contact NMFS. Instead, NMFS relied on a lengthy list created from information provided by the industry that was not readily verifiable and did not indicate whether each vessel owner

actually wished to fish for albacore tuna in Canada for any given year. The result was that NMFS was not able to provide the Canadian Government an updated vessel list of vessels owners who intended to fish for albacore tuna in Canada for a particular fishing season. With this final rule, NMFS would amend 50 CFR 300.172 to state explicitly that the vessel list is effective for only one calender year and will be recompiled beginning on January 1 of each year. Additional vessels may be added to the list throughout the year in accordance with 50 CFR 300.172.

**Comments and Responses**

A proposed rule to implement this action was published on February 7, 2007, at 72 FR 5652 and comments were solicited through March 9, 2007. No comments or responses were received.

**Classification**

The Regional Administrator, NMFS Southwest Region, determined that this final rule is consistent with the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*

This final rule has been determined to be not significant for the purposes of Executive Order (E.O.) 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage (72 FR 5652) that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

This final rule for revising the methodology for developing the list of vessels eligible to fish for albacore tuna in Canadian waters under the U.S. Canada Albacore Tuna Treaty presents contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) that has been approved by OMB under control number 0648–0492. Public reporting burden for requesting to be placed on the list of vessels eligible to fish in Canadian waters is estimated to average 0.08 hours per vessel or about 5 minutes each, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**) and by e-mail to *David__Rostker@omb.eop.gov*, or fax to (202) 395–7285.

Notwithstanding any other provision of the 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.

**List of Subjects in 50 CFR Part 300**

Fisheries, High seas fishing, International agreements, Permits, Reporting and recordkeeping requirements.

Dated: April 11, 2007.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

■ For the reasons set out in the preamble, 50 CFR part 300 is amended as follows:

## PART 300—INTERNATIONAL FISHERIES REGULATIONS

### Subpart L—Pacific Albacore Tuna Fisheries

■ 1. The authority citation for part 300 subpart L continues to read as follows:

**Authority:** Sec. 401, Pub. L. 108–219, 118 Stat. 616 (16 U.S.C. 1821 note).

■ 2. Section 300.172 is revised to read as follows:

**§ 300.172 Vessel list.**

The ''vessel list'' is the list of U.S. vessels that are authorized to fish under the Treaty as amended in 2002. Only a vessel on the list for at least 7 days may engage in fishing in Canadian waters under the Treaty as amended in 2002. The owner of any U.S. vessel that wishes to be eligible to fish for albacore tuna under the Treaty as amended in 2002 must provide the Regional Administrator or his designee with the vessel name, the owner's name and address, phone number where the owner can be reached, the USCG documentation number (or state registration number if not documented), and vessel operator (if different from the owner) and his or her address and phone number. On the date that NMFS receives a request that includes all the required information, NMFS will place the vessel on the annual vessel list. NMFS will notify fishermen by a confirmation letter or email of the date the vessel was placed on the list. Because the vessel list will revert to zero vessels on December 31 of each year, the required information must be provided in the manner specified on an annual basis.

[FR Doc. E7–7293 Filed 4–16–07; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 665

**[Docket No. 070207026–7079–02; I.D. 012207A]**

**RIN 0648–AS29**

### Fisheries in the Western Pacific; Optional Use of Electronic Logbook Forms

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

**ACTION:** Final rule.

**SUMMARY:** This final rule allows participants in U.S. domestic pelagics, crustaceans, bottomfish and seamount groundfish, precious corals, and coral reef ecosystems fisheries of the western Pacific region the optional use of NMFS-approved electronic logbook forms in lieu of paper logbooks. This action is intended to enhance the efficiency of fish catch and effort data reporting and recordkeeping by fishermen, reduce human error, and improve data accuracy.

**DATES:** This final rule is effective May 17, 2007.

**ADDRESSES:** Copies of the fishery management plans (FMPs) and the regulatory amendment may be obtained from Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council (Council), 1164 Bishop Street, Suite 1400, Honolulu, HI 96813, or via the World Wide Web at *www.wpcouncil.org*. Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to William L. Robinson, Regional Administrator, NMFS Pacific Islands Region (PIR), 1601 Kapiolani Blvd. Suite 1110, Honolulu, HI 96814, and by e-mail to David Rostker, *David__Rostker@omb.eop.gov* or fax to (202) 395–7285.

**FOR FURTHER INFORMATION CONTACT:** Bob Harman, NMFS PIR, (808) 944–2271.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

This **Federal Register** document is also accessible via the World Wide Web at the Office of the **Federal Register**: *www.gpoaccess.gov/fr/index.html.*

**Background**

The NMFS Pacific Islands Region encompasses western Pacific Federal waters, i.e., the 200–nautical mile U.S. Exclusive Economic Zone (EEZ), around the Territories of Guam and American Samoa, the State of Hawaii, the Commonwealth of the Northern Mariana Islands, and other U.S. island possessions in the Pacific. Western Pacific fisheries are currently managed under five fishery management plans (FMPs)--Pelagics, Crustaceans, Bottomfish and Seamount Groundfish, Precious Corals, and Coral Reef Ecosystems.

Current regulations (50 CFR 665.14) require permit holders, who fish for western Pacific management unit species and who are subject to Federal reporting requirements, to record their catch and effort information on paper logbook forms and submit them to NMFS. Maintaining paper logbook forms, and the interpretation of such forms, is subject to potential errors due to illegible handwriting and missed data entry. The availability and capacity of personal computers offer benefits to fishery participants and NMFS data collection programs. The optional use of electronic logbook data collection systems would utilize existing and emerging technologies to enhance the efficiency of fish catch and effort data reporting and recordkeeping by fishermen, reduce human error, and improve data accuracy. Furthermore, if transmitted through a remote communication system such as electronic mail or vessel monitoring system, electronic reporting provides a near real-time catch reporting system.

At its 123rd meeting in June 2004, the Council took final action to recommend amending the western Pacific regulations to provide fishermen an alternative to the currently-required paper logbook forms. Specifically, fishermen would be allowed to submit logbook data to NMFS on removable non-paper media (such as diskette, CD-ROM, memory stick, etc.), and would also be allowed to transmit the data to NMFS via e-mail or other remote communication systems, where such remote transmission was appropriate and feasible. The option to use electronic logbook forms would be available to fishermen who are subject to Federal reporting requirements under all western Pacific FMPs, as well as those participants in fisheries that may become subject to Federal reporting requirements.

This action does not establish the technical requirements or protocols for the electronic logbook program. It is, however, the initial step for program implementation. The technical and legal specifications and operational details for the electronic logbook software program and hardware requirements will be developed and published by NMFS subsequent to this final rule.

Additional background information on this final rule may be found in the preamble to the proposed rule (72 FR 7853) published on February 21, 2007, and is not repeated here.

**Comments and Responses**

On February 21, 2007, NMFS published in the **Federal Register** a proposed rule (72 FR 7853). The comment public comment period ended on March 23, 2007. NMFS received two comments on the proposed rule as follows:

*Comment 1:* Electronic logbooks offer a means of achieving greater efficiency and effectiveness in reporting fishery information.

*Response:* NMFS notes further that electronic data reporting has the potential to greatly reduce errors and costs.

*Comment 2:* Computer systems aboard fishing vessels are typically not designed for the rigors of use at sea. The effectiveness of an electronic logbook reporting program, therefore, is conditional to frequent power disruptions and unreliability of at-sea computer systems.

*Response:* NMFS recognizes the problems associated with using computers at sea, and will consider reliability, operational conditions, and associated issues when developing the technical specifications for approved electronic reporting systems. The difficulties of employing computers for fisheries data reporting is a reason that NMFS is implementing this final rule as an optional alternative to paper logbooks, and paper logbooks will continue to be accepted.

**Changes to the Proposed Rule**

No changes to the proposed rule were made in this final rule.

**Classification**

The Regional Administrator, NMFS PIR, has determined that this regulatory amendment is necessary for the conservation and management of the affected fisheries and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification, or the economic impacts of the proposed rule. As a result, a regulatory flexibility analysis was not required and none was prepared.

This final rule contains amendments to collection-of- information requirements subject to the Paperwork Reduction Act (PRA) and which has been approved by the Office of Management and Budget (OMB) under control number 0648–0214. The public reporting burden for this collection-of-information is estimated to average five minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection-of-information. Send comments regarding this burden estimate, or any other aspects of this data collection, including suggestions for reducing the burden, to William L. Robinson (see **ADDRESSES**), or by email to *David__Rostker@omb.eop.gov* or fax to (202) 395–7285.

Notwithstanding any other provision of the 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.

**List of Subjects in 50 CFR Part 665**

Administrative practice and procedure, American Samoa, Fisheries, Fishing, Guam, Hawaii, Hawaiian Natives, Northern Mariana Islands, Pacific Remote Island Areas, Reporting and recordkeeping requirements.

Dated: April 11, 2007.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

■ For the reasons set out in the preamble, 50 CFR part 665 is amended as follows:

## PART 665—FISHERIES IN THE WESTERN PACIFIC

■ 1. The authority citation for part 665 continues to read as follows:

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

■ 2. In § 665.14, revise paragraph (a) to read as follows:

### § 665.14 Reporting and recordkeeping.

(a) *Fishing record forms.* The operator of any fishing vessel subject to the requirements of §§ 665.21, 665.41, 665.61(a)(4), 665.81, or 665.602 must maintain on board the vessel an accurate and complete record of catch, effort, and other data on paper report forms provided by the Regional Administrator, or electronically as specified and approved by the Regional Administrator. All information specified by the Regional Administrator must be recorded on paper or electronically within 24 hours after the completion of each fishing day. The logbook information, reported on paper or electronically, for each day of the fishing trip must be signed and dated or otherwise authenticated by the vessel operator in the manner determined by the Regional Administrator, and be submitted or transmitted via an approved method as specified by the Regional Administrator, and as required by this paragraph (a). The operator of any vessel subject to the requirements of §§ 665.21, 665.41, 665.61(a)(4), or 665.81 must submit the original logbook information for each day of the fishing trip to the Regional Administrator within 72 hours of each landing of management unit species, unless the fishing was authorized under a PRIA troll and handline permit, a PRIA crustaceans fishing permit, a PRIA bottomfish permit, or a PRIA precious corals fishing permit, in which case the original logbook form for each day of fishing within the PRIA EEZ waters must be submitted to the Regional Administrator within 30 days of each landing of management unit species. For fisheries managed under § 665.602, the original logbook information for each day of the fishing trip must be submitted to the Regional Administrator within 30 days of each landing of management unit species.

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[FR Doc. E7–7291 Filed 4–16–07; 8:45 am]

BILLING CODE 3510–22–S

# Proposed Rules

Federal Register
Vol. 72, No. 73
Tuesday, April 17, 2007

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.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 9501

**RIN 3206–AL02**

### Office of Personnel Management Criteria for Internal Revenue Service Broadbanding Systems

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing proposed regulations to revise the criteria for Internal Revenue Service (IRS) broadbanding systems. The proposed regulations would provide the Department of the Treasury with the flexibility, in coordination with OPM, to establish broader bands for covered IRS employees. The proposed regulations also would establish a more direct relationship between pay and performance. Finally, the proposed regulations would revise the criteria consistent with the changes in the General Schedule pay administration rules made by the Federal Workforce Flexibility Act of 2004 and OPM implementing regulations.

**DATES:** Comments must be received on or before June 18, 2007.

**ADDRESSES:** Send or deliver written comments to Jerry Mikowicz, Deputy Associate Director for Pay and Leave Administration, Strategic Human Resources Policy Division, Office of Personnel Management, Room 7H31, 1900 E Street, NW., Washington, DC 20415–8200; by fax at (202) 606–0824; or by e-mail at *pay-performance-policy@opm.gov*.

**FOR FURTHER INFORMATION CONTACT:** Jeanne Jacobson, by telephone at (202) 606–2858; by fax at (202) 606–0824; or by e-mail at *pay-performance-policy@opm.gov*.

**SUPPLEMENTARY INFORMATION:** The Office of Personnel Management (OPM) is issuing proposed regulations to revise the criteria for Internal Revenue Service (IRS) broadbanding systems. Under 5 U.S.C. 9509, the Secretary of the Treasury may establish one or more broadbanding systems covering all or any portion of the IRS workforce under the General Schedule (GS). Note that under 5 U.S.C. 9501(c), employees within a unit to which a labor organization is accorded exclusive recognition under 5 U.S.C. chapter 71 will not be subject to the broadbanding flexibility provided by § 9509 unless the exclusive representative and IRS have entered into a written agreement that specifically provides for the exercise of the broadbanding flexibility. Section 9509(b) of title 5, United States Code, directs OPM to prescribe criteria for IRS broadbanding systems and specifies certain principles that such criteria must follow, at a minimum. OPM published the final criteria as a notice in the **Federal Register** on December 19, 2000 (65 FR 79433). We propose to issue these criteria as regulations in 5 CFR part 9501 with the revisions discussed in this Supplementary Information.

Under 5 U.S.C. 9508, the Secretary of the Treasury must develop a performance management system for the IRS. These criteria include the definition of certain performance appraisal terms consistent with the concepts and terminology found in 5 U.S.C. 9508. Any performance management system that supports broadbanding must include the concepts defined by these terms. However, in its operating instructions, the IRS may continue to use current terminology that captures these concepts or apply these definitions to currently used terms if it determines that such an approach is the most effective for employee understanding and acceptance. The supplemental information explaining the criteria contains language describing the relevant application of these concepts and terms as currently used by IRS, where applicable.

### Maximum Number of Grades in a Band

We are proposing to revise the criteria to provide the Department of the Treasury additional flexibility in combining GS grades into bands under IRS broadbanding systems. Section 9501.203(a) of the proposed regulations (section V.B. of the current criteria) provides the minimum and maximum number of GS grades that may be combined into bands. In § 9501.203(b), we propose to allow the Department of the Treasury, after coordination with OPM, to establish one or more bands that encompass grades not otherwise permitted by § 9501.203(a).

In addition, we propose to add a new provision in § 9501.203(c) to require each IRS broadbanding system to include at least one band that combines two or more General Schedule grades, consistent with the definition of ''broadbanded system'' in 5 U.S.C. 9509(a). We have also amended the definition of *broadbanding system* in § 9501.104 to provide that all positions covered by the regulations are considered to be in a single broadbanding system unless the Department of the Treasury determines that a separate system is needed for supervisors and managerial employees (as authorized in § 9501.206(a)).

### Within-Band Pay Adjustments

The proposed regulations at § 9501.205 revise the criteria currently found in section V.D. concerning within-band pay adjustments. This section includes some minor wording changes for clarity, consistency, and regulatory formatting. As discussed further, the other changes in the criteria for within-band adjustments are intended primarily to establish a more direct relationship between pay and performance.

Section 9501.205(f)(1) of the proposed regulations requires IRS to use performance assessments derived under a performance appraisal system established under 5 U.S.C. 9508 (i.e., ratings of record as currently applied by IRS) as a basis for within-band pay increases. This paragraph provides that IRS policies for granting within-band pay increases on the basis of a positive assessment must provide for pay distinctions based on levels of performance and requires that a positive assessment in the IRS performance appraisal system supporting the broadbanding system must have two or more summary rating levels that represent performance equivalent to fully successful or better (i.e., a rating of record of ''Fully Successful'' or higher level as currently applied by IRS). In § 9501.104, we have added a definition of *positive assessment* to mean a

summary performance assessment documenting that employee performance is the equivalent of fully successful or better (i.e., a rating of record of ''Fully Successful'' or higher as currently applied by IRS). In addition, we have added a definition of negative assessment to mean a summary performance assessment documenting that employee performance is less than the equivalent of fully successful (i.e., a rating of record of ''Minimally Successful'' or ''Unacceptable'' as currently applied by IRS). Furthermore, for clarification and ease of reference, we have included definitions for *performance assessment* and *unacceptable performance*.

The proposed regulations at § 9501.205(f)(6) allow IRS to establish a separate pay progression plan and separate salary increase budget for entry/developmental employees in recognition of the fact that pay progression for entry/developmental employees is often designed to be more rapid (as with GS entry/developmental employees who are in career ladders and receive regular promotions providing sizable pay increases typically each year). Because of this additional flexibility, the proposed regulations at § 9501.401 require that, if IRS provides prorated career-ladder promotion payments to a group of employees converted to entry/developmental positions covered by a separate pay progression plan, the first salary increase budget for these entry/developmental employees following conversion must be determined after taking into account the length of time between the prorated promotion payments and the first performance-based payments under the IRS broadbanding system. Generally, the normal salary increase budget for entry/developmental employees should be reduced if that length of time is less than 52 weeks. Similarly, if an individual employee enters the broadbanding system by transfer or reassignment from another Federal position and receives a prorated within-grade increase or career-ladder promotion payment at conversion, the employee's first performance-based payment under the IRS broadbanding system may be reduced, as allowed under § 9501.205(f)(8) and discussed below.

Section 9501.205(f)(8) provides IRS with the flexibility to reduce an employee's performance-based within-band increase from that generally provided under the pay progression plan when, for example, an employee enters the broadbanding system during the appraisal period that is the basis for the within-band increase, an employee was in a leave without pay status during the appraisal period (except for employees with restoration rights under 5 CFR part 353), or an employee entered the broadbanding system and received a prorated within-grade increase or career-ladder promotion payment less than 52 weeks before the performance-based within-band increase.

The proposed regulations provide IRS additional flexibility to grant within-band pay increases. For example, § 9501.205(f)(7) allows IRS to take into account an employee's position in the rate range in determining within-band pay increases. Section 9501.205(f)(5) continues to allow IRS to use other individual factors to provide within-band pay increases, such as the acceptance of a supervisory position within the same band. However, § 9501.205(f)(2) continues to prohibit within-band pay increases based solely on time at pay level.

Section 9501.205(g) allows IRS to provide general pay increases to specified categories of employees with current positive assessments when band rate ranges are adjusted under § 9501.204. We added a definition of *general pay increase* to § 9501.104 to help clarify that general pay increases for employees under IRS broadbanding systems are different from General Schedule across-the-board increases under 5 U.S.C. 5303. Such general pay increases may be paid in combination with performance-based pay increases under § 9501.205(f). The amount of such pay increases may be any percentage amount up to the percentage amount by which band rate ranges are adjusted. IRS may authorize different general pay increases for different employee categories. However, if IRS provides an increase that is less than the band rate range adjustment, the resulting unused funds must be redirected and applied to performance-based pay increases. The proposed regulations also provide IRS the flexibility to forgo paying any general pay increase and to use performance-based pay increases exclusively. Under § 9501.205(f)(4), the pay of an employee with a positive assessment must not fall below the minimum rate of a band as a result of receiving a pay increase that is less than the band rate range increase.

Section 9501.205(h) prohibits IRS from providing any kind of pay increase (including a locality pay increase or a staffing supplement increase) to an employee with a negative assessment, even if it were to cause the employee to fall below the band minimum rate. This section requires IRS to establish procedures for dealing with employees who do not receive a performance-based pay increase, a general pay increase, or other pay increase because of a negative assessment. Such procedures may allow an employee who later receives a positive assessment to receive such increases prospectively.

Section 9501.205(h) prescribes procedures for dealing with employees who do not receive a locality pay increase because of a negative assessment. The locality payment for such an employee must be frozen at its existing level. The regulations include provisions for adjusting a frozen locality payment when an employee moves to a new locality pay area and when an employee subsequently receives a positive assessment. The regulations include similar rules for employees receiving a frozen staffing factor under the staffing supplement provisions at § 9501.304(b).

Section 9501.205(i) provides the requirements for adjusting the pay of a retained rate employee, consistent with the proposed criteria in other paragraphs of § 9501.205. IRS must provide a retained rate employee a pay increase equal to 50 percent of the dollar increase in the maximum rate of the applicable band (including any locality payment or staffing supplement). A retained rate employee with a negative assessment may not receive a pay increase. This is a variation of the pay retention rules in 5 U.S.C. 5363, as authorized by 5 U.S.C. 9509(c).

Finally, § 9501.205(j) provides that within-band pay reductions authorized on the basis of unacceptable performance and/or conduct may not exceed 10 percent or cause an employee's rate of pay to fall below the minimum rate of his or her band. An employee's rate of pay may not be reduced more than once in a 12-month period based on unacceptable performance and/or conduct.

**Pay Administration Changes**

The proposed regulations contain changes in the IRS broadbanding criteria consistent with the changes in the GS pay administration rules made by sections 101 and 301 of the Federal Workforce Flexibility Act of 2004 (Public Law 108–411, October 30, 2004) and OPM implementing regulations. Section 101 of the Federal Workforce Flexibility Act of 2004 amended 5 U.S.C. 5753 and 5754 by providing a new authority to make recruitment, relocation, and retention incentive payments. OPM issued interim regulations to implement the new authority on May 13, 2005 (70 FR 25732). We propose to amend the

criteria for IRS broadbanding systems to reflect the new terms ''recruitment, relocation, and retention incentives,'' as used in the interim regulations. The remaining proposed revisions in the criteria are a result of amendments made by section 301 of the Act and implementing regulations.

Section 301 of the Federal Workforce Flexibility Act of 2004 amended provisions in 5 U.S.C. chapter 53 relating to the administration of special rates, locality rates, and retained rates. These statutory amendments became effective on the first day of the first pay period beginning on or after April 28, 2005—i.e., May 1, 2005. OPM issued interim regulations to implement the amendments and revise the rules that govern pay setting for Federal employees covered by the GS pay system on May 31, 2005 (70 FR 31278).

We are proposing to revise the criteria for IRS broadbanding systems to be consistent with the Federal Workforce Flexibility Act of 2004 amendments because 5 U.S.C. 9509(b)(3) provides that ''except as otherwise provided under this section, employees under a broad-banded system shall continue to be subject to the law and regulations covering employees under the pay system that otherwise would apply to such employees.'' That is, employees are to be treated as GS employees, except as otherwise provided by 5 U.S.C. 9509. For example, section V.G. of the current criteria, proposed in § 9501.208, states that the provisions in the criteria related to grade and pay retention are based on the current grade and pay retention authority in 5 U.S.C. chapter 53, subchapter VI, and 5 CFR part 536. Section 301 of the Federal Workforce Flexibility Act of 2004 amended 5 U.S.C. 5302 so that locality payments under 5 U.S.C. 5304 are no longer paid on top of a retained rate. Rather, an employee's pay retention entitlement is derived by comparing an employee's payable (highest) rate of basic pay (including any locality rate or special rate) to the highest applicable rate range (including a locality rate or special rate range) for the employee's current position. Consistent with this change, we are proposing to revise the procedures for converting the pay of an employee to a retained rate under an IRS broadbanding system in § 9501.401 (Appendix B of the current criteria). We are also proposing to revise the procedures for determining the converted GS-equivalent pay rate for an employee who is retaining a band or pay rate under an IRS broadbanding system in § 9501.402 (Appendix C of the current criteria), consistent with the changes in the GS pay retention rules.

The Federal Workforce Flexibility Act of 2004 also amended 5 U.S.C. 5303 so that an employee is not entitled to a special rate if he or she is entitled to a higher rate of basic pay under another authority (e.g., a locality rate or retained rate). We are proposing to delete a reference in the current Appendix C to a situation where an employee who is entitled to a higher locality rate of pay also is entitled to a special rate. We are also proposing to revise terminology throughout the criteria to be consistent with new terminology in the interim regulations implementing the Federal Workforce Flexibility Act of 2004.

**Publishing the Criteria in Regulations**

The IRS broadbanding criteria were originally published in the **Federal Register** as a notice with three appendices. Since that time, significant developments have occurred to establish agency-specific personnel systems in regulations (e.g., the Department of Homeland Security Human Resources Management System in 5 CFR Chapter XCVII and part 9701 and the Department of Defense Human Resources Management and Labor Relations Systems in 5 CFR chapter XCIX and part 9901). Consequently, OPM proposes to pursue the option of organizing and establishing the criteria for the Internal Revenue Service broadbanding systems and related appendices as four subparts in a new 5 CFR chapter XCV and part 9501.. Subpart A of the proposed regulations provides the purpose and the general provisions governing the IRS broadbanding system and defines terms that are used throughout the new part 9501. Subpart A also clarifies the relationship of the regulations in part 9501 to other provisions of law and regulations. Subpart B of the proposed regulations provides the criteria for the IRS broadbanding system. The criteria follow the principles outlined in 5 U.S.C. 9509(b)(4)(A)–(F). Subpart C consists of the former Appendix A, but we are proposing to delete the formulas in the current Appendix A because the rules the formulas express are adequately described in proposed § 9501.303(a). Subpart D consists of the current Appendices B and C. We have also taken this opportunity to make other minor clarifications and formatting changes.

**E.O. 12866, Regulatory Review**

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

**Regulatory Flexibility Act**

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

**List of Subjects in 5 CFR Part 9501**

Administrative practice and procedure, Government employees, Wages.

Office of Personnel Management.

**Linda M. Springer,**

*Director.*

Accordingly, under the authority of section 9509 of title 5, United States Code, OPM is proposing to amend title 5, Code of Federal Regulations, by establishing chapter XCV consisting of part 9501, as follows:

## CHAPTER XCV—OFFICE OF PERSONNEL MANAGEMENT CRITERIA FOR INTERNAL REVENUE SERVICE BROADBANDING SYSTEMS

## PART 9501—OFFICE OF PERSONNEL MANAGEMENT CRITERIA FOR INTERNAL REVENUE SERVICE BROADBANDING SYSTEMS

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9501.401 Conversion into broadbanding systems.
9501.402 Conversion to the General Schedule pay system.

**Authority:** 5 U.S.C. 9509(b).

## Subpart A—General Provisions

### § 9501.101 Authority.

This part contains regulations providing the criteria for Internal Revenue Service (IRS) broadbanding systems, as authorized by 5 U.S.C. 9509(b). Section 9509 of title 5, United States Code, as added by the IRS Restructuring and Reform Act of 1998 (Pub. L. 105–206), provides the Secretary of the Treasury the authority to establish one or more broadbanding systems covering all or any portion of the IRS workforce under the General Schedule (GS). Section 9509(b) of title 5, United States Code, directs the Office of Personnel Management (OPM) to prescribe criteria for IRS broadbanding systems and specifies certain principles that such criteria must follow, at a minimum.

### § 9501.102 Applicability.

(a) A *broad-banded system* is defined in 5 U.S.C. 9509(a) as a system for grouping positions for pay, job evaluation, and other purposes that is different from the General Schedule pay and classification system established under 5 U.S.C. chapter 51 and chapter 53, subchapter III. Employees covered by IRS broadbanding systems are not covered by subchapter III of chapter 53 or by those provisions of chapter 51 that define General Schedule grades. However, selected provisions from those parts of law are used in applying parallel features to employees in IRS broadbanding systems, as provided in this part.

(b)(1) As required by 5 U.S.C. 9509(b)(3), employees covered by IRS broadbanding systems are to be treated as if they are General Schedule employees for the purpose of applying other laws and regulations governing General Schedule employees, except as otherwise provided in this part. Applicable laws and regulations include, but are not limited to 5 U.S.C. 5304, authorizing locality-based comparability payments (except as provided in § 9501.205(h)); 5 U.S.C. chapter 53, subchapter VI, authorizing grade and pay retention (except as otherwise provided in this part); and 5 U.S.C. 5753 and 5754, authorizing recruitment, relocation, and retention incentives. (Many title 5 provisions apply to Federal employees on a more general basis and do not base coverage on whether an employee is covered by the General Schedule system—e.g., aggregate pay limitation under 5 U.S.C. 5307; premium pay under 5 U.S.C. chapter 55, subchapter V; severance pay under 5 U.S.C. 5595; leave under 5 U.S.C. chapter 63; retirement under 5 U.S.C. chapters 83 and 84; and insurance under 5 U.S.C. chapter 87.)

(2) Employees in IRS broadbanding systems are not covered by the special rate program established under 5 U.S.C. 5305. However, IRS broadbanding systems may use a parallel authority to establish staffing supplements, which are linked to established special rates as described in subpart C of this part.

(c) The criteria in this part apply only to broadbanding systems that cover General Schedule positions. Section 9509(b)(1)(B) of title 5, United States Code, authorizes the Secretary of the Treasury, with the prior approval of the Director of OPM, to include in a broadbanding system positions that otherwise would be subject to 5 U.S.C. chapter 53, subchapter IV (prevailing rate systems), or 5 U.S.C. 5376 (senior-level positions). Including such positions requires OPM's separate review and approval of a specific plan for that purpose. The criteria in this part do not apply to broadbanding systems that include such positions.

### § 9501.103 Broadbanding system plan.

Before implementing any broadbanding system under this part, IRS must develop a written plan that includes policies and implementing procedures to address each criterion relevant to the broadbanding system, including descriptions of broadbanding structure(s), positions covered, classification criteria, the method of pay progression within a band, policies for setting and adjusting pay, policies for paying supervisors or managerial employees, and policies for converting positions into broadbanding systems.

### § 9501.104 Definitions.

In this part:

*Band* means a pay level or work level within a career path containing one or more General Schedule grades and related ranges of pay.

*Broadbanding system* means a system for grouping positions for pay, job evaluation, and other purposes that is different from the General Schedule system established under 5 U.S.C. chapter 51 and chapter 53, subchapter III, as a result of combining the grades and related ranges of pay for one or more occupational series. All positions covered by this part are considered to be in a single broadbanding system unless the Department of the Treasury determines that a separate system is needed for supervisors and managerial employees (as authorized in § 9501.206(a)).

*Career path* means a grouping of one or more occupational series into broad occupational families or career tracks for job evaluation, pay, or other purposes. A career path may contain one or more bands.

*Employee* means an individual who otherwise would be covered by 5 U.S.C. chapter 51 and chapter 53, subchapter III, if not covered by a broadbanding system.

*General pay increase* means a pay increase IRS may provide to specified categories of employees when the minimum and maximum rates of pay for band rate ranges are adjusted under § 9501.204.

*Managerial* has the meaning given that term in OPM's General Schedule Supervisory Guide.

*Negative assessment* means a summary performance assessment consistent with 5 U.S.C. 9508 prepared at the end of the established period covering an employee's performance over the applicable period or to support a pay determination, including one granted in accordance with § 9501.205, and documenting that the employee's performance is less than the equivalent of fully successful.

*Performance assessment* has the meaning given that term in 5 U.S.C. 9508(b)(1).

*Positive assessment* means a summary performance assessment consistent with 5 U.S.C. 9508 prepared at the end of the established period covering an employee's performance over the applicable period or to support a pay determination, including one granted in accordance with § 9501.205, and documenting that the employee's performance is the equivalent of fully successful or better. Positive assessments must include a minimum of two levels of distinction and may include more than two.

*Supervisor* has the meaning given that term in OPM's General Schedule Supervisory Guide.

*Unacceptable performance* has the meaning given that term in 5 U.S.C. 9508(b)(2).

## Subpart B—Broadbanding Criteria

### § 9501.201 General.

Under 5 U.S.C. 9509(b)(3), the criteria for IRS broadbanding systems in this subpart must—

(a) Ensure that the structure of any broadbanding system maintains the principle of equal pay for substantially equal work (see § 9501.202);

(b) Establish the minimum and maximum number of grades that may be combined into bands (see § 9501.203);

(c) Establish the requirements for setting the minimum and maximum rates of pay in a band (see § 9501.204);

(d) Establish the requirements for adjusting the pay of an employee within a band (see § 9501.205);

(e) Establish the requirements for setting the pay of a supervisory employee whose position is in a band or who supervises employees whose positions are in bands (see § 9501.206); and

(f) Establish the requirements and methodologies for setting the pay of an employee upon conversion to a broadbanding system, initial appointment, change of position or type of appointment (including promotion, demotion, transfer, reassignment, reinstatement, placement in another broad band, or movement to a different geographic location), and movement between a broadbanding system and another pay system (see § 9501.207).

**§ 9501.202 Structure of broadbanding systems.**

(a) IRS broadbanding systems must—

(1) Link to the General Schedule;

(2) Assign occupations to career paths based on the nature of work performed, the qualifications required, the normal career and pay progression, and other characteristics of those occupations;

(3) Combine General Schedule grades into bands following the criteria in paragraph (b) of this section and § 9501.203;

(4) Place positions into bands within career paths in accordance with—

(i) Classification standards published by OPM under 5 U.S.C. 5105; or

(ii) Any agency guidance that places a position within its correct band and career path (but which need not be sufficient to determine a position's correct General Schedule grade);

(5) Not include law enforcement officers covered by special base rates under section 403 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Public Law 101–509, November 5, 1990, as amended) in the same band as non-law enforcement officers when the maximum grade in the band is any one of grades 3 through 10; and

(6) Use established General Schedule rates of pay (including any applicable locality rates or special rates) for premium pay purposes under 5 U.S.C. chapter 55, subchapter V, and 5 CFR part 550, subpart A (i.e., for the purpose of determining the maximum hourly overtime rate and the biweekly premium pay limitation).

(b) The range of difficulty and responsibility of each band must be the same as the range of difficulty and responsibility of the band's constituent grades (i.e., consistent with the grade level criteria in standards published by OPM in accordance with 5 U.S.C. 5105) and must represent the normal range of work performed in the organization.

**§ 9501.203 Minimum and maximum number of grades in a band.**

(a) Except as provided in paragraphs (b) and (c) of this section, a band under an IRS broadbanding system must contain—

(1) At least one General Schedule grade; and

(2) Not more than—

(i) Eight General Schedule grades when grades 13, 14, and 15 are not included in the band;

(ii) Five General Schedule grades when grade 13 is included, but neither grade 14 nor 15 is included in the band;

(iii) Three General Schedule grades when grade 14 is included, but grade 15 is not included in the band; and

(iv) Two General Schedule grades when grade 15 is included in the band.

(b)(1) The Department of the Treasury may, after coordination with OPM (as defined in paragraph (b)(2) of this section), approve the establishment of one or more bands containing General Schedule grades not otherwise permitted under paragraph (a) of this section.

(2) For the purpose of applying paragraph (b)(1) of this section, coordination with OPM means the process by which the Department of the Treasury, after appropriate staff-level consultation, officially provides OPM with notice of a proposed band and its intended effective date. If OPM concurs, or does not respond to that notice within 30 calendar days, the Department of the Treasury may proceed to establish the proposed band. However, in the event that OPM objects to the combination of grades that would be grouped together in a proposed band, the Department of the Treasury may not proceed until the matter is resolved. OPM may condition its concurrence on the establishment of appropriate within-band control points, as provided in § 9501.205(d).

(c) Each IRS broadbanding system must include at least one band that combines two or more General Schedule grades subject to the limits in paragraph (a)(2) of this section.

**§ 9501.204 Setting minimum and maximum rates of pay in a band.**

(a)(1) The minimum rate of pay for each band must equal the minimum rate of pay payable under 5 U.S.C. 5332 for the lowest General Schedule grade in that band. The maximum rate of pay for each band must equal the maximum rate of pay payable under 5 U.S.C. 5332 for the highest General Schedule grade in that band. Unless otherwise stated in this part, references in this part to the *minimum rate of pay* or *maximum rate of pay* for a band exclude any applicable locality payment or staffing supplement.

(2) Notwithstanding paragraph (a)(1) of this section, the minimum rates of pay and the maximum rates of pay for bands covering law enforcement officers must equal the minimum and maximum special base rates for grades 3 through 10 established under section 403 of the Federal Employees Pay Comparability Act of 1990, as applicable.

(3) The maximum rate of pay for any band may not exceed the maximum rate of pay for grade 15 under 5 U.S.C. 5332.

(b) The minimum rate of pay and maximum rate of pay that define each band must be adjusted at the same time and in the same manner as adjustments are made in the corresponding minimum and maximum General Schedule rates of pay under 5 U.S.C. 5303 or similar provision of law.

(c) Employees in IRS broadbanding systems are not covered by the special rate authority in 5 U.S.C. 5305. However, IRS broadbanding systems may provide for the use of staffing supplements instead of special rates under subpart C of this part. If special rates are not replaced with staffing supplements, special rate employees must be converted into a broadbanding system under the procedures established in subpart D of this part.

(d) Only employees receiving retained rates of pay under 5 U.S.C. chapter 53, subchapter VI, as applied in the broadbanding system, may receive rates of pay that exceed the locality-adjusted or staffing supplement-adjusted band maximum rates.

(e) Only employees who fail to receive a pay increase under § 9501.205(h) may receive rates of pay that are less than the band minimum rate of pay (as a result of the rate range adjustment made under paragraph (b) of this section).

**§ 9501.205 Adjusting an employee's pay within a band.**

(a) IRS broadbanding systems must establish policies providing for pay adjustments within a band consistent with the requirements of this section.

(b) IRS must establish policies concerning which level of management will make pay adjustment decisions for employees.

(c) IRS must establish principles for managing pay progression and payroll costs associated with pay adjustments and provide funding for salary increases under its broadbanding systems. Because broadbanding systems provide more choices on how to distribute pay to employees, IRS must have an overall

budget to manage the costs associated with such choices. At a minimum, the salary increase budget must include funds approximately equal to the amounts that would be required for individual pay adjustments made at the time of schedule adjustments under 5 U.S.C. 5303 (or similar provision of law), locality-based comparability payments under 5 U.S.C. 5304, and staffing supplement adjustments under subpart C of this part, as applicable. A salary increase budget must meet salary cost objectives and be consistent with policies and procedures for adjusting pay under a broadbanding system that are established to ensure equal pay for work of equal value, as required by 5 U.S.C. 2301(b)(3).

(d) IRS may use control points within bands. Control points are dollar points within bands that limit or restrict the movement of employees through the rate range of the band. They may be expressed as a percentage of the rate range or as a percentage of the range maximum rate of pay. If control points are used, IRS broadbanding systems must include policies governing the establishment of control points within bands including the circumstances under which an employee's rate of pay may be set or adjusted above a control point.

(e) IRS must provide for locality payments as if its employees were General Schedule employees covered by 5 U.S.C. 5304 and 5 CFR part 531, subpart F, except as provided by paragraph (h) of this section. (See subpart C of this part for information on possible staffing supplements.)

(f) IRS must establish policies for providing performance-based within-band pay increases to employees consistent with the criteria in this section, including the following:

(1) IRS must use employee performance assessments as a basis for within-band pay increases for employees. IRS policies for granting within-band pay increases on the basis of a positive assessment must provide for pay distinctions based on levels of performance. The IRS performance appraisal system supporting the IRS broadbanding system must have two or more summary rating levels that represent performance equivalent to fully successful or better.

(2) Within-band pay increases may not be based solely on time at pay level.

(3) As required by paragraph (h) of this section, an employee with a current negative assessment may not receive a pay increase under this paragraph.

(4) The rate of pay of an employee with a current positive assessment may not fall below the band minimum rate of pay.

(5) IRS may also use other individual factors to provide additional within-band pay increases, such as the acceptance of a supervisory position within the same band.

(6) IRS may cover entry/developmental employees under a different pay progression plan than that which is applicable to employees at the full performance (journey) level. IRS may establish a tailored salary increase budget for entry/developmental employees who are covered by a separate pay progression plan.

(7) IRS policies may take into account an employee's position in the rate range in determining the amount of a within-band pay increase.

(8) IRS policies may provide for proration of an employee's performance-based within-band increase (*i.e.*, reduction from the amount generally provided under the pay progression plan) in specified appropriate circumstances, such as—

(i) An employee entered the broadbanding system during the appraisal period that is the basis for the within-band increase;

(ii) An employee was in leave-without-pay status during the appraisal period that is the basis for the within-band increase (except for employees covered by 5 CFR part 353); or

(iii) An employee entered the broadbanding system and received a prorated within-grade increase or career-ladder promotion payment under § 9501.401(b) less than 52 weeks before the within-band increase.

(g) IRS may provide general pay increases for specified categories of employees when the minimum and maximum rates of pay for band rate ranges are adjusted under § 9501.204, consistent with the following criteria:

(1) As provided in paragraph (h) of this section, an employee with a current negative assessment may not receive a pay increase under this paragraph.

(2) A pay increase under this paragraph may be used in combination with performance-based pay increases under paragraph (f)(1) of this section. Alternatively, IRS may exclusively use performance-based pay increases under paragraph (f)(1) of this section and not grant general pay increases under this paragraph.

(3) The amount of a pay increase under this paragraph for a specified category of employees may be any percentage amount up to the percentage amount by which band rate ranges are adjusted under § 9501.204. IRS may authorize different pay increases under this paragraph for different employee categories. If IRS provides an increase under this paragraph that is less than the band rate range adjustment, the resulting unused funds must be redirected and applied to performance-based pay increases under paragraph (f) of this section.

(h) Except as provided in paragraph (h)(2) of this section and § 9501.304(b)(1), IRS may not provide any kind of pay increase to any employee who has a current negative assessment, even if this causes the employee's rate of pay to fall below the minimum rate of pay of the employee's band because of a simultaneous rate range adjustment. In addition, IRS may not allow such an employee to receive a pay increase as a result of a higher locality pay percentage (as described in paragraph (e) of this section). The locality pay percentage for that employee must be frozen at its existing level. IRS must apply the following rules for employees who do not receive pay increases under this paragraph:

(1) IRS must establish procedures for dealing with employees described in this paragraph who do not receive a pay increase under paragraphs (f) and/or (g) of this section because of a negative assessment. Those procedures may allow an employee who later receives a positive assessment to receive a pay increase. However, any such increase may not be retroactive and may not exceed the pay increase the employee would have received if the employee had a positive assessment at the time pay increases under paragraphs (f) and/or (g) of this section were determined.

(2) For an employee receiving a frozen locality payment because of a negative assessment, if such an employee moves to a new official worksite in a different locality pay area, the employee must receive the locality payment applicable in the new locality pay area as in effect on the day before the locality rate was frozen. See § 9501.304(b)(1) if the employee's position of record is covered by a staffing supplement at the new official worksite.

(3) If an employee receiving a frozen locality payment because of a negative assessment subsequently receives a positive assessment, the employee will become entitled to the currently applicable locality payment on the first day of the first pay period beginning on or after the date when he or she receives a positive assessment. See § 9501.304(b)(2) if the employee's position of record is covered by a staffing supplement when he or she receives a positive assessment.

(i) IRS policies on adjusting a retained rate for employees on pay retention must provide a retained rate employee

a pay increase equal to 50 percent of the dollar increase in the maximum rate of the applicable band (including any applicable locality payment or staffing supplement), except that a retained rate employee with a negative assessment may not receive a pay increase. (This is a variation of the pay retention rules in 5 U.S.C. 5363, as authorized by 5 U.S.C. 9509(c). See § 9501.208(b).)

(j) IRS may establish policies for reducing an employee's rate of pay within a band, but only for unacceptable performance and/or conduct, or the voluntary loss of supervisory status (if such loss results in a reversal of a within-band adjustment granted at the time of placement in a supervisory position). These reductions may be made effective at any time. However, reductions based on unacceptable performance, as defined in 5 U.S.C. 9508, and/or conduct may not occur more than once in a 12-month period. Any reductions in an employee's rate of pay based on unacceptable performance and/or conduct are adverse actions under 5 U.S.C. 7512 as long as the employee and the action are otherwise covered by that section. (See 5 CFR 752.401.) A reduction based on unacceptable performance and/or conduct may not exceed 10 percent of the employee's rate of pay or cause an employee's rate to fall below the minimum rate of pay of the employee's band.

**§ 9501.206 Setting the pay of a supervisor.**

(a) IRS broadbanding systems may provide for a separate broadbanding system or career path for supervisors and managerial employees.

(b) A supervisor's or managerial employee's rate of pay may not be based on the salaries of the employees he or she supervises or manages.

**§ 9501.207 Setting the pay of an employee.**

(a) IRS broadbanding systems must include policies for determining the career path, band, and rate of pay for employees upon conversion into the system consistent with the provisions in § 9501.401. IRS broadbanding systems may also include policies for making prorated within-grade increase or career-ladder promotion payments to employees as an adjustment in pay or a lump-sum payment upon conversion from the General Schedule to a broadbanding system consistent with the provisions in § 9501.401.

(b) IRS broadbanding systems must include policies for determining an employee's career path, band, and rate of pay upon initial appointment, promotion, demotion, transfer, reassignment, or placement in a different band or career path. The methods used to set pay must be consistent with the principle of equal pay for substantially equal work and the following:

(1) Pay must be set at least at the minimum rate of pay and must not exceed the maximum rate of pay of the band to which assigned (except for employees who receive a rate below the minimum rate of pay as described in § 9501.205(h) or who receive a rate above the maximum rate of pay under pay retention provisions). (See § 9501.204(d) and (e).)

(2) Policies must specify the conditions under which pay may be set above the minimum rate of pay upon initial placement in a band and the amount of any minimum or maximum pay increase upon promotion. The time-in-grade provisions in 5 CFR 300.601–605 do not apply to employees under a broadbanding system.

(3) Upon movement to a different official worksite, IRS must process a geographic conversion as provided in 5 CFR 531.205.

(4) Movement of an employee to a band with a lower maximum rate of pay than the employee's former band is equivalent to a reduction in grade for the purpose of applying 5 U.S.C. chapters 43 and 75.

(c) Agencies must use the procedures in § 9501.402 for determining an employee's GS equivalent grade and pay rate upon conversion from a broadbanding system to the General Schedule.

**§ 9501.208 Related provisions.**

(a) For provisions of 5 U.S.C. chapter 51 that apply to the determination of General Schedule grades, other than sections 5104 and 5105, the term *grade* is deemed to mean *band within a career path.*

(b) The provisions in this part related to grade and pay retention are based on the grade and pay retention authority in 5 U.S.C. chapter 53, subchapter VI, and 5 CFR part 536. When applying the grade and pay retention provisions, the term *band* has the same meaning as *grade* under the statute and regulations. Under 5 U.S.C. 9509(c), the Secretary of the Treasury may provide for variations from the grade and pay retention authority for employees who are covered by broadbanding systems with prior approval of the Director of OPM and in accordance with a plan for implementing such variations. Section 9501.205(i) is an implementation of this variation authority.

(c) When applying the severance pay provisions to employees covered by IRS broadbanding systems, the term *band* has the same meaning as *grade* in paragraph (c)(4) of the definition of *reasonable offer* in 5 CFR 550.703. When applying this definition, IRS will also consider a position one band below the employee's current band level to be a *reasonable offer* in the case of a broadbanding system under which the next lower band comprises two or more grades.

## Subpart C—Staffing Supplements

**§ 9501.301 Authority.**

IRS broadbanding systems may use staffing supplements under the terms and conditions in this subpart.

**§ 9501.302 Eligibility.**

If an employee is assigned to a position meeting the coverage requirements for a special rate under 5 U.S.C. 5305 and is in a band where the maximum rate for the banded GS grades is a special rate that exceeds the maximum GS rate of basic pay (including any applicable locality rate under 5 U.S.C. 5304 or similar provision of law) for the banded grades, the employee is eligible for a staffing supplement.

**§ 9501.303 Conversion to staffing supplement.**

(a) Upon conversion, the employee's broadbanding rate of pay is established by dividing the employee's former GS special rate or locality rate (whichever was higher) by the staffing factor. The staffing factor is determined by dividing the maximum special rate for the banded grades by the GS base rate corresponding to that special rate (step 10 of the GS rate for the same grade as the special rate, excluding any locality payment). The employee's staffing supplement is derived by multiplying the employee's broadbanding rate of pay by the staffing factor minus one. The employee's final staffing supplement-adjusted rate equals the employee's broadbanding rate of pay plus the staffing supplement. This amount will equal the employee's former GS special rate or locality rate. Since the employee's total pay rate immediately after conversion into the broadbanding system will be the same as immediately before conversion, the provisions regarding adverse action under 5 U.S.C. chapter 75, subchapter II, and pay retention under 5 U.S.C. 5363 do not apply.

(b) If an employee is in a band where the maximum GS rate for the banded grades is a locality rate, the broadbanding rate upon conversion into a broadbanding system is derived by dividing the employee's former locality rate or special rate by the applicable

locality pay factor (*e.g.*, 1.1750 in the Washington-Baltimore-Northern Virginia locality pay area in 2006). The employee's broadbanding locality-adjusted rate will equal the employee's former GS locality rate or special rate. Since there is no change in total pay rate, the provisions regarding adverse action under 5 U.S.C. chapter 75, subchapter II, and pay retention under 5 U.S.C. 5363 do not apply.

(c) The rules for converting an employee on pay retention who is in a position meeting the coverage requirements for a special rate under 5 U.S.C. 5305 are in § 9501.401(d).

**§ 9501.304 Administration of staffing supplements.**

(a) A staffing supplement is added to an employee's broadbanding rate much like a locality adjustment is added to a GS base rate, as follows:

(1) Any General Schedule or special rate schedule adjustment will require recomputation of the staffing supplement under § 9501.303. Employees receiving a staffing supplement remain entitled to a locality rate, which may, over time, supersede the need for a staffing supplement. If the employee is entitled to a higher locality rate, the employee is not entitled to a staffing supplement for any purpose.

(2) If OPM discontinues or decreases a special rate schedule on which staffing supplements are based, pay retention rules will be applied, as appropriate.

(3) Upon geographic movement, an employee who receives a staffing supplement will have the supplement removed or recomputed to reflect any applicable staffing supplement or locality rate in the new official worksite, consistent with § 9501.303(a). Any resulting reduction in pay is not an adverse action under 5 U.S.C. chapter 75, subchapter II, or a basis for pay retention under 5 U.S.C. 5363.

(b) IRS may not allow an employee with a current negative assessment to receive a pay increase as a result of a staffing factor increase. The staffing supplement for that employee must be frozen at its existing level. IRS must apply the following rules for employees who do not receive pay increases under this paragraph:

(1) For an employee receiving a frozen staffing supplement because of a negative assessment, if such an employee moves to a new position of record or official worksite where a different staffing supplement applies, the employee must receive the staffing supplement applicable to the employee's new position of record and/or official worksite as in effect on the day before the staffing supplement was frozen. If no staffing supplement applies to the employee's new position of record or official worksite, apply the rules in § 9501.205(h)(1) to determine the employee's entitlement to any locality payment.

(2) If an employee receiving a frozen staffing supplement because of a negative assessment subsequently receives a positive assessment, the employee will become entitled to the currently applicable staffing supplement on the first day of the first pay period beginning on or after the date when he or she receives a positive assessment. If no staffing supplement is applicable to the employee's position of record, the employee will become entitled to the currently applicable locality payment, as provided in § 9501.205(h)(2).

(c) An employee's broadbanding rate adjusted by a staffing supplement may not exceed the rate for level IV of the Executive Schedule.

**§ 9501.305 Treatment of staffing supplements as basic pay.**

The employee's broadbanding rate adjusted by the staffing supplement is basic pay for the same purposes as a special rate under 5 CFR 530.308—e.g., for retirement, life insurance, premium pay, pay retention, and severance pay purposes, and for determining recruitment, relocation, and retention incentives. The staffing supplement is also basic pay under 5 U.S.C. chapter 75, subchapter II, for the limited purpose of determining whether a reduction in pay occurs at the point of an employee's conversion into a broadbanding system. The staffing supplement will also be used to compute worker's compensation payments and lump-sum payments for accrued and accumulated annual leave.

**§ 9501.306 New staffing supplements.**

OPM may approve staffing supplements for categories of employees within an IRS broadbanding system who are not in approved special rate categories for General Schedule employees, consistent with the provisions in 5 U.S.C. 5305(a) and (b).

## Subpart D—Conversion Rules

**§ 9501.401 Conversion into broadbanding systems.**

(a)(1) *General.* IRS broadbanding systems must include policies for determining the career path, band, and pay rate for employees upon conversion into a broadbanding system under the terms and conditions in this section.

(2) An employee may not suffer a reduction in his or her total pay rate upon initial conversion to a broadbanding system. For this purpose, ''total pay rate'' includes any applicable locality payment, special rate supplement, and staffing supplement—each of which will be considered to be part of basic pay under 5 U.S.C. chapter 75, subchapter II, for the limited purpose of determining whether a reduction in pay occurs at conversion.

(3) If conversion into a broadbanding system is accompanied by any simultaneous pay action, the employee's General Schedule pay entitlements must be determined before converting the employee into the broadbanding system.

(b) *Prorated within-grade increase and career-ladder promotion payments.* IRS broadbanding systems may include policies for making prorated within-grade increase or career-ladder promotion payments to employees as an adjustment in pay or a lump-sum payment after conversion from the General Schedule to a broadbanding system under the following conditions:

(1) An employee may receive a prorated within-grade increase or a career-ladder promotion payment after conversion to an IRS broadbanding system under this section, but not both.

(2) The amount of any within-grade increase or career-ladder promotion payment may not be more than the prorated value of the employee's within-grade increase or career-ladder promotion at the time of conversion, based on the number of weeks of creditable service the employee has performed as of the date of initial conversion into the broadbanding system. There is no restriction on when such payments may be made.

(3) A prorated within-grade increase or career-ladder promotion payment may be made only to an employee with a positive assessment at the time of conversion into a broadbanding system.

(4) A within-grade increase payment may not be made to an employee receiving the maximum rate of pay for his or her grade or a retained rate immediately before conversion.

(5) If IRS provides career-ladder promotion payments to a group of employees converted to entry/developmental positions for which the IRS has established a special pay progression plan under § 9501.205(f)(6), the first salary increase budget for these entry/developmental employees following conversion must be determined after taking into account the length of time between the prorated career-ladder promotion payment and the first performance-based payments under an IRS broadbanding system.

(6) A within-grade increase or career-ladder promotion payment paid as an adjustment to pay after conversion into a broadbanding system may not cause

an employee's pay to exceed the maximum rate of pay of a band.

(c) *Special rate employees*. If an IRS broadbanding system uses staffing supplements instead of special rates under 5 U.S.C. 5305, special rate employees must be converted into the system consistent with the provisions in subpart C of this part. If an IRS broadbanding system eliminates special rates, a new locality-adjusted rate of pay must be derived for each employee, as follows:

(1) Divide the employee's special rate by the locality pay factor for the area (*e.g.*, 1.1750 for the Washington-Baltimore-Northern Virginia locality pay area in 2006) to determine the new broadbanding rate of pay.

(2) Multiply the employee's new broadbanding rate of pay by the locality pay factor for the area to determine the employee's broadbanding locality rate of pay. If the employee's broadbanding locality rate of pay exceeds the maximum locality-adjusted rate for the employee's band, the employee must be placed on pay retention (if not otherwise excluded from the pay retention authority at 5 U.S.C. chapter 53, subchapter VI). The locality adjustment is basic pay under 5 U.S.C. chapter 75, subchapter II, for the limited purpose of determining whether a reduction in basic pay occurs at the point of an employee's conversion into a broadbanding system.

(d) *Employees on pay retention*. Upon conversion, employees on pay retention must be assigned to the band that encompasses the grade of their position. Determine the employee's broadbanding rate of pay as follows:

(1) Compare the employee's retained rate to the highest applicable maximum rate of pay for the employee's band (including any applicable locality payment or staffing supplement).

(2) If the employee's retained rate is higher than the highest applicable maximum rate of pay for the band, the employee will continue to receive a retained rate.

(3) If the employee's retained rate is less than the highest applicable maximum rate of pay for the band, divide the employee's retained rate by the applicable locality pay factor or staffing factor that applies to the employee's new position of record and official worksite to derive the employee's new broadbanding rate of pay. Multiply the employee's new broadbanding rate of pay by the applicable locality pay or staffing factor to derive the employee's broadbanding locality-adjusted or staffing supplement-adjusted rate of pay. The locality adjustment and staffing supplement are basic pay under 5 U.S.C. chapter 75, subchapter II, for the limited purpose of determining whether a reduction in basic pay occurs at the point of an employee's conversion into a broadbanding system.

(e) *Employees on grade retention*. Upon conversion, employees on grade retention must be assigned to the band that encompasses their retained grade until the original 2-year grade retention period expires. When the 2-year period expires, the employee's rate of pay must be determined under the pay retention rules at 5 CFR 536.304 in the band for his or her position of record.

**§ 9501.402 Conversion to the General Schedule pay system.**

(a)(1) Except as provided in paragraph (a)(2) of this section, when an employee covered by a broadbanding system moves voluntarily or involuntarily to a GS position, IRS must use the procedures in this section to convert the employee's band and pay rate to a GS-equivalent grade and rate of pay before the employee moves out of the system. IRS must determine the converted GS-equivalent grade and rate of pay before any accompanying geographic move, promotion, or other simultaneous action. The new employing organization must use the converted GS-equivalent grade and rate of pay in applying various pay administration rules that govern how pay is set in the GS position (e.g., rules for promotion and highest previous rate under 5 CFR part 531, subpart B, and grade and pay retention under 5 CFR part 536). For the purpose of those rules, the converted GS grade and rate of pay are deemed to have been in effect at the time the employee left the broadbanding system. The rules for determining the converted GS grade for pay administration purposes do not apply to the determination of an employee's GS-equivalent grade for other purposes, such as reduction-in-force or adverse action.

(2) The conversion procedures in this section do not apply to employees who involuntarily move back to the same General Schedule career-ladder position they held immediately before conversion into the broadbanding system prior to any pay adjustment event under the system (including any promotion, demotion, or pay adjustment provided under § 9501.205). (A pay adjustment event does not include any prorated within-grade or career-ladder promotion pay increase received as part of conversion into the system.) For such employees, IRS must subtract any prorated within-grade or career-ladder promotion payment and reconstruct the employee's grade and rate of pay under the General Schedule as if he or she had never entered the broadbanding system.

(3) The provisions regarding adverse action under 5 U.S.C. chapter 75, subchapter II, and pay retention under 5 U.S.C. 5363 do not apply to reductions in pay that occur when the IRS subtracts any prorated within-grade or career-ladder promotion increase from a career-ladder employee's rate of pay upon conversion back to the General Schedule as required by paragraph (a)(2) of this section.

(b) *GS grade level determination*. (1) Upon voluntary or involuntary conversion of an employee out of a broadbanding system to the GS pay system (other than an involuntary conversion covered by paragraph (a)(2) of this section), IRS must determine the employee's GS-equivalent grade level as follows (except as otherwise provided in paragraphs (b)(2), (b)(3), and (d) of this section):

(i) Convert an employee in a band encompassing a single GS grade to that grade.

(ii) For an employee in a band encompassing more than one GS grade, compare the employee's rate of pay (including any locality adjustment or staffing supplement, as applicable) with the rates of pay in the highest applicable GS rate range for each grade encompassed by the employee's band. If the employee's occupational series is a two-grade interval series, consider only odd-numbered grades between GS–5 and GS–11. In identifying the *highest applicable GS rate range* consider the following types of rate ranges:

(A) The GS base pay schedule;

(B) The LEO special base rate schedule;

(C) An applicable locality pay schedule for the locality pay area in which the employee's official worksite is located; or

(D) A special rate schedule for the employee's position and official worksite, as applicable.

(iii) If the employee's rate of pay (including any locality adjustment or staffing supplement) fits into an area of the highest applicable GS rate range for a GS grade that does not overlap with the rate range of the next higher or lower grade in the same band, convert the employee to that GS grade.

(iv) If the employee's rate of pay (including any locality adjustment or staffing supplement) fits into an area of the highest applicable GS rate range for a grade that overlaps with the highest applicable GS rate range of the next higher or lower grade in the same band, compare the employee's rate of pay with the dollar midpoint of the overlap area. If the employee's rate of pay is lower

than the dollar midpoint of the overlap area, convert the employee to the lower grade. If the employee's rate of pay is equal to or higher than the dollar midpoint of the overlap area, convert the employee to the higher grade.

(v) If an employee's rate of pay (including any locality payment or staffing supplement) is lower than the minimum rate of the highest applicable GS rate range for the lowest GS grade in the band, convert the employee to the lowest grade.

(2) Notwithstanding paragraphs (b)(1)(i)–(b)(1)(v) of this section, upon voluntary or involuntary conversion of an employee out of a broadbanding system to the GS pay system (other than an involuntary conversion covered by paragraph (a)(2) of this section), an employee's converted GS grade may not be lower than the GS grade held by the employee immediately preceding a lateral conversion into the broadbanding system, unless the employee was retaining a GS grade immediately before conversion or the employee underwent a reduction in band while in the broadbanding system.

(3) Notwithstanding paragraphs (b)(1)(i) through (b)(1)(v) of this section, upon voluntary or involuntary conversion of an employee out of a broadbanding system to the GS pay system (other than an involuntary conversion covered by paragraph (a)(2) of this section), if an employee moves back to the General Schedule before any pay adjustment event under the broadbanding system (including any promotion, demotion, or pay adjustment provided under § 9501.205), the employee's converted GS grade is the grade the employee held immediately before conversion into the broadbanding system. (A pay adjustment event does not include any prorated within-grade or career-ladder promotion pay increase received as part of conversion into the system.)

(c) *GS pay rate determination*. Upon voluntary or involuntary conversion of an employee out of a broadbanding system to the GS pay system (other than an involuntary conversion covered by paragraph (a)(2) of this section), IRS must determine the employee's GS-equivalent rate of pay under the rules in this paragraph (except as otherwise provided in paragraph (d) of this section). If an employee voluntarily moves back to the General Schedule before any pay adjustment event under the broadbanding system (including any promotion, demotion, or pay adjustment provided under § 9501.205), IRS must subtract any prorated pay increase received as part of conversion into the broadbanding system (including any applicable locality payment or staffing supplement associated with that increase) before applying the rules in this paragraph. (The preceding sentence does not apply to an employee who involuntarily moves back to the General Schedule.) As provided in paragraph (a)(3) of this section, any resulting reduction in pay is not an adverse action.

(1) Convert the employee's rate of pay under the broadbanding system (including any locality adjustment or staffing supplement) to a rate on the highest applicable GS rate range for the converted GS grade derived under paragraph (b) of this section. In identifying the *highest applicable GS rate range* consider the following types of rate ranges:

(i) The GS base pay schedule;

(ii) The LEO special base rate schedule;

(iii) An applicable locality pay schedule for the locality pay area in which the employee's official worksite is located; or

(iv) A special rate schedule for the employee's position and official worksite, as applicable.

(2) If the highest applicable GS rate range is under a locality pay schedule, convert the employee's rate of pay (including any locality adjustment or staffing supplement) to a GS locality rate of pay. Since this converted rate is used only as a basis for setting the employee's rate in the new position, do not adjust the converted rate to equal a standard step rate. The rate of pay underlying the converted GS locality rate of pay becomes the employee's converted GS base rate.

(3) If the highest applicable GS rate range is a special rate range, convert the employee's rate of pay (including any locality adjustment or staffing supplement) to a special rate. The converted special rate may fall between the standard step rates. The rate of pay underlying the converted GS special rate becomes the employee's converted GS base rate.

(4) If the employee's rate of pay (including any locality adjustment or staffing supplement) exceeds the maximum rate of the highest applicable GS rate range, convert the rate of pay to a retained rate (if not otherwise excluded from the pay retention authority at 5 U.S.C. chapter 53, subchapter VI).

(5) If the employee's rate of pay (including any locality adjustment or staffing supplement) is lower than the minimum rate of the highest applicable GS rate range, convert the employee's rate of pay to a GS locality rate, or special rate, as applicable. Since this converted rate is used only as a basis for setting the employee's rate in the new position, do not adjust the converted rate to equal a standard step rate. If the employee's converted rate is a locality rate, the rate of pay underlying the locality rate becomes the employee's GS base rate.

(d) *Employees on band or pay retention*. Apply the following procedures to determine the converted GS-equivalent grade and pay rate upon voluntary or involuntary conversion of an employee from a broadbanding system to the GS system (other than an involuntary conversion covered by paragraph (a)(2) of this section) when the employee is retaining a band or pay rate under the broadbanding system:

(1) If an employee is retaining a band, apply the procedures in paragraphs (b) and (c) of this section using the grades encompassed by the employee's retained band to determine the employee's GS-equivalent retained grade and pay rate. The time in a retained band counts toward the 2-year limit on grade retention in 5 U.S.C. 5362. (If the employee is also receiving a retained rate, apply the procedures in paragraph (d)(2) of this section instead of paragraph (c) of this section to determine the employee's GS-equivalent rate of pay.)

(2) If the employee's rate of pay under the broadbanding system is a retained rate, the employee's GS-equivalent grade is the highest grade encompassed in his or her band (unless the employee is also retaining a band in which case apply paragraph (d)(1) of this section to determine the employee's GS-equivalent grade). If the employee's retained rate is less than the maximum rate of the highest applicable GS rate range for the employee's GS-equivalent grade, apply the procedures in paragraph (c)(1)–(c)(3) of this section to determine the employee's GS-equivalent pay rate. If the employee's retained rate exceeds the maximum rate of the highest applicable GS rate range for the employee's GS-equivalent grade, convert the employee's broadbanding retained rate to an equal GS-equivalent retained rate.

(e) *Within-grade increase equivalent increase determinations*. Service under a broadbanding system is creditable for within-grade increase purposes upon conversion to the GS pay system. (See 5 CFR 531.407(b) for additional information on equivalent increase determinations.)

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**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**32 CFR Part 112**

**[DOD–2007–OS–0025]**

**RIN 0790–AI08**

## Indebtedness of Military Personnel

**AGENCY:** Department of Defense.

**ACTION:** Proposed rule.

**SUMMARY:** This part contains uniform Department of Defense policies for indebtedness of Military Personnel. This updated rule contains editorial changes only as required for internal Department of Defense mandated reconsideration every five years.

**DATES:** Comments must be received by June 18, 2007.

**ADDRESSES:** You may submit comments, identified by docket number and or RIN number and title, by any of the following methods: *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

*Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://regulations.gov* as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Colonel Mark Gingras, Office of the Deputy Under Secretary of Defense for Program Integration, 4000 Defense Pentagon, Washington, DC 20301–4000.

**SUPPLEMENTARY INFORMATION:**

### Executive Order 12866, ''Regulatory Planning and Review''

It has been determined that 32 CFR part 123 is not a significant regulatory action. The rule does not:

(1) Have an annual effect to the economy of $100 million or more or adversely affect in a material way the economy; a section 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 this Executive Order.

### Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104–4)

It has been certified that this rule does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

### Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601)

It has been certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

### Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been certified that this rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. The reporting and recordkeeping requirements have been submitted to OMB for review.

### Executive Order 13132, ''Federalism''

It has been certified that this rule does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;

(2) The relationship between the National Government and the States; or

(3) The distribution of power and responsibilities among the various levels of government.

### List of Subjects in 32 CFR Part 112

Claims, Credit, Military personnel.

Accordingly, 32 CFR Part 112 is proposed to be revised as follows:

## PART 112—INDEBTEDNESS OF MILITARY PERSONNEL

Sec.

112.1 Purpose.
112.2 Applicability and scope.
112.3 Definitions.
112.4 Policy.
112.5 Processing of debt complaints.
112.6 Processing of involuntary allotments.
112.7 Responsibilities.

**Authority:** 5 U.S.C. 5520a(k) and 10 U.S.C. 113(d).

### § 112.1 Purpose.

This part:

(a) Updates DoD policies and assigns responsibilities governing delinquent indebtedness of members of the Military Services and prescribes policy for processing involuntary allotments from the pay of military members to satisfy judgment indebtedness in accordance with 5 U.S.C. 5520a(k).

(b) Establishes responsibility for procedures implementing 5 U.S.C. 5520a(k), 15 U.S.C. 1601 note, 1601–1614, 1631–1646, 1661–1665a, 1666–1666j, and 1667–1667e (''Truth in Lending Act''), and 15 U.S.C. 1601 note, and 1692–1692o (''Fair Debt Collection Practices Act'').

### § 112.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard when it is not operating as a Service in the Navy, under agreement with the Department of Homeland Security), the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as the ''DoD Components'').

(b) This part does not apply to:

(1) Indebtedness of a member of the Military Services to the Federal Government.

(2) Processing of indebtedness claims to enforce judgments against military members for alimony or child support.

(3) Claims by State or municipal governments under the processing guidelines for complaints, including tax collection actions.

### § 112.3 Definitions.

(a) *Absence.* A member's lack of an ''appearance,'' at any stage of the judicial process, as evidenced by failing to physically attend court proceedings; failing to be represented at court proceedings by counsel of the member's choosing; or failing to timely respond to pleadings, orders, or motions.

(b) *Court.* A court of competent jurisdiction within any State, territory, or possession of the United States.

(c) *Debt Collector.* An agency or agent engaged in the collection of debts described under 15 U.S.C. 1601 note and 1692–1692o (''Fair Debt Collection Practices Act'').

(d) *Exigencies of Military Duty.* A military assignment or mission-essential duty that, because of its urgency, importance, duration, location, or isolation, necessitates the absence of a

member of the Military Services from appearance at a judicial proceeding or prevents the member from being able to respond to a notice of application for an involuntary allotment. Exigency of military duty is normally presumed during periods of war, national emergency, or when the member is deployed.

(e) *Judgment.* A final judgment must be a valid, enforceable order or decree, by a court from which no appeal may be taken, or from which no appeal has been taken within the time allowed, or from which an appeal has been taken and finally decided. The judgment must award a sum certain amount and specify that the amount is to be paid by an individual who, at the time of application for the involuntary allotment, is a member of the Military Services.

(f) *Just Financial Obligation.* A legal debt acknowledged by the military member in which there is no reasonable dispute as to the facts or the law; or one reduced to judgment that conforms to Sections 501–591 of title 50 Appendix, United States Code (The Servicemembers Civil Relief Act, as amended).

(g) *Member of the Military Services.* For the purposes of this Part, any member of the Regular Army, Air Force, Navy, Marine Corps, or Coast Guard, and any member of a Reserve component of the Army, Air Force, Navy, Marine Corps, or Coast Guard (including the Army National Guard of the United States and the Air National Guard of the United States) on active duty pursuant to 10 U.S.C. 672 for a period in excess of 180 days at the time an application for involuntary allotment is received by the Director, DFAS, or Commanding Officer, Coast Guard Pay and Personnel Center. The following shall not be considered members:

(1) Retired personnel, including those placed on the temporary or permanent disabled retired list; and

(2) Personnel in a prisoner of war or missing in action status, as determined by the Secretary of the Military Department concerned.

**§ 112.4 Policy.**

(a) Members of the Military Services are expected to pay their just financial obligations in a proper and timely manner. A Service member's failure to pay a just financial obligation may result in disciplinary action under the Uniform Code of Military Justice (10 U.S.C. 801–940) or a claim pursuant to Article 139 of the Uniform Code of Military Justice. Except as stated in this section, and in paragraphs (a)(1) and (a)(2) of this section, the DoD Components have no legal authority to require members to pay a private debt or to divert any part of their pay for satisfaction of a private debt.

(1) Legal process instituted in civil courts to enforce judgments against military personnel for the payment of alimony or child support shall be acted on pursuant to 42 U.S.C. 651–665, and Part 7, Chapter 7, Section B. of Department of Defense Regulation 7000.14–R Volume 7.[1]

(2) Involuntary allotments under 5 U.S.C. 5520a(k) shall be established in accordance with this part.

(b) Whenever possible, indebtedness disputes should be resolved through amicable means. Claimants may contact military members by having correspondence forwarded through the military locator services for an appropriate fee, as provided under DoD Instruction 7230.7.[2]

**§ 112.5 Processing of debt complaints.**

(a) Debt complaints meeting the requirements of this Part and procedures established by the Under Secretary of Defense for Personnel and Readiness, as required by § 112.7(a)(1) shall receive prompt processing assistance from commanders.

(b) Assistance in indebtedness matters shall not be extended to those creditors:

(1) Who have not made a bona fide effort to collect the debt directly from the military member;

(2) Whose claims are patently false and misleading; or

(3) Whose claims are obviously exorbitant.

(c) Some States have enacted laws prohibiting creditors from contacting a debtor's employer about indebtedness or communicating facts on indebtedness to an employer unless certain conditions are met. The conditions that must be met to remove this prohibition are generally such things as reduction of a debt to judgment or obtaining written permission of the debtor.

(1) At DoD installations in States having such laws, the processing of debt complaints shall not be extended to those creditors who are in violation of the State law. Commanders may advise creditors that this rule has been established because it is the general policy of the Military Services to comply with State law when that law does not infringe upon significant military interests.

(2) The rule in paragraph(c)(1) of this section shall govern even though a creditor is not licensed to do business in the State where the debtor is located. A similar practice shall be started in any State enacting a similar law regarding debt collection.

(3) Pursuant to 15 U.S.C. 1601 note and 1692–1692o (''Fair Debt Collection Practices Act''), contact by a debt collector with third parties, such as commanding officers, for aiding debt collection is prohibited without a court order or the debtor's prior consent given directly to the debt collector. Creditors are generally exempt from this requirement, but only when they collect on their own behalf.

**§ 112.6 Processing of involuntary allotments.**

Pursuant to 5 U.S.C. 5520a(k):

(a) In those cases in which the indebtedness of a military member has been reduced to a judgment, an application for an involuntary allotment from the member's may be made under procedures prescribed by the Under Secretary of Defense for Personnel and Readiness. Such procedures shall provide the exclusive remedy available.

(b) An involuntary allotment from a member's pay shall not be permitted in any indebtedness case in which:

(1) Exigencies of military duty caused the absence of the member from the judicial proceeding at which the judgment was rendered; or

(2) There has not been compliance with the procedural requirements of the Servicemembers Civil Relief Act 50 U.S.C. Appendix, sections 501–591.

**§ 112.7 Responsibilities.**

(a) The Under Secretary of Defense for Personnel and Readiness shall:

(1) In consultation with the Under Secretary of Defense (Comptroller), establish procedures for the processing of debt complaints and involuntary allotments.

(2) Have policy oversight on the assistance to be provided by military authorities to creditors of military personnel who have debt complaints, and on involuntary allotment of military pay.

(b) The Under Secretary of Defense (Comptroller) shall:

(1) Establish, as necessary, procedures supplemental to those promulgated by the Under Secretary of Defense for Personnel and Readiness to administer and process involuntary allotments from the pay of members of the Military Services; this includes the authority to promulgate forms necessary for the efficient administration and processing of involuntary allotments.

(2) Ensure that the Director, Defense Finance and Accounting Service:

(i) Implements procedures established by the Under Secretary of Defense for

[1] Copies may be obtained from the DoD Directives Web page at: *http://www.dtic.mil/whs/directives.*

[2] See footnote 1 to § 112.4(a)(1).

Personnel and Readiness and The Under Secretary of Defense (Comptroller).

(ii) Considers whether Servicemembers Civil Relief Act 50 U.S.C. Appendix, sections 501–591 has been complied with pursuant to 5 U.S.C. 5520a(k) prior to establishing an involuntary allotment against the pay of a member of the Military Services.

(iii) Publishes, prints, stocks, redistributes, and revises DoD forms necessary to process involuntary allotments.

(c) The Heads of the DoD Components shall urge military personnel to meet their just financial obligations, since failure to do so damages their credit reputation and affects the public image of all DoD personnel. See DoD Directive 5500.7.[3]

(d) The Secretaries of the Military Departments shall:

(1) Establish, as necessary, procedures to administer and process involuntary allotments from the pay of members of the Military Services. This includes designating those commanders, or other officials who may act in the absence of the commander, who shall be responsible for determining whether a member's absence from a judicial proceeding was caused by exigencies of military duty, and establishing appeal procedures regarding such determinations.

(2) Require commanders to counsel members to pay their just debts, including complying, as appropriate, with court orders and judgments for the payments of alimony or child support.

(3) Emphasize prompt command action to assist with the processing of involuntary allotment applications.

(e) The Chief, Office of Personnel and Training, for the Coast Guard shall:

(1) Establish, as necessary, procedures supplemental to those promulgated by the Under Secretary of Defense for Personnel and Readiness to administer and process involuntary allotment from the pay of members of the Military Services; this includes the authority to promulgate forms necessary for the efficient administration and processing of involuntary allotments.

(2) Ensure that the Commanding Officer, Coast Guard Pay and Personal Center:

(i) Implements procedures established by the Under Secretary of Defense for Personnel and Readiness and Chief, Office of Personnel and Training.

(ii) Considers whether the Servicemembers Civil Relief Act, as amended (50 U.S.C. Appendix, sections 501–591) has been complied with pursuant to 5 U.S.C. 5520a(k) prior to establishing an involuntary allotment against the pay of a member of the Military Services.

(iii) Acts as the Coast Guard manager for forms necessary to process involuntary allotments.

Dated: April 11, 2007.

**C.R. Choate,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. E7–7292 Filed 4–16–07; 8:45 am]

**BILLING CODE 5001–06–P**

[3] See footnote 1 to § 112.4(a)(1).

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## LIBRARY OF CONGRESS

## Copyright Royalty Board

## 37 CFR Part 381

**[Docket No. 2006–2 CRB NCBRA]**

## Noncommercial Educational Broadcasting Statutory License

**AGENCY:** Copyright Royalty Board, Library of Congress.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Copyright Royalty Judges are publishing for comment certain royalty rates, proposed by the parties in the proceeding to determine the rates and terms for the noncommercial educational broadcasting statutory license contained in the Copyright Act.

**DATES:** Comments and objections, if any, are due on or before May 17, 2007.

**ADDRESSES:** An original, five paper copies, and one electronic copy in Portable Document Format (PDF) on compact disk (an optical data storage medium such as a CD–ROM, CD–R or CD–RW) or floppy diskette of a comment or objection must be delivered to the Copyright Royalty Board in one of the following ways: If hand delivered by a private party, the comment or objection should be brought to the Copyright Office Public Information Office in the James Madison Memorial Building, Room LM–401, 101 Independence Avenue, SE., Monday through Friday, between 8:30 a.m. and 5 p.m., and the envelope must be addressed as follows: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, 101 Independence Avenue, SE., Washington, DC 20559–6000. If delivered by a commercial courier (excluding overnight delivery services such as Federal Express, United Parcel Service and similar overnight delivery services), the comment or objection must be delivered to the Congressional Courier Acceptance Site (CCAS) located at 2nd and D Street, NE., Monday through Friday, between 8:30 a.m. and 4 p.m., and the envelope must be addressed as follows: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, 101 Independence Avenue, SE., Washington, DC 20559–6000. If a comment or objection is sent by mail (including overnight delivery using United States Postal Service Express Mail), the envelope must be addressed to: Copyright Royalty Board, P.O. Box 70977, Southwest Station, Washington, DC 20024–0977. Comments and objections may not be delivered by means of overnight delivery services such as Federal Express, United Parcel Service, etc., due to delays in processing receipt of such deliveries.

**FOR FURTHER INFORMATION CONTACT:** Gina Giuffreda, Attorney-Advisor. Telephone (202) 707–7658. Telefax (202) 252–3423.

**SUPPLEMENTARY INFORMATION:**

### Background

Section 118 of the Copyright Act, title 17 of the United States Code, establishes a statutory license for the use of certain copyrighted works in connection with noncommercial television and radio broadcasting. The terms and rates for this statutory license have been adjusted periodically by the Librarian of Congress and appear in 37 CFR Part 253. However, the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108–419, transferred jurisdiction over these rates and terms to the Copyright Royalty Judges. 17 U.S.C. 801(b)(1). This is a window year for the establishment of new rates and terms for the 2008–2012 license period.

On January 9, 2006, pursuant to 17 U.S.C. 803(b)(1)(A)(i)(V), the Copyright Royalty Judges published a notice in the **Federal Register** announcing commencement of proceedings under 17 U.S.C. 118 and requesting interested parties to submit their petitions to participate. 71 FR 1453 (January 9, 2006). Petitions to participate were received from: the American Council on Education (''ACE''); the National Music Publishers Association, Inc. (''NMPA''); the Harry Fox Agency (''HFA''); the National Religious Broadcasters Noncommercial Music License Committee (''NRBNMLC''); Royalty Logic, Inc.; the American Society of Composers, Authors and Publishers (''ASCAP''); Broadcast Music, Inc. (''BMI''); SESAC, Inc.; National Public Radio (''NPR''); the Corporation for Public Broadcasting (''CPB''); the Public Broadcasting Service (''PBS''); and the Church Music Publishers Association, Inc. The Judges set the timetable for the three-month negotiation period, see 17 U.S.C. 803(b)(3), and directed the

participants to submit their written direct statements no later than January 30, 2007. Instead of written direct statements, the parties submitted notification of settlements and proposed rates and terms for the Copyright Royalty Judges to adopt.

There are two ways that copyright owners and public broadcasting entities [1] may negotiate rates and terms under the section 118 statutory license. First, copyright owners may negotiate rates and terms with specific public broadcasting entities for the use of all of the copyright owners' works covered by the license. Section 118(b)(2) provides that such license agreements ''shall be given effect in lieu of any determination by the * * * Copyright Royalty Judges,'' provided that copies of the agreements are submitted to the Copyright Royalty Board ''within 30 days of execution.'' 17 U.S.C. 118(b)(2). The Copyright Royalty Judges received notification of several agreements in this category for which no further action is required.

Second, copyright owners and public broadcasting entities may negotiate rates and terms for categories of copyrighted works and uses, that would be binding on all owners and entities, and submit them to the Copyright Royalty Judges for approval. Section 801(b)(7)(A) provides that in such event:

> (i) the Copyright Royalty Judges shall provide to those that would be bound by the terms, rates, or other determination set by any agreement in a proceeding to determine royalty rates an opportunity to comment on the agreement and shall provide to participants in the proceeding under section 803(b)(2) that would be bound by the terms, rates, or other determination set by the agreement to comment on the agreement and object to its adoption as a basis for statutory terms and rates; and
>
> (ii) the Copyright Royalty Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement, if any participant described in clause (i) objects to the agreement and the Copyright Royalty Judges conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates.

17 U.S.C. 801(b)(7)(A). The Copyright Royalty Judges received seven proposals within this category: (1) A joint proposal of BMI and the NRBNMLC; (2) a joint proposal of ASCAP and ACE; (3) a joint proposal of SESAC and ACE; (4) a joint proposal of HFA, NMPA and the NRBNMLC; (5) a joint proposal of SESAC and the NRBNMLC; (6) a joint proposal of ASCAP and the NRBNMLC; and (7) a joint proposal of BMI and ACE. After reviewing the proposals, the Copyright Royalty Judges determined that they were insufficient on their face.[2] By Order dated February 22, 2007, the Judges directed the parties to amend their proposals. On March 15, 2007, ACE, ASCAP, BMI, HFA, NMPA, NPR, NRBNMLC, PBS and SESAC submitted a joint proposal for section 118 rates and terms. It is this proposal that the Judges are publishing today for comment.[3]

As part of this notice of proposed rulemaking (''NPRM''), the Copyright Royalty Judges are modifying three aspects of the joint proposal. First, the proposed regulations for terms governing the recording of nondramatic performances and displays of musical works and the terms for the use of published pictorial, graphic and sculptural works require the deposit with the Copyright Office of cue sheets (for musical works) and standard lists (for pictorial, graphic and sculptural works) in hard copy format. We are changing these provisions to require submission of cue sheets and standard lists in electronic disk format only (due to space limitations) and requiring that they be submitted to the offices of the Copyright Royalty Board rather than the Copyright Office.

Second, the joint proposal requires public broadcasting entities to make information concerning fees deposited in trust funds for unknown copyright owners available upon request to the Copyright Office. We are changing the provision to make the information available to the Copyright Royalty Judges instead of the Copyright Office.

Third, the parties have included a provision in their proposal governing the rates and terms applicable to certain public broadcasting entities that states that such rates and terms are experimental, without precedential effect, and may not be introduced or relied upon in any governmental, administrative or judicial proceeding. The Copyright Royalty Judges decline to include such a provision within our regulations. Our task, as set forth in section 118 and chapter 8 of the Copyright Act, is to adopt rates and terms for the noncommercial broadcasting license. It is not our task to offer evaluations, limitations or characterizations of the rates and terms, or make statements about their use or value in proceedings other than this one.

As discussed above, the public may comment and object to any or all of the proposed regulations contained in this NPRM. Those who do comment and object, however, must be prepared to participate in further proceedings in this docket to establish rates and terms for the section 118 license.

**List of Subjects in 37 CFR Part 381**

Copyright, Music, Radio, Television, Rates.

**Proposed Regulations**

For the reasons set forth in the preamble, the Copyright Royalty Judges propose to add Part 381 to Chapter III of title 37 of the Code of Federal Regulations to read as follows:

## PART 381—USE OF CERTAIN COPYRIGHTED WORKS IN CONNECTION WITH NONCOMMERCIAL EDUCATIONAL BROADCASTING

Sec.
381.1 General.
381.2 Definition of public broadcasting entity.
381.3 [Reserved]
381.4 Performance of musical compositions by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(c).
381.5 Performance of musical compositions by public broadcasting entities licensed to colleges and universities.
381.6 Performance of musical compositions by other public broadcasting entities.
381.7 Recording rights, rates and terms.
381.8 Terms and rates of royalty payments for the use of published pictorial, graphic and sculptural works.
381.9 Unknown copyright owners.
381.10 Cost of living adjustment.
381.11 Notice of restrictions on use of reproductions of transmission programs.

**Authority:** 17 U.S.C. 118, 801(b)(1) and 803.

### § 381.1 General.

This part establishes terms and rates of royalty payments for certain activities using published nondramatic musical works and published pictorial, graphic and sculptural works during a period beginning on January 1, 2008, and ending on December 31, 2012. Upon compliance with 17 U.S.C. 118, and the terms and rates of this part, a public broadcasting entity may engage in the

[1] A ''public broadcasting entity'' is defined as a ''noncommercial educational broadcast station as defined in section 397 of title 47 and any nonprofit institution or organization engaged in the activities described in paragraph (2) of subsection (c)'' of section 118.

[2] The reason for the insufficiency was the parties' incorrect assumption that the Copyright Royalty Judges would be amending part 253 of title 37 of the Code of Federal Regulations-the Copyright Office's rules-rather than our own rules. As a result, the parties only proposed amendments rather than a complete text of regulations.

[3] Part 381, which we propose today, will be part of a new Subchapter E which will contain the rates and terms for the various statutory licenses. This new subchapter will be established upon the publication of the final determination of the rates and terms for the section 112 and 114 statutory licenses, Docket No. 2005–1 CRB DTRA, and will contain Part 380.

activities with respect to such works set forth in 17 U.S.C. 118(c).

**§ 381.2 Definition of public broadcasting entity.**

As used in this part, the term *public broadcasting entity* means a noncommercial educational broadcast station as defined in section 397 of title 47 and any nonprofit institution organization engaged in the activities described in 17 U.S.C. 118(c).

**§ 381.3 [Reserved]**

**§ 381.4 Performance of musical compositions by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(c).**

The following schedule of rates and terms shall apply to the performance by PBS, NPR and other public broadcasting entities engaged in activities set forth in 17 U.S.C. 118(c) of copyrighted published nondramatic musical compositions, except for public broadcasting entities covered by §§ 381.5 and 381.6, and except for compositions which are the subject of voluntary license agreements.

(a) *Determination of royalty rate.* (1) For performance of such work in a feature presentation of PBS:

2008–2012 ..... $227.58

(2) For performance of such a work as background or theme music in a PBS program:

2008–2012 ..... $57.66

(3) For performance of such a work in a feature presentation of a station of PBS:

2008–2012 ..... $19.45

(4) For performance of such a work as background or theme music in a program of a station of PBS:

2008–2012 ..... $4.10

(5) For the performance of such a work in a feature presentation of NPR:

2008–2012 ..... $23.07

(6) For the performance of such a work as background or theme music in an NPR program:

2008–2012 ..... $5.59

(7) For the performance of such a work in a feature presentation of a station of NPR:

2008–2012 ..... $1.63

(8) For the performance of such a work as background or theme music in a program of a station of NPR:

2008–2012 ..... $.58

(9) For purposes of this schedule the rate for the performance of theme music in an entire series shall be double the single program theme rate.

(10) In the event the work is first performed in a program of a station of PBS or NPR, and such program is subsequently distributed by PBS or NPR, an additional royalty payment shall be made equal to the difference between the rate specified in this section for a program of a station of PBS or NPR, respectively, and the rate specified in this section for a PBS or NPR program, respectively.

(b) *Payment of royalty rate.* The required royalty rate shall be paid to each known copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(c) *Records of use.* PBS and NPR shall, upon the request of a copyright owner of a published musical work who believes a musical composition of such owner has been performed under the terms of this schedule, permit such copyright owner a reasonable opportunity to examine their standard cue sheets listing the nondramatic performances of musical compositions on PBS and NPR programs. Any local PBS and NPR station that shall be required by the provisions of any voluntary license agreement with ASCAP, BMI or SESAC covering the license period January 1, 2008, to December 31, 2012, to provide a music use report shall, upon request of a copyright owner who believes a musical composition of such owner has been performed under the terms of this schedule, permit such copyright owner to examine the report.

(d) *Terms of use.* The fees provided in this schedule for the performance of a musical work in a program shall cover performances of such work in such program for a period of four years following the first performance.

**§ 381.5 Performance of musical compositions by public broadcasting entities licensed to colleges and universities.**

(a) *Scope.* This section applies to the performance of copyrighted published nondramatic musical compositions by noncommercial radio stations which are licensed to accredited colleges, accredited universities, or other accredited nonprofit educational institutions and which are not affiliated with National Public Radio. For purposes of this section, accreditation of institutions providing post-secondary education shall be determined by a regional or national accrediting agency recognized by the Council for Higher Education Accreditation or the United States Department of Education; and accreditation of institutions providing elementary or secondary education shall be as recognized by the applicable state licensing authority.

(b) *Voluntary license agreements.* Notwithstanding the schedule of rates and terms established in this section, the rates and terms of any license agreements entered into by copyright owners and colleges, universities, and other nonprofit educational institutions concerning the performance of copyrighted musical compositions, including performances by noncommercial radio stations, shall apply in lieu of the rates and terms of this section.

(c) *Royalty rate.* A public broadcasting entity within the scope of this section may perform published nondramatic musical compositions subject to the following schedule of royalty rates:

(1) For all such compositions in the repertory of ASCAP, $277 annually in 2007, as adjusted pursuant to § 381.10.

(2) For all such compositions in the repertory of BMI, $277 annually in 2007, as adjusted pursuant to § 381.10.

(3) For all such compositions in the repertory of SESAC, $116 annually in 2008, as adjusted pursuant to § 381.10.

(4) For the performance of any other such compositions: $1.

(d) *Payment of royalty rate.* The public broadcasting entity shall pay the required royalty rate to ASCAP, BMI and SESAC not later than January 31 of each year.

(e) *Records of use.* A public broadcasting entity subject to this section shall furnish to ASCAP, BMI and SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI and SESAC shall not in any one calendar year request more than 10 stations to furnish such reports.

**§ 381.6 Performance of musical compositions by other public broadcasting entities.**

(a) *Scope.* This section applies to the performance of copyrighted published nondramatic musical compositions by radio stations not licensed to colleges, universities, or other nonprofit educational institutions and which are not affiliated with NPR. In the event that a station owned by a public broadcasting entity broadcasts programming by means of an in-band, on-channel (''IBOC'') digital radio signal and such programming is different than the station's analog broadcast programming, then any such programming shall be deemed to be provided by a separate station requiring a separate royalty payment.

(b) *Voluntary license agreements.* Notwithstanding the schedule of rates

and terms established in this section, the rates and terms of any license agreements entered into by copyright owners and noncommercial radio stations within the scope of this section concerning the performance of copyrighted musical compositions, including performances by noncommercial radio stations, shall apply in lieu of the rates and terms of this section.

(c) *Royalty rate.* A public broadcasting entity within the scope of this section may perform published nondramatic musical compositions subject to the following schedule of royalty rates:

(1) For all such compositions in the repertory of ASCAP, the royalty rates shall be as follows:

| | Population count | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|
| Level 1 | 0–249,999 | $550 | $567 | $583 | $601 | $619 |
| Level 2 | 250,000–499,999 | 1,000 | 1,030 | 1,061 | 1,093 | 1,126 |
| Level 3 | 500,000–999,999 | 1,500 | 1,545 | 1,591 | 1,639 | 1,688 |
| Level 4 | 1,000,000–1,499,999 | 2,000 | 2,060 | 2,122 | 2,185 | 2,251 |
| Level 5 | 1,500,000–1,999,999 | 2,500 | 2,575 | 2,652 | 2,732 | 2,814 |
| Level 6 | 2,000,000–2,499,999 | 3,000 | 3,090 | 3,183 | 3,278 | 3,377 |
| Level 7 | 2,500,000–2,999,999 | 3,500 | 3,605 | 3,713 | 3,825 | 3,939 |
| Level 8 | 3,000,000 and above | 5,000 | 5,150 | 5,305 | 5,464 | 5,628 |

(2) For all such compositions in the repertory of BMI, the royalty rates shall be as follows:

| | Population count | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|
| Level 1 | 0–249,999 | $550 | $567 | $583 | $601 | $619 |
| Level 2 | 250,000–499,999 | 1,000 | 1,030 | 1,061 | 1,093 | 1,126 |
| Level 3 | 500,000–999,999 | 1,500 | 1,545 | 1,591 | 1,639 | 1,688 |
| Level 4 | 1,000,000–1,499,999 | 2,000 | 2,060 | 2,122 | 2,185 | 2,251 |
| Level 5 | 1,500,000–1,999,999 | 2,500 | 2,575 | 2,652 | 2,732 | 2,814 |
| Level 6 | 2,000,000–2,499,999 | 3,000 | 3,090 | 3,183 | 3,278 | 3,377 |
| Level 7 | 2,500,000–2,999,999 | 3,500 | 3,605 | 3,713 | 3,825 | 3,939 |
| Level 8 | 3,000,000 and above | 5,000 | 5,150 | 5,305 | 5,464 | 5,628 |

(3) For all such compositions in the repertory of SESAC, the royalty rates shall be as follows:

| | Population count | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|
| Level 1 | 0–249,999 | $120 | $124 | $127 | $131 | $135 |
| Level 2 | 250,000–499,999 | 200 | 206 | 212 | 219 | 225 |
| Level 3 | 500,000–999,999 | 300 | 309 | 318 | 328 | 338 |
| Level 4 | 1,000,000–1,499,999 | 400 | 412 | 424 | 437 | 450 |
| Level 5 | 1,500,000–1,999,999 | 500 | 515 | 530 | 546 | 563 |
| Level 6 | 2,000,000–2,499,999 | 600 | 618 | 637 | 656 | 675 |
| Level 7 | 2,500,000–2,999,999 | 700 | 721 | 743 | 765 | 788 |
| Level 8 | 3,000,000 and above | 1,000 | 1,030 | 1,061 | 1,093 | 1,126 |

(4) For the performance of any other such compositions, in 2008 through 2012, $1.

(d) *Payment of royalty rate.* The public broadcasting entity shall pay the required royalty rate to ASCAP, BMI and SESAC not later than January 31 of each year. Each annual payment shall be accompanied by a signed declaration stating the Population Count of the public broadcasting entity and the source for such Population Count. An exact copy of such declaration shall be furnished to each of ASCAP, BMI and SESAC. Upon prior written notice thereof from ASCAP, BMI or SESAC, a public broadcasting entity shall make its books and records relating to its Population Count available for inspection.

(e) *Records of use.* A public broadcasting entity subject to this section shall furnish to ASCAP, BMI and SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI and SESAC each shall not in any one calendar year request more than 10 stations to furnish such reports.

(f) *Definitions.* As used in paragraphs (c) and (d) of this section, the following terms and their variant forms mean the following:

(1) *Population Count.* The combination of:

(i) The number of persons estimated to reside within a station's Predicted 60 dBu Contour, based on the most recent available census data; and

(ii) The nonduplicative number of persons estimated to reside in the Predicted 60 dBu Contour of any Translator Station or Booster Station that extends a public broadcasting entity's signal beyond the contours of a station's Predicted 60 dBu Contour.

(iii) In determining Population Count, a station or a Translator Station or a Booster Station may use and report the total population data, from a research company generally recognized in the broadcasting industry, for the radio market within which the station's community license is located.

(2) *Predicted 60 dBu Contour* shall be calculated as set forth in 47 CFR 73.313.

(3) *Translator Station and Booster Station* shall have the same meanings as set forth in 47 CFR 74.1201.

**§ 381.7 Recording rights, rates and terms.**

(a) *Scope.* This section establishes rates and terms for the recording of nondramatic performances and displays of musical works, other than compositions subject to voluntary license agreements, on and for the radio and television programs of public broadcasting entities, whether or not in synchronization or timed relationship with the visual or aural content, and for the making, reproduction, and distribution of copies and phonorecords of public broadcasting programs containing such nondramatic performances and displays of musical works solely for the purpose of transmission by public broadcasting entities. The rates and terms established in this schedule include the making of the reproductions described in 17 U.S.C. 118(c)(3).

(b) *Royalty rate.* (1)(i) For uses described in paragraph (a) of this section of a musical work in a PBS-distributed program, the royalty fees shall be calculated by multiplying the following per-composition rates by the number of different compositions in that PBS-distributed program:

| | 2008–2012 |
|---|---|
| (A) Feature | $149.94 |
| (B) Concert feature (per minute) | 44.59 |
| (C) Background | 74.97 |
| (D) Theme: | |
| (*1*) Single program or first series program | 74.97 |
| (*2*) Other series program | 30.39 |

(ii) For such uses other than in a PBS-distributed television program, the royalty fee shall be calculated by multiplying the following per-composition rates by the number of different compositions in that program:

| | 2008–2012 |
|---|---|
| (A) Feature | $9.43 |
| (B) Concert feature (per minute) | 2.48 |
| (C) Background | 4.10 |
| (D) Theme: | |
| (*1*) Single program or first series of program | 4.10 |
| (*2*) Other series program | 1.63 |

(iii) In the event the work is first recorded other than in a PBS-distributed program, and such program is subsequently distributed by PBS, an additional royalty payment shall be made equal to the difference between the rate specified in this section for other than a PBS-distributed program and the rate specified in this section for a PBS-distributed program.

(2) For uses licensed herein of a musical work in a NPR program, the royalty fees shall be calculated by multiplying the following per-composition rates by the number of different compositions in any NPR program distributed by NPR. For purposes of this schedule ''National Public Radio'' programs include all programs produced in whole or in part by NPR, or by any NPR station or organization under contract with NPR.

| | 2008–2012 |
|---|---|
| (i) Feature | $12.35 |
| (ii) Concert feature (per minute) | 18.13 |
| (iii) Background | 6.19 |
| (iv) Theme: | |
| (A) Single program or first series program | 6.19 |
| (B) Other series program | 2.47 |

(3) For purposes of this schedule, a ''Concert Feature'' shall be deemed to be the nondramatic presentation in a program of all or part of a symphony, concerto, or other serious work originally written for concert performance, or the nondramatic presentation in a program of portions of a serious work originally written for opera performance.

(4) For such uses other than in an NPR-produced radio program:

| | 2008–2012 |
|---|---|
| (i) Feature | $.79 |
| (ii) Feature (concert) (per half hour) | 1.65 |
| (iii) Background | .40 |

(5) The schedule of fees covers use for a period of three years following the first use. Succeeding use periods will require the following additional payment: additional one-year period—25 percent of the initial three-year fee; second three-year period—50 percent of the initial three-year fee; each three-year fee thereafter—25 percent of the initial three-year fee; provided that a 100 percent additional payment prior to the expiration of the first three-year period will cover use during all subsequent use periods without limitation. Such succeeding uses which are subsequent to December 31, 2012, shall be subject to the royalty rates established in this schedule.

(c) *Payment of royalty rates.* The required royalty rates shall be paid to each known copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(d) *Records of use.* (1) Maintenance of cue sheets. PBS and its stations, NPR, or other public broadcasting entities shall maintain and make available for examination pursuant to paragraph (e) of this section copies of their standard cue sheets or summaries of same listing the recording of the musical works of such copyright owners.

(2) Content of cue sheets or summaries. Such cue sheets or summaries shall include:

(i) The title, composer and author to the extent such information is reasonably obtainable.

(ii) The type of use and manner of performance thereof in each case.

(iii) For Concert Feature music, the actual recorded time period on the program, plus all distribution and broadcast information available to the public broadcasting entity.

(e) *Filing of use reports with the Copyright Royalty Judges. Deposit of cue sheets or summaries.* PBS and its stations, NPR, or other television public broadcasting entity shall deposit with the Copyright Royalty Judges one electronic copy in Portable Document Format (PDF) on compact disk (an optical data storage medium such as a CD-ROM, CD-R or CD-RW) or floppy diskette of their standard music cue sheets or summaries of same listing the recording pursuant to this schedule of the musical works of copyright owners. Such cue sheets or summaries shall be deposited not later than July 31 of each calendar year for recordings during the first six months of the calendar year and not later than January 31 of each calendar year for recordings during the second six months of the preceding calendar year. PBS and NPR shall maintain at their offices copies of all standard music cue sheets from which such music use reports are prepared. Such music cue sheets shall be furnished to the Copyright Royalty Judges upon their request and also shall be available during regular business hours at the offices of PBS or NPR for examination by a copyright owner who believes a musical composition of such owner has been recorded pursuant to this schedule.

**§ 381.8 Terms and rates of royalty payments for the use of published pictorial, graphic, and sculptural works.**

(a) *Scope.* This section establishes rates and terms for the use of published pictorial, graphic, and sculptural works by public broadcasting entities for the activities described in 17 U.S.C. 118. The rates and terms established in this

schedule include the making of the reproductions described in 17 U.S.C. 118(c).

(b) *Royalty rate.* (1) The following schedule of rates shall apply to the use of works within the scope of this section:

(i) For such uses in a PBS-distributed program:

| | 2008–2012 |
|---|---|
| (A) For featured display of a work | $69.70 |
| (B) For background and montage display | 33.99 |
| (C) For use of a work for program identification or for thematic use | 137.40 |
| (D) For the display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced irrespective of whether the reproduced work of fine art is copyrighted so as to be subject also to payment of a display fee under the terms of the schedule | 45.14 |

(ii) For such uses in other than PBS-distributed programs:

| | 2008–2012 |
|---|---|
| (A) For featured display of a work | $45.14 |
| (B) For background and montage display | 23.13 |
| (C) For use of a work for program identification or for thematic use | 92.27 |
| (D) For the display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced irrespective of whether the reproduced work of fine art is copyrighted so as to be subject also to payment of a display fee under the terms of this schedule | 23.14 |

(2) For the purposes of the schedule in paragraph (b)(1) of this section the rate for the thematic use of a work in an entire series shall be double the single program theme rate. In the event the work is first used other than in a PBS-distributed program, and such program is subsequently distributed by PBS, an additional royalty payment shall be made equal to the difference between the rate specified in this section for other than a PBS-distributed program and the rate specified in this section for a PBS-distributed program.

(3) ''Featured display'' for purposes of this schedule means a full-screen or substantially full-screen display appearing on the screen for more than three seconds. Any display less than full-screen or substantially full-screen, or full-screen for three seconds or less, is deemed to be a ''background or montage display''.

(4) ''Thematic use'' is the utilization of the works of one or more artists where the works constitute the central theme of the program or convey a story line.

(5) ''Display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced'' means a transparency or other reproduction of an underlying work of fine art.

(c) *Payment of royalty rate.* PBS or other public broadcasting entity shall pay the required royalty fees to each copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(d) *Records of use.* (1) PBS and its stations or other public broadcasting entity shall maintain and furnish either to copyright owners, or to the offices of generally recognized organizations representing the copyright owners of pictorial, graphic and sculptural works, copies of their standard lists containing the pictorial, graphic, and sculptural works displayed on their programs. Such notice shall include the name of the copyright owner, if known, the specific source from which the work was taken, a description of the work used, the title of the program on which the work was used, and the date of the original broadcast of the program.

(2) Such listings shall be furnished not later than July 31 of each calendar year for displays during the first six months of the calendar year, and not later than January 31 of each calendar year for displays during the second six months of the preceding calendar year.

(e) *Filing of use reports with the Copyright Royalty Judges.* (1) PBS and its stations or other public broadcasting entity shall deposit with the Copyright Royalty Judges one electronic copy in Portable Document Format (PDF) on compact disk (an optical data storage medium such as a CD-ROM, CD-R or CD-RW) or floppy diskette of their standard lists containing the pictorial, graphic, and sculptural works displayed on their programs. Such notice shall include the name of the copyright owner, if known, the specific source from which the work was taken, a description of the work used, the title of the program on which the work was used, and the date of the original broadcast of the program.

(2) Such listings shall be furnished not later than July 31 of each calendar year for displays during the first six months of the calendar year, and not later than January 31 of each calendar year for displays during the second six months of the preceding calendar year.

(f) *Terms of use.* (1) The rates of this schedule are for unlimited use for a period of three years from the date of the first use of the work under this schedule. Succeeding use periods will require the following additional payment: Additional one-year period—25 percent of the initial three-year fee; second three-year period—50 percent of the initial three-year fee; each three-year period thereafter—25 percent of the initial three-year fee; provided that a 100 percent additional payment prior to the expiration of the first three-year period will cover use during all subsequent use periods without limitation. Such succeeding uses which are subsequent to December 31, 2012, shall be subject to the rates established in this schedule.

(2) Pursuant to the provisions of 17 U.S.C. 118(e), nothing in this schedule shall be construed to permit, beyond the limits of fair use as provided in 17 U.S.C. 107, the production of a transmission program drawn to any substantial extent from a published compilation of pictorial, graphic, or sculptural works.

**§ 381.9 Unknown copyright owners.**

If PBS and its stations, NPR and its stations, or other public broadcasting entity is not aware of the identity of, or unable to locate, a copyright owner who is entitled to receive a royalty payment under this part, they shall retain the required fee in a segregated trust account for a period of three years from the date of the required payment. No claim to such royalty fees shall be valid after the expiration of the three-year period. Public broadcasting entities may establish a joint trust fund for the purposes of this section. Public broadcasting entities shall make available to the Copyright Royalty Judges, upon request, information concerning fees deposited in trust funds.

**§ 381.10 Cost of living adjustment.**

(a) On December 1, 2007, the Copyright Royalty Judges shall publish in the **Federal Register** a notice of the change in the cost of living as determined by the Consumer Price Index (all consumers, all items) during the period from the most recent Index published prior to December 1, 2006, to

the most recent Index published prior to December 1, 2007. On each December 1 thereafter the Copyright Royalty Judges shall publish a notice of the change in the cost of living during the period from the most recent index published prior to the previous notice, to the most recent Index published prior to December 1, of that year.

(b) On the same date of the notices published pursuant to paragraph (a) of this section, the Copyright Royalty Judges shall publish in the **Federal Register** a revised schedule of rates for § 381.5 which shall adjust those royalty amounts established in dollar amounts according to the change in the cost of living determined as provided in paragraph (a) of this section. Such royalty rates shall be fixed at the nearest dollar.

(c) The adjusted schedule for rates for § 381.5 shall become effective thirty days after publication in the **Federal Register**.

**§ 381.11 Notice of restrictions on use of reproductions of transmission programs.**

Any public broadcasting entity which, pursuant to 17 U.S.C. 118, supplies a reproduction of a transmission program to governmental bodies or nonprofit institutions shall include with each copy of the reproduction a warning notice stating in substance that the reproductions may be used for a period of not more than seven days from the specified date of transmission, that the reproductions must be destroyed by the user before or at the end of such period, and that a failure to fully comply with these terms shall subject the body or institution to the remedies for infringement of copyright.

Dated: April 10, 2007.

**James Scott Sledge,**

*Chief Copyright Royalty Judge.*

[FR Doc. E7–7067 Filed 4–16–07; 8:45 am]

**BILLING CODE 1410–72–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R09–OAR–2007–0165; FRL–8300–3]**

## Approval and Promulgation of Implementation Plans; Revisions to the Nevada State Implementation Plan; Stationary Source Permits

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing, under the Clean Air Act, approval of certain revisions to the applicable state implementation plan for the State of Nevada and full disapproval of certain other revisions. These revisions involve State rules governing applications for, and issuance of, permits for stationary sources, but not including review and permitting of major sources and major modifications under parts C and D of title I of the Clean Air Act. These revisions involve submittal of certain new or amended State rules and requests by the State for rescission of certain existing rules from the state implementation plan. The rescission requests for which we propose approval are contingent upon receipt of public notice and hearing documentation from the State. EPA is proposing this action under the Clean Air Act obligation to take action on State submittals of revisions to state implementation plans. The intended effect is to update the rules governing permitting in the applicable state implementation plan and to rescind unnecessary provisions from the applicable plan. EPA is taking comments on this proposal and plans to follow with a final action.

**DATES:** Any comments must arrive by June 18, 2007.

**ADDRESSES:** Submit comments, identified by docket number EPA–R09–OAR–2007–0165, by one of the following methods:

1. Federal eRulemaking Portal: *www.regulations.gov.* Follow the on-line instructions.
2. E-mail: *R9airpermits@epa.gov.*
3. Mail or deliver: Gerardo Rios (Air-3), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

*Instructions:* All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through www.regulations.gov or e-mail. www.regulations.gov is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. 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.

*Docket:* The index to the docket for this action is available electronically at www.regulations.gov and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.*, copyrighted material), and some may not be publicly available in either location (*e.g.*, CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:** Laura Yannayon, EPA Region IX, (415) 972–3534, *yannayon.laura@epa.gov.*

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

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## I. The State's Submittal

### *A. Which rules did the state submit or rescind?*

On February 16, 2005, the State of Nevada's Department of Conservation and Natural Resources, Division of Environmental Protection (NDEP) submitted a large revision to the applicable State Implementation Plan (SIP). The February 16, 2005 SIP revision submittal includes statutory provisions, new or amended rules as well as requests for rescission of certain statutory provisions and rules approved by EPA into the applicable SIP. The rules and rescission requests submitted by NDEP on February 16, 2005 relate to definitions, administrative requirements, prohibitory rules, and permitting-related requirements and procedures. The February 16, 2005 SIP submittal also includes documentation of public notice and hearing for all of the new or amended rules through the hearing on November 30, 2004 held by the Nevada State Environmental Commission.

On January 12, 2006, NDEP re-submitted most of the earlier submittal as modified to reflect new or amended rules adopted by the State Environmental Commission on October

4, 2005. The January 12, 2006 SIP revision submittal supersedes the regulatory portion of the earlier SIP revision submittal but is not a complete re-submittal of the earlier submittal in that it did not include the documentation of public notice and hearing previously submitted. The January 12, 2006 SIP revision submittal does include such documentation for amendments adopted by the commission on October 4, 2005.

On December 8, 2006, NDEP submitted a SIP revision supplementing and superseding certain rules submitted on January 12, 2006 to reflect amendments adopted by the State Environmental Commission on September 6, 2006. The December 8, 2006 SIP revision submittal contains the amended rules and related documentation of public notice and hearing. Our consideration of the rules submitted on January 12, 2006 and December 8, 2006 is made herein in light of the public participation documentation contained in those two submittals as well as the February 16, 2005 submittal. With some specific exceptions, none of the three submittals contains documentation of public notice and hearing for the State's rescissions.

The primary purpose of these SIP revision submittals is to clarify and harmonize the provisions approved by EPA under section 110 of the Clean Air Act (''Act'' or CAA) with the current provisions adopted by the State. Because these submittals incorporate so many changes from the 1970s and 1980s vintage SIP regulations, EPA has decided to review and act on them in a series of separate actions. The first such action, related to various definitions, sulfur emission rules, and restrictions on open burning and use of incinerators, was proposed in the **Federal Register** on September 13, 2005 (70 FR 53975) and finalized on March 27, 2006 (71 FR 15040). The second such action, related to statutory authority, was proposed on June 9, 2006 (71 FR 33413) and finalized on August 31, 2006 (71 FR 51766). A third action, related to most of the State's rescissions, was proposed on August 28, 2006 (71 FR 50875); EPA finalized most of the proposed rescissions on January 3, 2007 (72 FR 11). A fourth action, related to monitoring and VOC rules, was proposed on August 31, 2006 (71 FR 51793) and finalized on December 11, 2006 (71 FR 71486).

In today's action, we are taking another step in the process of acting on the State's January 12, 2006, and December 8, 2006 SIP revision submittals by proposing action on the State's submittal of rules governing applications for, and issuance of, permits for stationary sources.[1] We are also proposing action on the State's requests for rescission of certain permit-related rules in the existing SIP. The remaining portions of the submittals will be acted on in future **Federal Register** actions.

*B. What is the regulatory history of the Nevada SIP?*

Pursuant to the Clean Air Amendments of 1970, the Governor of Nevada submitted the original Nevada SIP to EPA in January 1972. EPA approved certain portions of the original SIP and disapproved other portions under CAA section 110(a). See 37 FR 10842 (May 31, 1972). For some of the disapproved portions of the original SIP, EPA promulgated substitute provisions under CAA section 110(c).[2] This original SIP included various rules, codified as articles within the Nevada Air Quality Regulations (NAQR), and various statutory provisions codified in chapter 445 of the Nevada Revised Statutes (NRS). In the early 1980's, Nevada reorganized and re-codified its air quality rules into sections within chapter 445 of the Nevada Administrative Code (NAC). Today, Nevada codifies its air quality regulations in chapter 445B of the NAC and codifies air quality statutes in chapter 445B (''Air Pollution'') of title 40 (''Public Health and Safety'') of the NRS.

Nevada adopted and submitted many revisions to the original set of regulations and statutes in the SIP, some of which EPA approved on February 6, 1975 at 40 FR 5508; on March 26, 1975 at 40 FR 13306; on January 9, 1978 at 43 FR 1341; on January 24, 1978 at 43 FR 3278; on August 21, 1978 at 43 FR 36932; on July 10, 1980 at 45 FR 46384; on April 14, 1981 at 46 FR 21758; on August 27, 1981 at 46 FR 43141; on March 8, 1982 at 47 FR 9833; on April 13, 1982 at 47 FR 15790; on June 18, 1982 at 47 FR 26386; on June 23, 1982 at 47 FR 27070; on March 27, 1984 at 49 FR 11626. Since 1984, EPA has approved very few revisions to Nevada's applicable SIP despite numerous changes that have been adopted by the State Environmental Commission. As a result, the version of the rules enforceable by NDEP is often quite different from the SIP version enforceable by EPA.

*C. What is the purpose of this proposed rule?*

The purpose of this proposed rule is to present our evaluation under the Clean Air Act and EPA's regulations of the new and amended rules in NDEP's January 12, 2006 and December 8, 2006 SIP revision submittals. The submitted rules relate to application for, and issuance of, permits for stationary sources and with respect to NDEP's requests for rescission of certain permitting-related rules from the existing SIP. We provide our reasoning in general terms below but provide a more detailed analysis in the technical support document (TSD) that has been prepared for this proposed rulemaking.

## II. EPA's Evaluation and Action

*A. How is EPA evaluating the rules?*

Under CAA section 110(k)(2), EPA is obligated to take action on submittals by States of SIPs and SIP revisions. CAA section 110(k)(3) authorizes EPA to approve or disapprove, in whole or in separable part, such submittals.

EPA has reviewed the rules submitted on January 12, 2006 and December 8, 2006 by NDEP governing application for, and issuance of, permits for stationary sources and the permitting-related rules (in the existing SIP) that the State has requested rescission for compliance with the CAA requirements for SIPs in general set forth in CAA section 110(a)(2) and for stationary source permitting programs in particular in 40 CFR part 51, sections 51.160 through 51.164, and also for compliance with CAA requirements for SIP revisions in CAA section 110(l) and 193.[3] As described below, EPA is

[1] We note that the stationary source permitting rules that are the subject of this proposal are not intended to satisfy the requirements for pre-construction review and permitting of major sources or major modifications under part C (''Prevention of significant deterioration of air quality'') or part D (''Plan requirements for nonattainment areas'') of title I of the Clean Air Act. Of the 100+ permit-related rules or statutes that were submitted by NDEP for approval or for rescission, we are proposing action today on all but two. We are deferring action on the State's requests for rescission of rule 25 of general order number 3 of the Nevada Public Service Commission and Nevada Revised Statutes (NRS) 704.820 to 704.900—Construction of utility facilities: utility environmental protection act. Rule 25 of general order number 3 and NRS 704.820–900 relate to new source review under part D, and as such, we will take action on the State's related rescissions after the State submits, and we take action on, a revised ''nonattainment'' new source review program under part D of title I of the Clean Air Act.

[2] Provisions that EPA promulgates under CAA section 110(c) in substitution of disapproved State provisions are referred to as Federal Implementation Plans (FIPs).

[3] CAA section 110(l) requires SIP revisions to be subject to reasonable notice and public hearing prior to adoption and submittal by States to EPA and prohibits EPA from approving any SIP revision that would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the CAA. CAA section 193 provides

Continued

proposing approval of some, but full disapproval of most, of the submitted rules and rescissions.

*B. Do the rules meet the evaluation criteria?*

We are proposing action on the submitted rules listed in tables 1 and 2 and on the requests for rescission of existing SIP rules listed in table 3. Table 1 lists the submitted rules that, while permit-related, are separable from the rest of the permit-related rules and thus qualify for action independent of our action on the bulk of the permit-related rules. Table 2 lists the submitted set of rules that comprise the bulk of NDEP's stationary source permitting program (excluding review under parts C and D of the title I of the CAA). Table 3 lists the permit-related rules (in the existing SIP) for which NDEP has requested rescission and for which we are proposing action.

TABLE 1.—SUBMITTED RULES THAT ARE PROPOSED FOR ACTION INDEPENDENT OF THE REST OF THE PERMIT-RELATED RULES

| Submitted rule | Title | Adoption date | Submittal date | Proposed action |
|---|---|---|---|---|
| NAC 445B.021 | "Area source" defined | 11/03/93 | 01/12/06 | Disapproval. |
| NAC 445B.028 | "Best available control technology" defined | 03/26/96 | 01/12/06 | Disapproval. |
| NAC 445B.178 | "Source reduction" defined | 03/03/94 | 01/12/06 | Disapproval. |
| NAC 445B.196 | "Toxic regulated air pollutant" defined | 10/03/95 | 01/12/06 | Disapproval. |
| NAC 445B.22083 | Construction, major modification or relocation of plants to generate electricity using steam produced by burning of fossil fuels. | 10/04/05 | 01/12/06 | Approval. |
| NAC 445B.250 | Notification of planned construction or reconstruction | 10/04/05 | 01/12/06 | Approval. |
| NAC 445B.252 | Testing and sampling | 09/18/03 | 01/12/06 | Approval. |

The separable, submitted rules are listed in table 1 along with the applicable adoption and submittal dates and our proposed actions. As shown in table 1, we are proposing approval of the three specific submitted rules and disapproval of four specific submitted rules. We are proposing approval of NAC 445B.22083, 445B.230, and 445B.252 because they strengthen the SIP and otherwise meet all applicable requirements. We are proposing disapproval of NAC 445B.021, 445B.178, and 445B.196 because they define terms that are not used in any of the other submitted rules or in any of the rules of the existing SIP and thus are unnecessary. We are also proposing to disapprove NAC 445B.028 (''Best Available Control Technology'' defined) because it is not used in any of the other submitted rules and is used only in an existing SIP rule for which we are proposing to grant NDEP's rescission request.[4] The TSD provides more details concerning our proposal and rationale with respect to each of the rules listed in table 1.

Table 2 lists the submitted rules governing application for, and issuance of, permits for stationary sources under NDEP jurisdiction in the State of Nevada, excluding rules intended to provide for review and permitting of major sources and major modifications under parts C and D of title I of the CAA. In our review of these submitted rules, we have identified a number of deficiencies that lead us to conclude that the submitted rules do not comply with the requirements of section 110 and 40 CFR part 51, sections 51.160 through 51.164 and that form the basis for our proposed disapproval.

TABLE 2.—SUBMITTED RULES GOVERNING APPLICATION FOR, AND ISSUANCE OF, PERMITS FOR STATIONARY SOURCES UNDER NDEP JURISDICTION

| Submitted rule | Title | Adoption date | Submittal date |
|---|---|---|---|
| NAC 445B.003 | "Adjacent properties" defined | 11/03/93 | 01/12/06 |
| NAC 445B.0035 | "Administrative revision to a Class I operating permit" defined | 08/19/04 | 01/12/06 |
| NAC 445B.007 | "Affected state" defined | 11/03/93 | 01/12/06 |
| NAC 445B.013 | "Allowable emissions" defined | 10/04/05 | 01/12/06 |
| NAC 445B.014 | "Alteration" defined | 10/03/95 | 01/12/06 |
| NAC 445B.016 | "Alternative operating scenarios" defined | 10/03/95 | 01/12/06 |
| NAC 445B.019 | "Applicable requirements" defined | 01/22/98 | 01/12/06 |
| NAC 445B.035 | "Class I–B application" defined | 10/03/95 | 01/12/06 |
| NAC 445B.036 | "Class I source" defined | 08/19/04 | 01/12/06 |
| NAC 445B.037 | "Class II source" defined | 09/18/01 | 01/12/06 |
| NAC 445B.038 | "Class III source" defined | 09/18/01 | 01/12/06 |
| NAC 445B.044 | "Construction" defined | 10/04/05 | 01/12/06 |
| NAC 445B.046 | "Contiguous property" defined | 09/16/76 | 01/12/06 |
| Sec. 2 of R096–05 | "Dispersion technique" defined | 10/04/05 | 01/12/06 |
| Sec. 3 of R096–05 | "Excessive concentration" defined | 10/04/05 | 01/12/06 |
| NAC 445B.066 | "Existing stationary source" defined | 10/03/95 | 01/12/06 |
| NAC 445B.068 | "Facility" defined | 10/03/95 | 01/12/06 |
| NAC 445B.069 | "Federally enforceable" defined | 11/03/93 | 01/12/06 |
| NAC 445B.070 | "Federally enforceable emissions cap" defined | 11/03/93 | 01/12/06 |

that no control requirement in effect in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.

[4] ''Best Available Control Technology'' (BACT) is the control technology requirement under EPA's Prevention of Significant Deterioration (PSD) regulations for pre-construction review and permitting of new major sources and major modifications in attainment or unclassifiable areas, and we would expect this definition to be re-submitted by NDEP when they submit their rules implementing PSD for approval by EPA as a SIP revision.

TABLE 2.—SUBMITTED RULES GOVERNING APPLICATION FOR, AND ISSUANCE OF, PERMITS FOR STATIONARY SOURCES UNDER NDEP JURISDICTION—Continued

| Submitted rule | Title | Adoption date | Submittal date |
|---|---|---|---|
| NAC 445B.082 | ''General permit'' defined | 10/03/95 | 01/12/06 |
| Sec. 4 of R096–05 | ''Good engineering practice stack height'' defined | 10/04/05 | 01/12/06 |
| NAC 445B.087 | ''Increment'' defined | 11/03/93 | 01/12/06 |
| NAC 445B.093 | ''Major modification'' defined | 08/19/04 | 01/12/06 |
| NAC 445B.094 | ''Major source'' defined | 05/10/01 | 01/12/06 |
| NAC 445B.0945 | ''Major stationary source'' defined | 08/19/04 | 01/12/06 |
| NAC 445B.099 | ''Modification'' defined | 10/03/95 | 01/12/06 |
| NAC 445B.104 | ''Motor vehicle'' defined | 05/10/01 | 01/12/06 |
| Sec. 5 of R096–05 | ''Nearby'' defined | 10/04/05 | 01/12/06 |
| NAC 445B.108 | ''New stationary source'' defined | 10/03/95 | 01/12/06 |
| NAC 445B.117 | ''Offset'' defined | 10/03/95 | 01/12/06 |
| NAC 445B.123 | ''Operating permit'' defined | 11/19/02 | 01/12/06 |
| NAC 445B.124 | ''Operating permit to construct'' defined | 11/19/02 | 01/12/06 |
| NAC 445B.1345 | ''Plantwide applicability limitation'' defined | 08/19/04 | 01/12/06 |
| NAC 445B.138 | ''Potential to emit'' defined | 03/26/98 | 01/12/06 |
| NAC 445B.142 | ''Prevention of significant deterioration of air quality'' defined | 11/03/93 | 01/12/06 |
| NAC 445B.147 | ''Program'' defined | 11/03/93 | 01/12/06 |
| NAC 445B.154 | ''Renewal of an operating permit'' defined | 11/03/93 | 01/12/06 |
| NAC 445B.156 | ''Responsible official'' defined | 11/03/93 | 01/12/06 |
| NAC 445B.157 | ''Revision of an operating permit'' defined | 08/19/04 | 01/12/06 |
| NAC 445B.179 | ''Special mobile equipment'' defined | 05/10/01 | 01/12/06 |
| NAC 445B.187 | ''Stationary source'' defined | 05/10/01 | 01/12/06 |
| NAC 445B.194 | ''Temporary source'' defined | 05/10/01 | 01/12/06 |
| NAC 445B.287 | Operating permits: General requirements; exception; restriction on transfers. | 08/19/04 | 01/12/06 |
| NAC 445B.288 | Operating permits: Exemptions from requirements; insignificant activities. | 05/10/01 | 01/12/06 |
| NAC 445B.295 | Application: General requirements | 09/06/06 | 12/08/06 |
| NAC 445B.297 | Application: Submission of application and supplementary or corrected information. | 08/19/04 | 01/12/06 |
| NAC 445B.298 | Application: Official date of submittal | 08/19/04 | 01/12/06 |
| NAC 445B.305 | Operating permits: Imposition of more stringent standards for emissions | 10/03/95 | 01/12/06 |
| NAC 445B.308 | Prerequisites and conditions for issuance of operating permits: Environmental evaluation; compliance with control strategy; exemption from environmental evaluation. | 09/06/06 | 12/08/06 |
| NAC 445B.310 | Environmental evaluation: Applicable sources | 09/06/06 | 12/08/06 |
| NAC 445B.311 | Environmental evaluation: Required information | 09/06/06 | 12/08/06 |
| NAC 445B.313 | Method for determining heat input: Class I sources | 11/19/02 | 01/12/06 |
| NAC 445B.3135 | Method for determining heat input: Class II sources | 11/19/02 | 01/12/06 |
| NAC 445B.314 | Method for determining heat input: Class III sources | 11/19/02 | 01/12/06 |
| NAC 445B.315 | Contents of operating permits: Exception for operating permits to construct; required conditions. | 11/19/02 | 01/12/06 |
| NAC 445B.318 | Operating permits: Separate permit required for each source; form of application; issuance or denial of permit; posting of permit. | 09/06/06 | 12/08/06 |
| NAC 445B.319 | Operating permits: Administrative amendment | 08/19/04 | 01/12/06 |
| NAC 445B.325 | Operating permits: Termination, reopening and revision, revision, or revocation and reissuance. | 01/22/98 | 01/12/06 |
| NAC 445B.326 | Operating permits: Assertion of emergency as affirmative defense to action for noncompliance. | 11/03/93 | 01/12/06 |
| NAC 445B.331 | Request for change of location of emission unit | 09/06/06 | 12/08/06 |
| NAC 445B.3361 | General requirements | 09/06/06 | 12/08/06 |
| NAC 445B.3363 | Operating permit to construct: Application | 09/06/06 | 12/08/06 |
| NAC 445B.33637 | Operating permit to construct for approval of plantwide applicability limitation: Application. | 08/19/04 | 01/12/06 |
| NAC 445B.3364 | Operating permit to construct: Review of application and determination of completeness by director; notice. | 09/06/06 | 12/08/06 |
| NAC 445B.3365 | Operating permit to construct: Required conditions | 09/06/06 | 12/08/06 |
| NAC 445B.33656 | Operating permit to construct for approval of plantwide applicability limitation: Required conditions and information. | 09/06/06 | 12/08/06 |
| NAC 445B.3366 | Operating permit to construct: Expiration; extension | 09/06/06 | 12/08/06 |
| NAC 445B.3368 | Application: Additional requirements; exception | 08/19/04 | 01/12/06 |
| NAC 445B.3375 | Class I–B application: Filing requirement | 09/06/06 | 12/08/06 |
| NAC 445B.3395 | Review of application and determination of completeness by director; notice; expiration of permit. | 09/06/06 | 12/08/06 |
| NAC 445B.340 | Prerequisites to issuance, revision or renewal of permit | 01/22/98 | 01/12/06 |
| NAC 445B.342 | Revision of permit: Exception when making certain changes; notification of changes. | 09/06/06 | 12/08/06 |
| NAC 445B.3425 | Minor revision of permit | 08/19/04 | 01/12/06 |
| NAC 445B.344 | Significant revision of permit | 11/19/02 | 01/12/06 |
| NAC 445B.3441 | Administrative revision of permit to incorporate conditions of certain permits to construct. | 09/06/06 | 12/08/06 |

TABLE 2.—SUBMITTED RULES GOVERNING APPLICATION FOR, AND ISSUANCE OF, PERMITS FOR STATIONARY SOURCES UNDER NDEP JURISDICTION—Continued

| Submitted rule | Title | Adoption date | Submittal date |
|---|---|---|---|
| NAC 445B.3443 | Renewal of permit | 02/26/04 | 01/12/06 |
| NAC 445B.3453 | Application: General requirements | 11/19/02 | 01/12/06 |
| NAC 445B.3457 | Application: Determination of completeness by director | 09/06/06 | 12/08/06 |
| NAC 445B.346 | Required contents of permit | 10/03/95 | 01/12/06 |
| NAC 445B.3465 | Application for revision | 10/04/05 | 01/12/06 |
| NAC 445B.3473 | Renewal of permit | 02/26/04 | 01/12/06 |
| NAC 445B.3477 | Class II general permit | 11/19/02 | 01/12/06 |
| NAC 445B.3485 | Application: General requirements | 09/06/06 | 12/08/06 |
| NAC 445B.3487 | Application: Determination of completeness by director | 09/06/06 | 12/08/06 |
| NAC 445B.3489 | Required content of permits | 09/06/06 | 12/08/06 |
| NAC 445B.3493 | Application for revision | 09/18/01 | 01/12/06 |
| NAC 445B.3497 | Renewal of permits | 02/26/04 | 01/12/06 |

First, we find that certain submitted rules use undefined terms, contain incorrect citations, rely on rules or statutory provisions that have not been submitted for approval as part of the SIP, or multiple versions of the same rule were included in the same submittal, and thus are unnecessarily ambiguous. Specifically, NAC 445B.3366 relies on the term, ''commence,'' that is not defined in the SIP for contexts outside of CAA section 111. NAC 445B.069 includes incorrect citations to EPA regulations. The following submitted rules rely on rules or statutory provisions that have not been submitted: NAC 445B.287 (citing subsection (2)), NAC 445B.104 (citing NRS 485.050), NAC 445B.179 (citing NRS 482.123), and NAC 445B.311 (citing 445B.083). More than one version of the following rules was submitted on December 8, 2006: NAC 445B.308, NAC 445B.3363, and NAC 445B.3364. NDEP must define the relevant term, correct the citations, submit the relevant rules and statutory provisions for approval into the SIP, and submit a single version of those rules for which multiple versions were submitted.

Second, the definition of ''potential to emit'' in submitted rule NAC 445B.138 must be revised to require effective limits and to include criteria by which a limit is judged to be practicably enforceable by NDEP.

Third, NDEP's stationary source program may not be as inclusive as required under the CAA depending upon whether the exclusion of ''special mobile equipment'' from the definition of ''stationary source'' in submitted rule NAC 445B.187 extends to engines and vehicles that are not considered to be ''nonroad.'' Absent a satisfactory explanation by NDEP, the definition must be amended accordingly.

Fourth, the method for determining heat input for class I sources in submitted rule NAC 445B.313 must be amended to require combustion sources to make applicability determinations based on the maximum heat input.

Fifth, NAC 445B.331 (''Request for change of location of emission unit'') must be amended to limit its applicability to location changes within the confines of the existing stationary source at which the emission unit is originally permitted. Relocation of an emission unit to a site outside of the existing source at which it is originally permitted should trigger new source review.

Sixth, the submitted rule NAC 445B.3477 (''Class II general permit'') does not identify the requirements for general permits, the public participation requirements for issuing such permits, nor the criteria by which stationary sources may qualify for such a permit. To be approved, the rule must be amended accordingly.

Seventh, NAC 445B.311 allows for NDEP to authorize use of a modification or substitution of a model specified in appendix W of 40 CFR part 51 without EPA approval and must be amended accordingly to comply with 40 CFR 51.160(f).

Eighth, to comply with 40 CFR 51.161 (''Public availability of information''), the relevant submitted rules must be amended to provide for adequate public review of new or modified class II sources. Under submitted rule NAC 445B.3457 (''Application: Determination of completeness by Director''), NDEP may initiate public notice and comment if, after review of an application for a class II permit, NDEP determines that the change to the stationary source results in a significant change in air quality at any location where the public is present on a regular basis. Such a provision does not provide well-defined objective criteria for determining when public notice is required to meet the requirements of 40 CFR 51.161.

With respect to issue of public review of proposed permits, the submitted provisions for class I sources are generally acceptable with one exception; NAC 445B.3364 must be amended to specifically require that copies of NDEP's review and preliminary intent to issue or deny a class I operating permit be sent to Washoe County Health District for those sources proposed to be constructed or modified in Washoe County and to the Clark County Department of Air Quality and Environmental Management in Clark County. Also, the rules must be amended to provide for public participation for sources of lead with PTE's greater than 5 tons per year. See 40 CFR 51.100(k)(2) and 40 CFR 51.161(d).

Ninth, while the affirmative defense provision in NAC 445B.326 is acceptable as applied to permit conditions, it is not approvable under CAA section 110(a)(2) if applied to technology-based emission limitations approved into the SIP. Because of the potential for confusion, NAC 445B.326 should be withdrawn from further consideration as part of the Nevada SIP or must be revised to clarify that the affirmative defense applies only to actions brought for noncompliance of permit conditions and not to technology-based emission limitations approved into the SIP.

Lastly, while the submitted rules include a specific prohibition on approving a permit for any source where the degree of emission limitation required is affected by that amount of the stack height as exceeds good engineering practice stack height or any other dispersion technique, the relevant provision (i.e., 445B.308(3)) includes director's discretion (* * * if ''the Director determines'' * * *), which must be removed in order for EPA to approve the rules as meeting the requirements of 40 CFR 51.164.

The TSD provides more details concerning our proposal and rationale with respect to each of the issues discussed above in connection with the rules listed in table 2. In the TSD, we also identify certain other deficiencies in the rules listed in table 2 that we do not view as approvability issues but that we recommend for further clarification or correction.

Table 3 lists the permit-related rules in the existing SIP for which NDEP has requested rescission and for which we are proposing action. Table 3 lists these rules along with the dates they were submitted to EPA and the dates on which we published approval of them into the SIP in the **Federal Register**. As shown in table 3, we are proposing approval of rescission requests for NAQR article 13.1.3(3) and NAC 445.706(2) and proposing disapproval of rescission requests for NAQR article 1.60 and 1.72 and NAC 445.715.

TABLE 3.—EXISTING SIP RULES FOR WHICH THE STATE HAS REQUESTED RESCISSION AND FOR WHICH WE ARE PROPOSING ACTION

| Existing SIP rule | Title | Submittal date | Approval date and FR | Proposed action |
|---|---|---|---|---|
| Article 1.60 | Effective date | 12/29/78 | 08/27/81 at 46 FR 43141 | Disapproval. |
| NAQR Article 1.72 | Existing facility | 12/10/76 | 08/21/78 at 43 FR 36932 | Disapproval. |
| NAQR Article 13, subsection 13.1.3(3). | [BACT requirement in attainment areas]. | 03/17/80 | 04/14/81 at 46 FR 21758 | Approval. |
| NAC 445.706(2) | [payment of fees] | 10/26/82 | 03/27/84 at 49 FR 11626 | Approval. |
| NAC 445.715 | Operation permits: Revocation | 10/26/82 | 03/27/84 at 49 FR 11626 | Disapproval. |

We are proposing approval of the rescission request for NAQR article 13.1.3(3), which applies a control technology requirement defined by Best Available Control Technology (BACT) to certain new sources in attainment areas for the following reasons:

- Air pollution permit programs developed by States under section 110 of the Clean Air Act are not required to impose a BACT requirement on new sources in attainment areas so long as the program is not intended to satisfy part C of title I of the Act;
- Rescission of the SIP BACT requirement would only act prospectively and would not relax emission limits in any existing permits;
- Rescission would not eliminate the BACT requirement for all new sources in Nevada given that BACT continues to be a requirement for new major sources and major modifications in attainment areas under EPA's prevention of significant deterioration regulations at 40 CFR 52.21 (see 40 CFR 52.1485); and
- We find no evidence to suggest that Nevada is relying on the BACT requirement in NAQR article 13.1.3(3) to maintain the National Ambient Air Quality Standards (NAAQS) in any area.

Thus, we find that rescission of the BACT requirement in NAQR article 13.1.3(3) from the SIP would not interfere with continued attainment of the NAAQS and can therefore be approved under CAA section 110(l).

We are proposing approval of the rescission request for NAC 445.706(2), which relates to permit fees, because permit fee rules are no longer required for the NDEP portion of the Nevada SIP under CAA section 110(a)(2)(L) given our approval of NDEP's title V program (and related fee requirements). Our proposed approval of the rescission requests for NAQR article 13.1.3(3) and NAC 445.706(2) is contingent upon receipt of documentation from NDEP of notice and public hearing for repeal or rescission of these provisions as required under CAA section 110(l) for all SIP revisions.

We are proposing disapproval of the rescission request for NAQR article 1.60 because it defines a term, ''effective date,'' that is relied upon by other terms in the existing SIP that NDEP intends to retain, such as ''existing source'' as defined in NAQR article 1.73 and ''new source'' as defined in NAQR article 1.114. We find that the rescission requests for NAQR article 1.72 and NAC 445.715 could otherwise be approved but for the fact that we are proposing disapproval of the submitted set of rules comprising NDEP's current stationary source permitting program (listed in table 2, above). NAQR article 1.72 and NAC 445.715 need to be retained in connection with the stationary source permitting program as approved in the existing SIP, and thus we are proposing to disapprove their related rescission requests at this time. The TSD provides more details concerning our proposal and rationale with respect to each of the rules listed in table 3.

### *C. Public Comment and Proposed Action*

Under CAA section 110(k)(3) and for the reasons stated above, EPA is proposing, under the Clean Air Act, approval of certain revisions to the applicable Nevada SIP and full disapproval of certain other revisions. These revisions involve State rules governing applications for, and issuance of, permits for stationary sources, but not including pre-construction review and permitting of major sources and major modifications under parts C and D of title I of the Clean Air Act. NDEP submitted the rules that are the subject of this proposal on January 12, 2006 and re-submitted amendments to some of these rules on December 8, 2006.

Specifically, we are proposing approval of three specific submitted rules and disapproval of one such rule (see table 1, above); full disapproval of the rest of the submitted rules that comprise NDEP's stationary source permitting program (see table 2, above); and approval of two, and disapproval of three, requests for rescission of rules from the existing SIP (see table 3, above). The rescission requests for which we propose approval are contingent upon receipt of public notice and hearing documentation from the State. We will accept comments from the public on this proposal for the next 60 days.

Unless we receive convincing new information during the comment period, we intend to publish a final rule that will approve three rules shown in table 1, above, as revisions to the Nevada SIP;[5] disapprove one rule shown in table 1 and all of the submitted rules shown in table 2, above; rescind two rules shown in table 3, above, from the Nevada SIP (contingent upon receipt of public notice and hearing documentation); and retain three rules (also shown in table 3) in the Nevada SIP. If we finalize our disapproval of the relevant submitted rules, we will not be imposing sanctions under CAA section

[5] Final approval of these rules would supersede the following rules in the applicable SIP (superseding rules shown in parentheses) upon the established compliance date for any new or amended requirements in the superseding rules: NAC 445B.22083, as submitted on November 30, 2003 (NAC 445B.22083); NAQR article 2.16.1 (NAC 445B.250); and NAC 445.682 (NAC 445B.252).

179 and 40 CFR 52.31 because the State of Nevada has an approved stationary source permitting program in the applicable SIP and is not required under the Clean Air Act to submit its updated stationary source permitting program to EPA for approval.[6]

## III. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed 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 proposes to approve or disapprove new or amended state rules, or to approve or disapprove requests for rescission of previously-approved state rules, as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this proposed 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 proposes to approve or disapprove 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 proposed 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 proposes to approve or disapprove new or amended state rules, or to approve or disapprove requests for rescission of previously-approved state rules, implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

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

## List of Subjects in 40 CFR Part 52

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

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

Dated: April 4, 2007.

**Jane Diamond,**

*Acting Regional Administrator, Region IX.*

[FR Doc. E7–7285 Filed 4–16–07; 8:45 am]

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[6] In this context, we are referring to NDEP's program for issuing pre-construction permits for all new sources and modifications other than those for which part C (i.e., PSD) or part D (i.e., Nonattainment NSR) of title I of the CAA apply and for issuing operating permits under title I of the CAA (not title V).

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## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 63

**[EPA–HQ–OAR–2002–0034; FRL–8299–8]**

**RIN 2060–AM85**

## National Emission Standards for Hazardous Air Pollutants for Iron and Steel Foundries

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing amendments to the national emission standards for hazardous air pollutants for iron and steel foundries. The proposed amendments add alternative compliance options for cupolas at existing foundries and clarify several provisions to increase operational flexibility and improve understanding of the final rule requirements.

**DATES:** Comments must be received on or before May 17, 2007, unless a public hearing is requested by April 27, 2007. If a hearing is requested on the proposed rule, written comments must be received by June 1, 2007.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2002–0034, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–1741.
- *Mail:* National Emission Standards for Hazardous Air Pollutants for Iron and Steel Foundries Docket, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies.
- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–OAR–2002–0034. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic

comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the National Emission Standards for Hazardous Air Pollutants for Iron and Steel Foundries Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** Mr. Phil Mulrine, Sector Policies and Programs Division, Office of Air Quality Planning and Standards (D243–02), Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number: (919) 541–5289; fax number: (919) 541–3207; e-mail address: *mulrine.phil@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this action apply to me?*

The regulated categories and entities potentially affected by this proposed action include:

| Category | NAICS code [1] | Examples of regulated entities |
|---|---|---|
| Industry | 331511 | Iron foundries. Iron and steel plants. Automotive and large equipment manufacturers. |
| | 331512 | Steel investment foundries. |
| | 331513 | Steel foundries (except investment). |
| Federal government | | Not affected. |
| State/local/tribal government | | Not affected. |

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. To determine whether your facility would be regulated by this action, you should examine the applicability criteria in 40 CFR 63.7682 of subpart EEEEE (NESHAP for Iron and Steel Foundries). If you have any questions regarding the applicability of this action to a particular entity, consult either the air permit authority for the entity or your EPA regional representative as listed in 40 CFR 63.13 of subpart A (General Provisions).

### *B. What should I consider as I prepare my comments to EPA?*

Do not submit information containing confidential business information (CBI) to EPA through www.regulations.gov or e-mail. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711, Attention Docket ID EPA-HQ-OAR–2002–0034. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

### *C. Where can I get a copy of this document?*

In addition to being available in the docket, an electronic copy of this proposed action will also be available on the Worldwide Web (WWW) through the Technology Transfer Network (TTN). Following signature, a copy of this proposed action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg/*. The TTN provides information and technology exchange in various areas of air pollution control.

### *D. When would a public hearing occur?*

If anyone contacts EPA requesting to speak at a public hearing concerning the proposed amendments by April 27, 2007, we will hold a public hearing on May 2, 2007. If you are interested in attending the public hearing, contact Ms. Pamela Garrett at (919) 541–7966 to verify that a hearing will be held.

### *E. How is this document organized?*

The supplementary information in this preamble is organized as follows:

I. General Information
- A. Does this action apply to me?
- B. What should I consider as I prepare my comments to EPA?
- C. Where can I get a copy of this document?
- D. When would a public hearing occur?
- E. How is this document organized?

II. Background Information

III. Summary of Proposed Amendments
- A. Emissions Limitations
- B. Work Practice Standards
- C. Operation and Maintenance Requirements
- D. Compliance With Alternative Emissions Limits
- E. Monitoring Requirements
- F. Recordkeeping and Reporting Requirements
- G. Definitions
- H. Applicability
- I. Editorial Corrections

IV. Statutory and Executive Order Reviews
- A. Executive Order 12866: Regulatory Planning and Review
- B. Paperwork Reduction Act
- C. Regulatory Flexibility Act
- D. Unfunded Mandates Reform Act
- E. Executive Order 13132: Federalism
- F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
- G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
- H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

## II. Background Information

The national emission standards for hazardous air pollutants (NESHAP) for iron and steel foundries (40 CFR part 63, subpart EEEEE) establish emissions limitations and work practice requirements for the control of hazardous air pollutants (HAP) from foundry operations. The NESHAP implement section 112(d) of the Clean Air Act (CAA) by requiring all iron and steel foundries that are major sources of HAP to meet standards reflecting application of the maximum achievable control technology (MACT). The compliance date for most of the subpart EEEEE requirements is April 23, 2007.

After publication of the NESHAP (69 FR 21906, April 22, 2004), the American Foundry Society, the Alliance of Automobile Manufacturers, and the Steel Founders' Society of America filed petitions for reconsideration of the final rule. The American Foundry Society and the Steel Founders' Society of America also filed petitions for review of the final rule (*Steel Founders' Society of America* v. *U.S. EPA*, No. 04–1190, DC Cir.) and *American Foundry Society* v. *U.S. EPA*, No. 04–1191, DC Cir.). The concerns raised by the petitioners regarding the work practice standards for scrap management have been resolved by rule amendments issued on May 20, 2005 (97 FR 29400). The Steel Founders' Society of America petitioned the court for voluntary dismissal of their petition for review on March 23, 2006, and the court granted that petition on May 2, 2006. Thus, the only challenge to the NESHAP remaining before the court is the American Foundry Society petition for review, No. 04–1191. This proposed rule addresses the need for alternative emissions limits for cupolas at existing foundries and clarification of other rule requirements. EPA anticipates that these proposed amendments will resolve the remaining issues raised by the petitioners.

These amendments are set out in Attachment A to a settlement agreement between EPA and the petitioners that became final on March 9, 2007. In accordance with section 113(g) of the CAA, EPA published a notice of the proposed settlement agreement (72 FR 1986, January 17, 2007) and provided a 30-day comment period which ended on February 16, 2007. The settlement agreement requires that the EPA Administrator sign proposed amendments no later than April 9, 2007.

In addition, since publication of the final rule, we have identified a few minor editorial errors requiring correction. Rather than publish a separate notice of corrections, we are including those changes along with the proposed amendments.

## III. Summary of Proposed Amendments

### *A. Emissions Limitations*

#### 1. New Compliance Options for Cupola Metal Melting Furnaces

Section 63.7690(a)(2) of the NESHAP establishes HAP emissions limits for cupola metal melting furnaces at existing iron and steel foundries. The owner or operator may elect to comply with a limit of 0.006 grains per dry standard cubic foot (gr/dscf) of particulate matter (PM) or 0.0005 gr/dscf of total metal HAP. The PM emissions limits for cupolas were based on an evaluation of the average performance achieved by the top 12 percent of the cupola emissions sources (i.e., the ''MACT floor''). Because baghouses (the technology on which the MACT floor performance was based) are generally designed to meet a specified outlet concentration limit and because EPA Method 5 (40 CFR part 60, appendix A) directly determines concentration, a concentration-based emissions limit was selected for inclusion in the rule. The alternative concentration-based emissions limit expressed as total metal HAP provided equivalent metal HAP emissions reductions as the MACT floor PM emissions limit. We documented the determination of these emissions limits in a memorandum titled, ''Determination of the MACT Floor Metal HAP Emission Limits for Iron and Steel Foundries'', which is included in the docket for the final rule (Docket Item No. EPA–HQ–OAR– 2002–0034–0239).

As part of our discussions with the petitioners on technical issues, we recognized the need for an equivalent mass-based emissions limit for cupola melting furnaces to allow the use of control technologies that are designed on a mass removal basis rather than an outlet concentration basis. We reviewed the data previously identified for the top 12 percent of cupola emissions sources as well as the 6th percentile unit on which the promulgated emissions limit was based. These data indicate that the equivalent mass PM emissions rate for a baghouse operating at the MACT floor emissions limit for cupolas at existing sources (0.006 gr/dscf) is 0.10 pound per ton (lb/ton) of metal charged. In terms of total metal HAP, the MACT-equivalent mass emissions rate for cupolas at existing sources is 0.008 lb/ton. We documented the determination of these mass-based emissions limits in a memorandum titled, ''Determination of a MACT Floor Equivalent Emission Limit for Cupola Melting Furnaces,'' which is included in the docket for this rulemaking (Docket Item EPA–HQ–OAR–2002–0034–0223). Therefore, we are proposing to amend the emissions limits in 40 CFR 63.7690(a)(2) for cupolas at existing sources to add alternative limits of 0.10 lb/ton of PM or 0.008 lb/ton of total metal HAP.

#### 2. Fugitive Emissions Opacity Limit

Some of the petitioners requested that we revise the opacity limit for fugitive emissions in 40 CFR 63.7690(a)(7) to clarify that the limit does not apply to fugitive emissions that are unrelated to emissions sources subject to the NESHAP. According to the petitioners, the rule could be interpreted to apply to fugitive emissions from foundry-related operations not subject to the rule or operations in other source categories that may be co-located in foundries.

Some foundries are co-located with other manufacturing processes that are housed in separate buildings. We did not intend to set emissions limitations for these co-located operations. Therefore, we are clarifying that the opacity emissions limitations apply only to buildings that house iron and steel foundry emissions sources. If nonfoundry operations are housed in the same building as the foundry operations, the foundry must comply with the opacity limits for that building.

#### 3. Triethylamine Emissions Limit

In response to the petitioners' suggestion, we are proposing to clarify the language of the emissions limit for triethylamine (TEA) in § 63.7690(a)(11) by replacing the reference to test conditions (''as determined when scrubbing with fresh acid solution'') with the phrase ''according to the performance test procedures in § 63.7732(g)'' since § 63.7732(g) contains the requirement to conduct the test when scrubbing with fresh acid solution.

Although the existing NESHAP primarily address the control of HAP metals, there are potential opportunities for foundries to reduce emissions of other HAP such as TEA through the use of low-HAP binders and other pollution prevention (P2) techniques. Current information indicates that these P2 methods show promise, but they are not appropriate for all foundries or casting methods. And, in some cases, it can be quite costly for the foundry to incorporate P2 methods into their

overall process. EPA encourages foundries to explore the various P2 options available and use them when appropriate and cost-effective to further reduce their HAP footprint.

*B. Work Practice Standards*

1. Capture and Collection Systems

Section 63.7690(b)(1) of the NESHAP requires the owner or operator of an iron or steel foundry to install, operate, and maintain a capture and collection system for all emissions sources subject to a limit or standard for volatile organic hazardous air pollutants (VOHAP) or TEA in 40 CFR 63.7690(a)(8) through (11). One petitioner was concerned that this provision could be construed to require capture and collection systems for electric arc furnaces and electric induction furnaces, even though these furnaces are not directly subject to a VOHAP limit. According to the petitioner, the scrap certification and inspection/selection requirements in 40 CFR 63.7700 could be understood as work practice standards to limit organics from entering electric arc furnaces and electric induction furnaces. It could be inferred that a ''standard'' limiting VOHAP does exist for these furnaces and therefore, a capture and collection system is required. A similar concern exists for foundries that decide to meet the work practice requirement in 40 CFR 63.7700(e) instead of the VOHAP emissions limit in 40 CFR 7690(a)(9). The petitioner requests that EPA confirm that the scrap certification and inspection/selection requirements are not considered VOHAP work practice standards which would necessitate a capture and collection system.

It is our intent that the requirements for capture and collection systems apply to emissions sources subject to an emissions limit but not to an emissions source subject to work practice standards. A capture and control system that routes emissions to an add-on control device is not needed because the work practice acts to reduce or prevent the release of emissions. In response to the petitioner's concerns, we are proposing to clarify the requirement in § 63.7690(b)(1) by deleting the reference to ''standard''.

2. Scrap Management

Section 63.7700(a) of the NESHAP establishes work practice standards to minimize the organics and HAP metals in charge materials. The owner or operator must comply with certification requirements in § 63.7700(b) or operate according to a scrap selection and inspection plan required in § 63.7700(c). One commenter requested that the work practice standards specify that the requirements for the certification and the written plan specify ''chlorinated'' plastics. Plastics were included in the list of undesirable scrap material primarily because certain types of plastics, such as polyvinyl chloride, could lead to the formation of dioxins. We did not intend to make certain metal components, such as Quiet Steel(®), that contain some plastics that cannot be removed from the scrap unrecyclable. Recycling these materials in foundries is environmentally preferable to landfilling these materials. Therefore, to clarify our intent, we now specify that it is ''chlorinated'' plastics that are to be removed from the scrap material.

The petitioner also objected to the requirement in 40 CFR 63.7700(c)(2) for the owner or operator to obtain and maintain onsite a copy of the procedures used by the scrap supplier for either removing accessible mercury switches or for purchasing automobile bodies that have had the switches removed. According to the petitioner, it is difficult for some plants to obtain such written procedures from scrap suppliers. In this case, the plant should be able to document their attempts to obtain a copy of the procedures. The proposed amendments include an alternative procedure that allows the plant to document their attempts to obtain a copy of the procedures from the scrap suppliers servicing their area. We note, however, that under 40 CFR 63.7700(c)(2) the materials acquisition program must specify that the scrap supplier remove accessible mercury switches from the trunks and hoods of any automotive bodies contained in the scrap in addition to accessible lead components such as batteries and wheel weights. It is incumbent on the foundry owner or operator to communicate these specifications to their scrap suppliers.

3. Scrap Preheaters

Section 63.7700(e) of the rule establishes requirements for scrap preheaters at an existing iron and steel foundry. The owner or operator must install, operate, and maintain a gas-fired preheater according to 40 CFR 63.7700(e)(1) or charge only certain materials according to 40 CFR 63.7700(e)(2). One petitioner was concerned that the language in 40 CFR 63.7700(e)(1) could be interpreted to require foundries to install gas-fired preheaters, even when not necessary for foundry operations. It was not our intent to mandate installation of preheaters, but rather to establish requirements for those existing facilities that use scrap preheaters in lieu of selecting the option in 40 CFR 63.7700(e)(2). Therefore, we are proposing to clarify § 63.7700(e)(1) by deleting the word ''install''. Instead, the owner or operator would be required to operate and maintain a gas-fired preheater where the flame directly contacts the scrap charged.

*C. Operation and Maintenance Requirements*

One petitioner suggested that the requirement in 40 CFR 63.7710(b) for an operation and maintenance plan would be better understood if it clarified the emissions sources subject to the plan requirements. The proposed amendments clarify that the requirement applies to each capture and collection system and control device for an emissions source subject to a PM, metal HAP, TEA, or VOHAP emissions limit in 40 CFR 63.7690(a).

*D. Compliance With Alternative Emissions Limits*

The existing NESHAP establishes PM emissions limits and alternative emissions limits expressed in total metal HAP for cupolas and other foundry processes. In response to requests by the petitioners, we are proposing amendments to 40 CFR 63.7732, 40 CFR 63.7690, and 40 CFR 63.7734 to clarify our original intent to allow foundries to demonstrate compliance with any of the applicable alternative emissions limitations that are provided for a specific emissions source. When multiple alternative emissions limitations are provided for a specific emissions source, iron and steel foundries can demonstrate initial compliance with any of the alternative limits; they are not required to comply with all of the alternative emissions limits at any one time. We are also clarifying a facility's ability to change their selected compliance alternative and the procedures needed to effect that change. However, regarding continuous compliance, the facility is expected to continuously comply with the alternative emissions limit that was selected as their compliance option as demonstrated in their most recent performance test. The facility may choose to alter their selected alternative but must continue to comply with the previously selected alternative until they successfully demonstrate compliance with the new alternative emissions limitation.

We are also proposing requirements for determining initial compliance for cupola melting furnaces at existing iron and steel foundries that are subject to the new mass rate emissions limit. Revisions to 40 CFR 63.7732(b) and (c) would include new equations for

determining PM or total metal HAP emissions from cupolas in the lb/ton format. Other amendments to 40 CFR 63.7732(b) and (c) would clarify test method and emissions source sampling requirements.

1. Single Performance Test for Control Devices Serving Multiple Units

Section 63.7734 of the NESHAP requires iron and steel foundries to demonstrate initial compliance with PM emissions limits by conducting a performance test for each process unit according to the procedures in 40 CFR 63.7732. One petitioner pointed out that a common emissions control system may serve two similar or identical cupolas or serve multiple furnaces or process units. According to the petitioner, a requirement for separate tests of the control device while the emissions sources are operating is redundant and imposes unnecessary costs because the control device should perform the same on each identical furnace.

We acknowledge that there are certain control device configurations that we cannot fully address within the rule requirements. These situations are best evaluated on a case-by-case basis. Therefore, we are proposing to resolve the petitioner's concern by adding a new provision to the performance test requirements. The proposed amendment requires foundries to submit a site-specific test plan for the situation described by the petitioner or other situations not expressly considered in 40 CFR 63.7734. The site-specific test plan, which is subject to approval by the Administrator, would explain the procedures that would be followed during the test, such as operation of the unit or units at the maximum operating condition of the control system. The Administrator or delegated authority would determine on a case-by-case basis if one representative furnace/control device configuration may be tested.

2. Sampling Procedure for Electric Arc Furnaces, Electric Induction Furnaces, and Scrap Preheaters

One petitioner objected to the sampling instructions in 40 CFR 63.7732(c)(4) and (5) for electric arc and electric induction metal melting furnaces (when metal is being melted) and scrap preheaters (when scrap is being preheated) as inappropriate restrictions on performance testing. Many operations that occur during the furnace melting process are considered part of typical operation. Scrap preheaters operate on a batch basis and do not heat scrap for extended periods of time. It is not practical to start and stop tests for these emissions sources over the course of a heat until the required sampling time is accumulated. According to the petitioner, testing during all phases of operations is consistent with the requirement in § 63.6(f)(2)(iii)(A) of the NESHAP General Provisions (40 CFR part 63, subpart A), which state that a performance test must be conducted under representative operating conditions of the source.

In response to these concerns, we are proposing to clarify that the initial compliance demonstrations for electric arc metal melting furnaces, electric induction metal melting furnaces, and scrap preheaters should be conducted under normal production conditions. The emissions limitations derived for these sources used data for various production cycles, including charging, melting, back-charging, and tapping. As the MACT floor emissions limitation was based on various production cycles and because significant PM and metal HAP emissions can occur from these other production cycles, the promulgated requirement to test only during melting is being amended to more accurately align the testing requirements to the testing procedures used as the basis of the MACT emissions limitation. The proposed amendments require sampling during normal operating conditions, which may include charging, melting, alloying, refining, slagging, and tapping (for a furnace) or charging, heating, and discharging (for a scrap preheater).

3. Minimum Sampling Volume for Total Metal HAP

One petitioner pointed out that it was unnecessary to specify the minimum sample volume for test runs by EPA Method 29 (40 CFR part 60, appendix A) because the method already includes a requirement. The proposed amendments remove this requirement from 40 CFR 63.7732(c)(2).

4. Opacity Test

Section 63.7732(d) of the existing rule establishes the requirements for opacity tests. The proposed amendments instruct the certified observer how to take opacity readings by Method 9 (40 CFR part 60, appendix A) for a building that has many openings. This issue was not addressed in the NESHAP. Under the proposed amendments, the observer would be allowed to take readings from a limited number of openings or vents that appear to have the highest opacities instead of making observations for each opening or vent from the building or structure. Alternatively, a single observation for the entire building would be allowed if the fugitive release points afford such an observation.

Section 63.7732(d)(2) requires that opacity observations to demonstrate compliance with the fugitive emissions opacity standards in 40 CFR 63.7690(a)(7) overlap with the PM performance tests. One petitioner stated that it is not feasible for opacity observations to overlap with PM performance tests in all cases because subsequent tests are required every 6 months for opacity and every 5 years for PM emissions. The petitioner raised the concern that the rule could have been read to require a PM performance test during each opacity test; however, this was not our intent. In response to the petitioner's concern, we are proposing amendments to 40 CFR 63.7732(d)(2) to clarify that opacity tests are to be conducted during PM performance tests, but that PM performance tests are not required to occur during the semiannual opacity tests.

5. Alternative Test Method

Section 63.7732(g)(v) of the NESHAP requires the use of EPA Method 18 (40 CFR part 60, appendix A) to determine the triethylamine (TEA) concentration of gases from the TEA cold box mold or core making line. One petitioner requested EPA to allow an alternative to Method 18 because the detection limit of Method 18, which is approximately 1 part per million by volume (ppmv), is not significantly less than the emissions limit. The petitioner believed this could make compliance determinations problematic. According to the petitioner, operators will need to use the alternative silica gel adsorption tube sampling technique in section 8.2.4 of Method 18 to achieve lower detection limits, but that not all facilities will know to specify the alternative sampling techniques to their testing contractors. The commenter stated that the alternative methodology is equivalent to National Institute of Occupational Safety and Health (NIOSH) Method 2010 and requested that the rule allow the NIOSH method as an acceptable alternative. If the rule specifies the NIOSH method as an alternative, facilities can ensure that proper sampling techniques are used to achieve the low detection limits.

We agree that NIOSH Method 2010 is an acceptable and equivalent sampling alternative to EPA Method 18. However, the NIOSH method does not include quality assurance performance requirements. Therefore, we are proposing NIOSH Method 2010, ''Amines, Aliphatic'' (incorporated by reference-see § 63.14) as an acceptable alternative to EPA Method 18 (40 CFR

part 60, appendix A) provided the performance requirements outlined in section 13.1 of EPA Method 18 are satisfied. Method 2010 is included in the *NIOSH Manual of Analytical Methods* (4th edition, NIOSH Publication 94–113, August 1994). The manual is available from the Government Printing Office and the National Technical Information Service (NTIS), NTIS publication no. PB95154191. The NIOSH method may also be found on the NIOSH Web site at the following address: *www.cdc.gov/niosh/nmam/method-4000.html.*

6. Procedures for Establishing Operating Limits

One petitioner pointed out that the procedures for establishing control device operating limits in 40 CFR 63.7733(b) through (d) should not instruct operators to compute and record the 3-hour average parameter value because some sampling durations are based on sampling volumes which do not correspond to a 3-hour period. This requirement could be misinterpreted to require performance testing over a period of at least 3 hours.

We originally intended that the performance test consist of three 1-hour tests runs, and that the control device parameter operating limit would be based on the average of these data. However, there are instances where the duration of the sampling runs may be greater than 1 hour. The proposed amendments delete the reference to the 3-hour average from the test procedures and clarify that the operator is to compute and record the average operating parameter value for each valid sampling run in which the applicable limit is met.

7. Repeat Performance Tests

One petitioner requested EPA to clarify that demonstrating compliance by one method does not preclude a demonstration of compliance using an alternative method at a later date. EPA agrees that a plant may elect to demonstrate compliance with an alternative emissions limit during the repeat performance tests conducted at least every 5 years. Furthermore, the plant may elect to conduct a performance test earlier than 5 years in order to change an operating limit or to demonstrate compliance with a different alternative emissions limit. The proposed amendments clarify these testing options in amendments to 40 CFR 63.7731(a). A test conducted for the purpose of changing operating limits is subject to notification requirements in 40 CFR 63.7750(d).

*E. Monitoring Requirements*

1. Baghouse Monitoring Requirements

Section 63.7740(b) of the existing NESHAP requires a bag leak detection system for each negative pressure baghouse and for each positive pressure baghouse equipped with a stack where the baghouse is applied to meet any PM or total metal HAP emissions limitation in subpart EEEEE. This provision also requires inspection of each baghouse according to the requirements in 40 CFR 63.7740(b) (1) through (8). One petitioner states that the final rule appears to omit any monitoring requirements for positive pressure baghouses not equipped with a stack. Although these units are not required to install a bag leak detection system, we intended to require the visual inspection of these positive pressure baghouses to ensure their proper performance. Therefore, we are proposing amendments to clarify our original intent to require monitoring inspections of positive baghouses that are not equipped with a stack. The proposed amendments to 40 CFR 63.7740(b) clarify the text to ensure that the requirements in this paragraph for installing and using a bag leak detection system apply only to negative pressure baghouses and positive pressure baghouses equipped with a stack. The inspection requirements would be separated and placed in a new paragraph (c) and clarified to state that the inspection requirements apply to each baghouse regardless of type. The proposed amendments to 40 CFR 63.7740 also renumber the paragraphs which follow new paragraph (c). Similar clarifications would be made to the requirements for demonstrating continuous compliance in 40 CFR 63.7743(c).

2. Demonstration of Initial Compliance With Bag Leak Detection System Operation and Maintenance Requirements

Section 63.7736(c) of the existing NESHAP instructs the owner or operator how to demonstrate initial compliance with the requirements for bag leak detection systems. Under 40 CFR 63.7736(c)(1), the owner or operator must submit the bag leak detection system monitoring plan to the Administrator for approval according to the requirements in 40 CFR 63.7710(b). One petitioner requested EPA to clarify this provision because the requirement could be interpreted to necessitate submission of the monitoring plan independent of the operation and maintenance plan. Our intent in the existing rule was to include the bag leak detection system information in the operation and maintenance plan to streamline the approval process and avoid the administrative costs associated with a separate submission. In addition, having one integrated plan provides a centralized reference tool for control device operation and maintenance requirements. The proposed amendments to 40 CFR 63.7736(c)(1) clarify the requirement to submit the bag leak system monitoring information to the Administrator within the written operation and maintenance plan for approval according to the requirements in § 63.7710(b).

3. Installation, Operation, and Maintenance Requirements for Monitors

One petitioner requested that EPA revise the requirements for operation and maintenance of continuous parameter monitoring systems (CPMS) to more clearly describe the inspection requirements. Under the operation and maintenance requirements for flow measurement devices in 40 CFR 63.7741(a)(1)(iv), the owner or operator must perform monthly inspections of all flow sensor components for integrity, all electrical connections for continuity, and all mechanical connections for leakage. The proposed amendments change this provision to require a monthly visual inspection of all components, including all electrical and mechanical connections for proper functioning. The same changes would be made to the monthly inspection requirements for other types of monitoring devices in §§ 63.7741(a)(2)(vi), (c)(1)(vi), (c)(2)(iv), (d)(8), and (e)(2)(iv).

We are proposing these changes in response to the concerns expressed by one petitioner who explained that the changes are needed to ensure the ability of a facility to comply on a monthly basis. According to the petitioner, the ability of a facility to specifically inspect for ''integrity'', ''continuity'' and ''leakage'' depends on where the components are located, but a facility would be able to readily determine proper functioning. One the facility determines that a connection is not working properly, additional steps can be taken to address the problem, which may include removing a barrier to allow access to the connection. In addition, testing of the electrical connections for continuity is not necessary when indicators are routinely used to show whether the current is flowing. A visual inspection is sufficient to ensure that current is flowing to each electrical connection.

The proposed amendments also revise the requirement for pressure

measurement devices in 40 CFR 63.7741(a)(2)(iii) and 40 CFR 63.7741(c)(1)(iv) for a ''daily check of the pressure tap for pluggage.'' We are proposing to require a daily check for pluggage when using a regular pressure tap and a monthly check when using a non-clogging pressure tap. Less frequent checks for non-clogging pressure taps would encourage use of newer technology and provide an inspection frequency commensurate with the operation of a non-clogging pressure tap. The proposed amendments also clarify the requirements for pressure measurement devices in 40 CFR 63.7741(a)(2)(iv) and 40 CFR 63.7741(c)(1)(iv) to allow the use of a manometer or equivalent device for calibrations.

*F. Recordkeeping and Reporting Requirements*

The proposed amendments clarify two of the recordkeeping requirements in 40 CFR 63.7752(a)(4). The requirement for the annual quantity of chemical binder or coating materials used to make molds and cores would be revised to require the annual quantity of chemical binder or coating materials used to coat or make molds and cores. We inadvertently omitted the word ''coat'' from the original rule language. The requirement for records of the annual quantity of HAP used would state that records are required of the annual quantity of HAP used in these chemical binder or coating materials at the foundry, as calculated from the recorded quantities and chemical compositions (from Material Data Safety Sheet or other documentation). This proposed amendment clarifies that the HAP records requirement is specific to the chemicals used in the mold and core-making and coating operations and not to other HAP materials used at the foundry such as solvents used to clean or degrease equipment.

Proposed amendments to the reporting requirements allow foundries to report the results of the semiannual opacity tests within the semiannual reports rather than having to submit these semiannual documents separately. This change would reduce the administrative costs associated with submission of separate reports. Other proposed amendments to the reporting requirements clarify the requirements for an immediate startup, shutdown, and malfunction report by adding the same language used in 40 CFR 63.10(d)(5)(ii). The proposed amendments require an immediate report if you had a startup, shutdown, or malfunction and the source exceeded any applicable emissions limitation in 40 CFR 63.7690.

*G. Definitions*

We are proposing to add definitions of the terms ''off blast'' and ''on blast'' to 40 CFR 63.7765. These definitions would clarify that blast conditions used to bring the cupola up to operating temperature during start-up are not covered by the VOHAP parameter operating limit in 40 CFR 63.7690(b)(3). The existing parameter operating limit requires the foundry to operate each combustion device applied to emissions from a cupola that is subject to the VOHAP emissions limit so that the 15-minute average combustion zone temperature does not fall below a certain level. The operating limit states that periods when the cupola is off-blast and for 15 minutes after going on-blast from an off-blast condition are not included in the 15-minute average combustion zone temperature. The term ''off blast'' would be defined as those periods of cupola operation when the cupola is not actively being used to produce molten metal. Off-blast conditions include cupola startup procedures as defined in the startup, shutdown, and malfunction plan. Off-blast conditions also include idling conditions when the blast air is turned off or down to the point that the cupola does not produce additional molten metal. The term ''on blast'' would mean those periods of cupola operation when combustion (blast) air is introduced to the cupola furnace and the furnace is capable of producing molten metal. On blast conditions are characterized by both blast air introduction and molten metal production.

The petitioners also raised the concern that only a limited number of metal constituents were evaluated when assessing the total metal HAP emissions limits. They noted that not all constituents for which EPA Method 29 (40 CFR part 60, appendix A) is applicable are HAP. They also sought clarification on how to calculate the total metal HAP if certain constituents were below the analytical detection limit.

The evaluation of the total metal HAP emissions limits actually included most Method 29 HAP constituents, although it did not include phosphorus. The evaluation did not include detection limits or other non-zero values for metal constituents measured below detection limit. To address the petitioners' concerns, we are proposing to revise the definition of ''total metal HAP'' to specify the analytes to be included and how non-detect values are to be used in calculating the total metal HAP quantity. The proposed definition is based on the analytes and methods used to derive the total metal HAP alternative. The definition of ''total metal HAP'' would be the sum of the concentrations of antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese, mercury, nickel, and selenium as measured by EPA Method 29 (40 CFR part 60, appendix A). Only the measured concentration of the listed analytes that are present at concentrations exceeding one-half of the quantification limit of the analytical method are used in the sum. If any of the analytes are not detected or are detected at concentrations less than one-half the quantification limit of the analytical method, the concentration of those analytes is assumed to be zero for the purposes of calculating the total metal HAP for this subpart.

We are also proposing to clarify the definition of ''scrap preheater'' to differentiate scrap dryers that are used solely to remove moisture from the scrap metal from scrap preheaters. Scrap preheaters are used to preheat the metal scrap and reduce the energy required to effect melting. Most scrap preheaters heat the scrap metal to 400 degrees Fahrenheit or higher while scrap dryers operate at lower temperatures and are used solely to remove moisture from the scrap metal as a safety consideration when operating an electric induction furnace. Because of the lower operating temperatures, we do not believe that scrap dryers are a significant potential source for VOHAP emissions. We are proposing to amend the definition of ''scrap preheater'' to state that scrap dryers, which are used solely to remove water from metal scrap that does not contain any volatile impurities or other tramp materials, are not considered to be scrap preheaters for purposes of this subpart.

*H. Applicability*

One of the petitioners asked EPA to reference the CAA or NESHAP General Provisions definition of ''major source'' in 40 CFR 63.7681 (Am I subject to this subpart?). We are proposing to add a reference to 40 CFR 63.2 as requested by the commenter. This addition would clarify that when we refer to a ''major source'' of hazardous air pollutants in 40 CFR 63.7681, we are referring to the definition of major source in 40 CFR 63.2, and not, for example, to the definition of major source in 40 CFR 51.166.

*I. Editorial Corrections*

We are proposing to correct a grammatical error in 40 CFR 63.7710(b), which should refer to an emissions

source subject to a (rather than ''an'') PM, metal HAP, TEA, or VOHAP emissions limit in 40 CFR 63.7690(a). A comma would be added to 40 CFR 63.7734(a)(11). The words ''as possible'' were inadvertently omitted from 40 CFR 63.7741(a)(2)(i) and would be added. The proposed amendments also correct a misspelling of the word ''calendar'' in 40 CFR 63.7700(c)(3)(iii).

## IV. Statutory and Executive Order Reviews

### *A. Executive Order 12866: Regulatory Planning and Review*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it may ''raise novel legal or policy issues.'' Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

### *B. Paperwork Reduction Act*

This action does not impose any new information collection burden. The proposed amendments add a new compliance alternative, allow a new alternative test method, and clarify requirements in the existing rule. One proposed amendment to the baghouse monitoring requirements clarifies our original intent to require inspections of positive pressure baghouses not equipped with a stack. No new burden is associated with this proposed requirement because the burden was included in the approved information collection request (ICR) for the existing rule. The OMB has previously approved the information collection requirements contained in the existing regulation (40 CFR part 63, subpart EEEEE) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0543, EPA ICR number 2096.02. A copy of the OMB-approved ICR may be obtained from Susan Auby, Collection Strategies Division, U.S. EPA (2822T), 1200 Pennsylvania Ave., NW., Washington, DC 20460, by e-mail at *auby.susan@epa.gov*, or by calling (202) 566–1672.

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; 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 part 63 are listed in 40 CFR part 9.

### *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 would not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

For the purposes of assessing the impacts of the proposed amendments on small entities, small entity is defined as: (1) A small business that meets the Small Business Administration size standards for small businesses found at 13 CFR 121.201 (less than 500 employees for NAICS codes 331511, 331512, and 331513); (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 the proposed amendments 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 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.

There would not be any adverse impacts on any source (including any small entity) as a result of the proposed amendments because the proposed amendments provide an overall economic benefit to entities subject to the rule. The proposed amendments do not create any new requirements or burdens that were not already included in the economic impact assessment for the existing rule. The proposed amendments relieve regulatory burden for all entities as a result of the operational flexibility afforded by the alternative compliance option, alternative test method, and provisions allowing plants to combine multiple reports into a single submission. We have therefore concluded that these proposed amendments will relieve regulatory burden for all affected small entities. We continue to be interested in the potential impacts of the proposed action 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), Pub. L. 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 by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 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 the proposed amendments do 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. The proposed amendments are expected to result in an overall reduction in expenditures for the private sector and are not expected to impact State, local, or tribal governments. Thus, the proposed amendments are not subject to the requirements of sections 202 and 205 of the UMRA. In addition, the proposed amendments do not significantly or uniquely affect small governments. The proposed amendments contain no requirements that apply to such governments, and impose no obligations upon them.

*E. Executive Order 13132: Federalism*

Executive Order 13132 (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'' are 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.''

The proposed amendments do not have federalism implications. They would 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. The proposed amendments do not impose any requirements on State and local governments. Thus, Executive Order 13132 does not apply to the proposed amendments.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local government, EPA specifically solicits comments on this proposed rule from State and local officials.

*F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175 (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.'' The proposed rule amendments do not have tribal implications, as specified in Executive Order 13175. They would 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. The proposed amendments impose no requirements on tribal governments. Thus, Executive Order 13175 does not apply to the proposed amendments.

*G. Executive Order 13045: Protection of Children From Environmental Health 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, EPA 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 Executive Order has the potential to influence the regulation. These proposed amendments are not subject to the Executive Order because they are based solely on technology performance.

*H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use*

These proposed amendments are 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 they are not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that these proposed amendments are not likely to have any adverse energy effects because energy requirements would remain at the existing level. No additional pollution controls or other equipment that would consume energy are required by the proposed amendments.

*I. National Technology Transfer Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) of 1995 (Pub. L. No. 104–113, Section 12(d), 15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. The VCS are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency does not use available and applicable VCS.

The proposed amendments involve technical standards. These proposed amendments include an alternative methodology, the NIOSH Method 2010, ''Amines, Aliphatic'' (incorporated by reference in § 63.14) for EPA Method 18 (40 CFR part 60, appendix A) to determine the triethylamine (TEA) concentration of gases from the TEA cold box mold or core making line provided the performance requirements outlined in section 13.1 of EPA Method 18 are satisfied.

Consistent with the NTTAA, EPA conducted searches to identify voluntary consensus standards in addition to these EPA and alternative methods. No applicable voluntary consensus standards were identified.

For the methods required or referenced by this proposed rule, a source may apply to EPA for permission to use alternative test methods or alternative monitoring requirements in place of any required testing methods, performance specifications, or procedures under §§ 63.7(f) and 63.8(f) of Subpart A of the General Provisions.

EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to identify potentially-applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that these proposed amendments will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. These proposed amendments do not relax the control measures on sources regulated by the rule and therefore will not cause emissions increases from these sources.

**List of Subjects in 40 CFR Part 63**

Environmental protection, Air pollution control, Hazardous substances, Incorporation by reference, Reporting and recordkeeping requirements.

Dated: April 9, 2007.

**Stephen L. Johnson,**

*Administrator.*

For the reasons stated in the preamble, part 63, title 40, chapter I, of the Code of Federal Regulations is proposed to be amended as follows:

## PART 63—[AMENDED]

1. The authority citation for part 63 continues to read as follows:

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

## Subpart A—[AMENDED]

2. Section 63.14 is amended by adding paragraph (k)(2) to read as follows:

### § 63.14 Incorporations by reference.

* * * * *

(k) * * *

(2) The following method as published in the National Institute of Occupational Safety and Health (NIOSH) test method compendium, ''NIOSH Manual of Analytical Methods'', NIOSH publication no. 94–113, Fourth Edition.

(i) NIOSH Method 2010, ''Amines, Aliphatic,'' Issue 2 (and subsequent revisions), August 15, 1994, IBR approved for § 63.7732(g)(1)(v) of Subpart EEEEE of this part.

(ii) [Reserved]

## Subpart EEEEE—[Amended]

3. Section 63.7681 is amended by revising the second sentence to read as follows:

### § 63.7681 Am I subject to this subpart?

* * * Your iron and steel foundry is a major source of HAP for purposes of this subpart if it emits or has the potential to emit any single HAP at a rate of 10 tons or more per year or any combination of HAP at a rate of 25 tons or more per year or if it is located at a facility that emits or has the potential to emit any single HAP at a rate of 10 tons or more per year or any combination of HAP at a rate of 25 tons or more per year as defined in § 63.2.

4. Section 63.7690 is amended by:

a. Revising paragraphs (a) introductory text;

b. Revising paragraph (a)(2);

c. Revising paragraph (a)(7);

d. Revising paragraphs (a)(11)(i) and (ii); and

e. Revising paragraph (b)(1) introductory text to read as follows:

### § 63.7690 What emissions limitations must I meet?

(a) You must meet the emissions limits or standards in paragraphs (a)(1) through (11) of this section that apply to you. When alternative emissions limitations are provided for a given emissions source, you are not restricted in the selection of which applicable alternative emissions limitation is used to demonstrate compliance.

* * * * *

(2) For each cupola metal melting furnace at an existing iron and steel foundry, you must not discharge emissions through a conveyance to the atmosphere that exceed either the limit for PM in paragraph (a)(2)(i) or (ii) of this section or, alternatively the limit for total metal HAP in paragraph (a)(2)(iii) or (iv) of this section:

(i) 0.006 gr/dscf of PM; or

(ii) 0.10 pound of PM per ton (lb/ton) of metal charged, or

(iii) 0.0005 gr/dscf of total metal HAP; or

(iv) 0.008 lb/ton of total metal HAP.

* * * * *

(7) For each building or structure housing any iron and steel foundry emissions source at the iron and steel foundry, you must not discharge any fugitive emissions to the atmosphere from foundry operations that exhibit opacity greater than 20 percent (6-minute average), except for one 6-minute average per hour that does not exceed 27 percent opacity.

* * * * *

(11) * * *

(i) You must not discharge emissions of TEA through a conveyance to the atmosphere that exceed 1 ppmv, as determined according to the performance test procedures in § 63.7732(g); or

(ii) You must reduce emissions of TEA from each TEA cold box mold or core making line by at least 99 percent, as determined according to the performance test procedures in § 63.7732(g).

(b) * * *

(1) You must install, operate, and maintain a capture and collection system for all emissions sources subject to an emissions limit for VOHAP or TEA in paragraphs (a)(8) through (11) of this section.

* * * * *

5. Section 63.7700 is amended by:

a. Revising the last sentence in paragraph (b);

b. Revising paragraphs (c)(1)(i) and (ii);

c. Revising the last sentence in paragraph (c)(2);

d. Revising paragraph (c)(3)(iii); and

e. Revising paragraph (e)(1) to read as follows:

### § 63.7700 What work practice standards must I meet?

* * * * *

(b) * * * Any post-consumer engine blocks, post-consumer oil filters, or oily turnings that are processed and/or cleaned to the extent practicable such that the materials do not include lead components, mercury switches, chlorinated plastics, or free organic liquids can be included in this certification.

(c) * * *

(1) * * *

(i) For scrap charged to a scrap preheater, electric arc metal melting furnace, or electric induction metal melting furnace, specifications for scrap materials to be depleted (to the extent practicable) of the presence of used oil filters, chlorinated plastic parts, organic liquids, and a program to ensure the scrap materials are drained of free liquids; or

(ii) For scrap charged to a cupola metal melting furnace, specifications for scrap materials to be depleted (to the extent practicable) of the presence of chlorinated plastic, and a program to ensure the scrap materials are drained of free liquids.

(2) * * * You must either obtain and maintain onsite a copy of the

procedures used by the scrap supplier for either removing accessible mercury switches or for purchasing automobile bodies that have had mercury switches removed, as applicable, or document your attempts to obtain a copy of these procedures from the scrap suppliers servicing your area.

(3) * * *

(iii) The inspection procedures must include provisions for rejecting or returning entire or partial scrap shipments that do not meet specifications and limiting purchases from vendors whose shipments fail to meet specifications for more than three inspections in one calendar year.

* * * * *

(e) * * *

(1) You must operate and maintain a gas-fired preheater where the flame directly contacts the scrap charged; or

* * * * *

6. Section 63.7710 is amended by revising the first sentence in paragraph (b) introductory text to read as follows:

**§ 63.7710 What are my operation and maintenance requirements?**

* * * * *

(b) You must prepare and operate at all times according to a written operation and maintenance plan for each capture and collection system and control device for an emissions source subject to a PM, metal HAP, TEA, or VOHAP emissions limit in § 63.7690(a). * * *

* * * * *

7. Section 63.7731 is amended by revising the first sentence in paragraph (a) to read as follows:

**§ 63.7731 When must I conduct subsequent performance tests?**

(a) You must conduct subsequent performance tests to demonstrate compliance with all applicable PM or total metal HAP, VOHAP, and TEA emissions limitations in § 63.7690 for your iron and steel foundry no less frequently than every 5 years and each time you elect to change an operating limit or to comply with a different alternative emissions limit, if applicable. * * *

* * * * *

8. Section 63.7732 is amended by:

a. Revising paragraph (a);

b. Revising paragraphs (b) introductory text, (b)(4), and (b)(5) and adding paragraph (b)(6);

c. Revising paragraphs (c) introductory text, (c)(2), (c)(4), and (c)(5) and adding paragraph (c)(6);

d. Revising paragraph (d) introductory text, adding two sentences to the end of paragraph (d)(1), and revising paragraph (d)(2);

e. Revising paragraph (e)(3);

f. Revising paragraphs (f)(2)(ix) and (f)(3);

g. Revising paragraphs (g)(1)(v), (g)(2), and (g)(4);

h. Revising paragraphs (h)(2)(ii), (h)(3)(ii), and (h)(3)(iii); and

i. Adding paragraph (i) to read as follows:

**§ 63.7732 What test methods and other procedures must I use to demonstrate initial compliance with the emissions limitations?**

(a) You must conduct each performance test that applies to your iron and steel foundry based on your selected compliance alternative, if applicable, according to the requirements in § 63.7(e)(1) and the conditions specified in paragraphs (b) through (i) of this section.

(b) To determine compliance with the applicable emissions limit for PM in § 63.7690(a)(1) through (6) for a metal melting furnace, scrap preheater, pouring station, or pouring area, follow the test methods and procedures in paragraphs (b)(1) through (6) of this section.

* * * * *

(4) For electric arc and electric induction metal melting furnaces, sample only during normal production conditions, which may include, but are not limited to the following cycles: Charging, melting, alloying, refining, slagging, and tapping.

(5) For scrap preheaters, sample only during normal production conditions, which may include, but are not limited to the following cycles: Charging, heating, and discharging.

(6) Determine the total mass of metal charged to the furnace or scrap preheater For a cupola metal melting furnace at an existing iron and steel foundry that is subject to the PM emissions limit in § 63.7690(a)(ii), calculate the PM emissions rate in lb/ton using Equation 1 of this section:

$$EF_{PM} = C_{PM} \times \left(\frac{Q}{M_{charge}}\right) \times \left(\frac{t_{test}}{7,000}\right) \qquad \text{(Eq. 1)}$$

Where:

$EF_{PM}$ = Mass emissions rate of PM, lb/ton;

$C_{PM}$ = Concentration of PM measured during performance test run, gr/dscf;

Q = Volumetric flow rate of exhaust gas, dry standard cubic feet per minute (dscfm);

$M_{charge}$ = Mass of metal charged during performance test run, tons;

$t_{test}$ = Duration of performance test run, minutes; and

7,000 = Unit conversion factor, grains per pound (gr/lb).

(c) To determine compliance with the applicable emissions limit for total metal HAP in § 63.7690(a)(1) through (6) for a metal melting furnace, scrap preheater, pouring station, or pouring area, follow the test methods and procedures in paragraphs (c)(1) through (6) of this section.

* * * * *

(2) A minimum of three valid test runs are needed to comprise a performance test.

* * * * *

(4) For electric arc and electric induction metal melting furnaces, sample only during normal production conditions, which may include, but are not limited to the following cycles: Charging, melting, alloying, refining, slagging, and tapping.

(5) For scrap preheaters, sample only during normal production conditions, which may include, but are not limited to the following cycles: Charging, heating, and discharging.

(6) Determine the total mass of metal charged to the furnace or scrap preheater during each performance test run and calculate the total metal HAP emissions rate using Equation 2 of this section:

$$EF_{TMHAP} = C_{TMHAP} \times \left(\frac{Q}{M_{charge}}\right) \times \left(\frac{t_{test}}{7,000}\right) \qquad \text{(Eq. 2)}$$

Where:

$EF_{TMHAP}$ = Emissions rate of total metal HAP, lb/ton;

$C_{TMHAP}$ = Concentration of total metal HAP measured during performance test run, gr/dscf;

Q = Volumetric flow rate of exhaust gas, dscfm;

$M_{charge}$ = Mass of metal charged during performance test run, tons;

$t_{test}$ = Duration of performance test run, minutes; and

7,000 = Unit conversion factor, gr/lb.

(d) To determine compliance with the opacity limit in § 63.7690(a)(7) for fugitive emissions from buildings or structures housing any iron and steel foundry emissions source at the iron and steel foundry, follow the procedures in paragraphs (d)(1) and (2) of this section.

(1) * * * The certified observer may identify a limited number of openings or vents that appear to have the highest opacities and perform opacity observations on the identified openings or vents in lieu of performing observations for each opening or vent from the building or structure. Alternatively, a single opacity observation for the entire building or structure may be performed, if the fugitive release points afford such an observation.

(2) During testing intervals when PM performance tests, if applicable, are being conducted, conduct the opacity test such the opacity observations are recorded during the PM performance tests.

(e) * * *

(3) For a cupola metal melting furnace, correct the measured concentration of VOHAP, TGNMO, or TOC for oxygen content in the gas stream using Equation 3 of this section:

$$C_{VOHAP,\ 10\%\ O_2} = C_{VOHAP}\left(\frac{10.9\%}{20.9\% - \%O_2}\right) \qquad \text{(Eq. 3)}$$

Where:

$C_{VOHAP}$ = Concentration of VOHAP in ppmv as measured by Method 18 in 40 CFR part 60, appendix A or the concentration of TGNMO or TOC in ppmv as hexane as measured by Method 25 or 25A in 40 CFR part 60, appendix A; and

$\%O_2$ = Oxygen concentration in gas stream, percent by volume (dry basis).

* * * * *

(f) * * *

(2) * * *

(ix) Calculate the site-specific VOC emissions limit using Equation 4 of this section:

$$VOC_{limit} = 20 \times \frac{C_{VOHAP,\ avg}}{C_{CEM}} \qquad \text{(Eq. 4)}$$

Where:

$C_{VOHAP,avg}$ = Average concentration of VOHAP for the source test in ppmv as measured by Method 18 in 40 CFR part 60, appendix A or the average concentration of TGNMO for the source test in ppmv as hexane as measured by Method 25 in 40 CFR part 60, appendix A; and

$C_{CEM}$ = Average concentration of total hydrocarbons in ppmv as hexane as measured using the CEMS during the source test.

(3) For two or more exhaust streams from one or more automated conveyor and pallet cooling lines or automated shakeout lines, compute the flow-weighted average concentration of VOHAP emissions for each combination of exhaust streams using Equation 5 of this section:

$$C_W = \frac{\sum_{i=1}^{n} C_i Q_i}{\sum_{i=1}^{n} Q_i} \qquad \text{(Eq. 5)}$$

Where:

$C_w$ = Flow-weighted concentration of VOHAP or VOC, ppmv (as hexane);

$C_i$ = Concentration of VOHAP or VOC from exhaust stream ''i'', ppmv (as hexane);

n = Number of exhaust streams sampled; and

$Q_i$ = Volumetric flow rate of effluent gas from exhaust stream ''i,'', dscfm.

(g) * * *

(1) * * *

(v) Method 18 to determine the TEA concentration. Alternatively, you may use NIOSH Method 2010 (incorporated by reference-see § 63.14) to determine the TEA concentration provided the performance requirements outlined in section 13.1 of EPA Method 18 are satisfied. The sampling option and time must be sufficiently long such that either the TEA concentration in the field sample is at least 5 times the limit of detection for the analytical method or the test results calculated using the laboratory's reported analytical detection limit for the specific field samples are less than ⅕ of the applicable emissions limit. When using Method 18, the adsorbent tube approach, as described in section 8.2.4 of Method 18, may be required to achieve the necessary analytical detection limits. The sampling time must be at least 1 hour in all cases.

(2) If you use a wet acid scrubber, conduct the test as soon as practicable after adding fresh acid solution and the system has reached normal operating conditions.

* * * * *

(4) If you are subject to the 99 percent reduction standard, calculate the mass emissions reduction using Equation 6 of this section:

$$\%\ \text{reduction} = \frac{E_i - E_o}{E_1} \times 100\% \qquad \text{(Eq. 6)}$$

Where:

$E_i$ = Mass emissions rate of TEA at control device inlet, kilograms per hour (kg/hr); and

$E_o$ = Mass emissions rate of TEA at control device outlet, kg/hr.

(h) * * *

(2) * * *

(ii) Calculate the flow-weighted average emissions limit, considering only the regulated streams, using Equation 5 of this section, except $C_w$ is the flow-weighted average emissions limit for PM or total metal HAP in the exhaust stream, gr/dscf; and $C_i$ is the concentration of PM or total metal HAP in exhaust stream ''i'', gr/dscf.

* * * * *

(3) * * *

(ii) Measure the flow rate and PM or total metal HAP concentration of the combined exhaust stream both before and after the control device and calculate the mass removal efficiency of the control device using Equation 6 of this section, except $E_i$ is the mass emissions rate of PM or total metal HAP at the control device inlet, lb/hr and $E_o$ is the mass emissions rate of PM or total metal HAP at the control device outlet, lb/hr.

(iii) Meet the applicable emissions limit based on the calculated PM or total metal HAP concentration for the regulated emissions sources using Equation 7 of this section:

$$C_{released} = C_i \times \left(1 - \frac{\%\ reduction}{100}\right) \qquad \text{(Eq. 7)}$$

Where:

$C_{released}$ = Calculated concentration of PM (or total metal HAP) predicted to be released to the atmosphere from the regulated emissions source, gr/dscf; and

$C_i$ = Concentration of PM (or total metal HAP) in the uncontrolled regulated exhaust stream, gr/dscf.

(i) To determine compliance with an emissions limit for situations when multiple sources are controlled by a single control device, but only one source operates at a time, or other situations that are not expressly considered in paragraphs (b) through (h) of this section, a site-specific test plan should be submitted to the Administrator for approval according to the requirements in § 63.7(c)(2) and (3).

9. Section 63.7733 is amended by revising paragraphs (b)(2), (c)(2), and (d)(2) to read as follows:

**§ 63.7733 What procedures must I use to establish operating limits?**

* * * * *

(b) * * *

(2) Compute and record the average pressure drop and average scrubber water flow rate for each valid sampling run in which the applicable emissions limit is met.

(c) * * *

(2) Compute and record the average combustion zone temperature for each valid sampling run in which the applicable emissions limit is met.

(d) * * *

(2) Compute and record the average scrubbing liquid flow rate for each valid sampling run in which the applicable emissions limit is met.

* * * * *

10. Section 63.7734 is amended by:

a. Revising paragraph (a) introductory text;

b. Revising paragraph (a)(2)(ii);

c. Adding paragraphs (a)(2)(iii) and (iv);

d. Revising paragraphs (a)(7) and (a)(11) to read as follows:

**§ 63.7734 How do I demonstrate initial compliance with the emissions limitations that apply to me?**

(a) You have demonstrated initial compliance with the emissions limits in § 63.7690(a) by meeting the applicable conditions in paragraphs (a)(1) through (11) of this section. When alternative emissions limitations are provided for a given emissions source, you are not restricted in the selection of which applicable alternative emissions limitation is used to demonstrate compliance.

* * * * *

(2) * * *

(ii) The average total metal HAP concentration in the exhaust stream, determined according to the performance test procedures in § 63.7732(c), did not exceed 0.0005 gr/dscf; or

(iii) The average PM mass emissions rate, determined according to the performance test procedures in § 63.7732(b), did not exceed 0.10 lb/ton; or

(iv) The average total metal HAP mass emissions rate, determined according to the performance test procedures in § 63.7732(c), did not exceed 0.008 lb/ton.

* * * * *

(7) For each building or structure housing any iron and steel foundry emissions source at the iron and steel foundry, the opacity of fugitive emissions from foundry operations discharged to the atmosphere, determined according to the performance test procedures in § 63.7732(d), did not exceed 20 percent (6-minute average), except for one 6-minute average per hour that did not exceed 27 percent opacity.

* * * * *

(11) For each TEA cold box mold or core making line in a new or existing iron and steel foundry, the average TEA concentration, determined according to the performance test procedures in § 63.7732(g), did not exceed 1 ppmv or was reduced by 99 percent.

* * * * *

11. Section 63.7736 is amended by revising paragraph (c)(1) to read as follows:

**§ 63.7736 How do I demonstrate initial compliance with the operation and maintenance requirements that apply to me?**

* * * * *

(c) * * *

(1) You have submitted the bag leak detection system monitoring information to the Administrator within the written O&M plan for approval according to the requirements of § 63.7710(b);

* * * * *

12. Section 63.7740 is amended by:

a. Revising paragraph (b);

b. Redesignating paragraphs (c) through (g) as (d) through (h); and

c. Adding paragraph (c) to read as follows:

**§ 63.7740 What are my monitoring requirements?**

* * * * *

(b) For each negative pressure baghouse or positive pressure baghouse equipped with a stack that is applied to meet any PM or total metal HAP emissions limitation in this subpart, you must at all times monitor the relative change in PM loadings using a bag leak detection system according to the requirements in § 63.7741(b).

(c) For each baghouse, regardless of type, that is applied to meet any PM or total metal HAP emissions limitation in this subpart, you must conduct inspections at their specified frequencies according to the requirements specified in paragraphs (c)(1) through (8) of this section.

(1) Monitor the pressure drop across each baghouse cell each day to ensure pressure drop is within the normal operating range identified in the manual.

(2) Confirm that dust is being removed from hoppers through weekly visual inspections or other means of ensuring the proper functioning of removal mechanisms.

(3) Check the compressed air supply for pulse-jet baghouses each day.

(4) Monitor cleaning cycles to ensure proper operation using an appropriate methodology.

(5) Check bag cleaning mechanisms for proper functioning through monthly visual inspections or equivalent means.

(6) Make monthly visual checks of bag tension on reverse air and shaker-type baghouses to ensure that bags are not kinked (kneed or bent) or lying on their sides. You do not have to make this check for shaker-type baghouses using self-tensioning (spring-loaded) devices.

(7) Confirm the physical integrity of the baghouse through quarterly visual inspections of the baghouse interior for air leaks.

(8) Inspect fans for wear, material buildup, and corrosion through quarterly visual inspections, vibration detectors, or equivalent means.

* * * * *

13. Section 63.7741 is amended by:

a. Revising paragraphs (a)(1)(iv), (a)(2)(i), (a)(2)(iii), (a)(2)(iv), and (a)(2)(vi);

b. Revising paragraph (b) introductory text;

c. Revising paragraphs (c)(1)(iii), (c)(1)(iv), (c)(1)(vi), and (c)(2)(iv);

d. Revising paragraph (d)(8); and

e. Revising paragraph (e)(2)(iv) to read as follows:

**§ 63.7741 What are the installation, operation, and maintenance requirements for my monitors?**

(a) * * *

(1) * * *

(iv) At least monthly, visually inspect all components, including all electrical and mechanical connections, for proper functioning.

(2) * * *

(i) Locate the pressure sensor(s) in or as close as possible to a position that provides a representative measurement of the pressure and that minimizes or eliminates pulsating pressure, vibration, and internal and external corrosion.

* * * * *

(iii) Check the pressure tap for pluggage daily. If a ''non-clogging'' pressure tap is used, check for pluggage monthly.

(iv) Using a manometer or equivalent device such as a magnahelic or other pressure indicating transmitter, check gauge and transducer calibration quarterly.

* * * * *

(vi) At least monthly, visually inspect all components, including all electrical and mechanical connections, for proper functioning.

* * * * *

(b) For each negative pressure baghouse or positive pressure baghouse equipped with a stack that is applied to meet any PM or total metal HAP emissions limitation in this subpart, you must install, operate, and maintain a bag leak detection system according to the requirements in paragraphs (b)(1) through (7) of this section.

* * * * *

(c) * * *

(1) * * *

(iii) Check the pressure tap for pluggage daily. If a ''non-clogging'' pressure tap is used, check for pluggage monthly.

(iv) Using a manometer or equivalent device such as a magnahelic or other pressure indicating transmitter, check gauge and transducer calibration quarterly.

* * * * *

(vi) At least monthly, visually inspect all components, including all electrical and mechanical connections, for proper functioning.

(2) * * *

(iv) At least monthly, visually inspect all components, including all electrical and mechanical connections, for proper functioning.

(d) * * *

(8) At least monthly, visually inspect all components, including all electrical and mechanical connections, for proper functioning.

(e) * * *

(2) * * *

(iv) At least monthly, visually inspect all components, including all electrical and mechanical connections, for proper functioning.

* * * * *

14. Section 63.7743 is amended by:

a. Adding a second sentence to the end of paragraph (a) introductory text and removing the colon after the first sentence in paragraph (a) in text and adding period in its place;

b. Revising paragraph (a)(2)(ii) and adding paragraphs (a)(2)(iii) and (iv);

c. Revising paragraph (a)(7); and

d. Revising paragraph (c) introductory text and paragraphs (c)(1) and (2) to read as follows:

**§ 63.7743 How do I demonstrate continuous compliance with the emissions limitations that apply to me?**

(a) * * * When alternative emissions limitations are provided for a given emissions source, you must comply with the alternative emissions limitation most recently selected as your compliance alternative.

* * * * *

(2) * * *

(ii) Maintaining the average total metal HAP concentration in the exhaust stream at or below 0.0005 gr/dscf; or

(iii) Maintaining the average PM mass emissions rate at or below 0.10 lb/ton; or

(iv) Maintaining the average total metal HAP mass emissions rate at or below 0.008 lb/ton.

* * * * *

(7) For each building or structure housing any iron and steel foundry emissions source at the iron and steel foundry, maintaining the opacity of any fugitive emissions from foundry operations discharged to the atmosphere at or below 20 percent opacity (6-minute average), except for one 6-minute average per hour that does not exceed 27 percent opacity.

* * * * *

(c) For each baghouse,

(1) Inspecting and maintaining each baghouse according to the requirements of § 63.7740(c)(1) through (8) and recording all information needed to document conformance with these requirements; and

(2) If the baghouse is equipped with a bag leak detection system, maintaining records of the times the bag leak detection system sounded, and for each valid alarm, the time you initiated corrective action, the corrective action taken, and the date on which corrective action was completed.

* * * * *

15. Section 63.7750 is amended by adding a sentence to the end of paragraph (e) introductory text to read as follows:

**§ 63.7750 What notifications must I submit and when?**

* * * * *

(e) * * * For opacity performance tests, the notification of compliance status may be submitted with the semiannual compliance report in § 63.7751(a) and (b) or the semiannual part 70 monitoring report in § 63.7551(d).

* * * * *

16. Section 63.7751 is amended by revising paragraph (c) to read as follows:

**§ 63.7751 What reports must I submit and when?**

* * * * *

(c) Immediate startup, shutdown, and malfunction report. If you had a startup, shutdown, or malfunction during the semiannual reporting period that was not consistent with your startup, shutdown, and malfunction plan and the source exceeds any applicable emissions limitation in § 63.7690, you must submit an immediate startup, shutdown, and malfunction report according to the requirements of § 63.10(d)(5)(ii).

* * * * *

17. Section 63.7752 is amended by revising paragraph (a)(4) to read as follows:

**§ 63.7752 What records must I keep?**

(a) * * *

(4) Records of the annual quantity of each chemical binder or coating material used to coat or make molds and cores, the Material Data Safety Sheet or other documentation that provides the chemical composition of each component, and the annual quantity of HAP used in these chemical binder or coating materials at the foundry as calculated from the recorded quantities and chemical compositions (from Material Data Safety Sheets or other documentation).

* * * * *

18. Section 63.7765 is amended by:

a. Revising the definition for ''Deviation'';

b. Adding, in alphabetical order, definitions for ''Offblast'' and ''On blast''; and

c. Revising the definitions ''Scrap preheater'' and adding ''Total metal HAP'' to read as follows:

**§ 63.7765 What definitions apply to this subpart?**

* * * * *

*Deviation* means any instance in which an affected source or an owner or operator of such an affected source. A deviation is not always a violation. The determination of whether a deviation constitutes a violation of the standard is up to the discretion of the entity responsible for enforcement of the standards.

* * * * *

*Off blast* means those periods of cupola operation when the cupola is not actively being used to produce molten metal. Off blast conditions include cupola startup when air is introduced to the cupola to preheat the sand bed and other cupola startup procedures as defined in the startup, shutdown, and malfunction plan. Off blast conditions also include idling conditions when the blast air is turned off or down to the point that the cupola does not produce additional molten metal.

*On blast* means those periods of cupola operation when combustion (blast) air is introduced to the cupola furnace and the furnace is capable of producing molten metal. On blast conditions are characterized by both blast air introduction and molten metal production.

* * * * *

*Scrap preheater* means a vessel or other piece of equipment in which metal scrap that is to be used as melting furnace feed is heated to a temperature high enough to eliminate volatile impurities or other tramp materials by direct flame heating or similar means of heating. Scrap dryers, which solely remove moisture from metal scrap, are not considered to be scrap preheaters for purposes of this subpart.

* * * * *

*Total metal HAP* means, for the purposes of this subpart, the sum of the concentrations of antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese, mercury, nickel, and selenium as measured by EPA Method 29 (40 CFR part 60, appendix A). Only the measured concentration of the listed analytes that are present at concentrations exceeding one-half the quantitation limit of the analytical method are to be used in the sum. If any of the analytes are not detected or are detected at concentrations less than one-half the quantitation limit of the analytical method, the concentration of those analytes will be assumed to be zero for the purposes of calculating the total metal HAP for this subpart.

* * * * *

19. Table 1 to subpart EEEEE is amended by revising the entry for § 63.9 to read as follows:

TABLE 1 TO SUBPART EEEEE OF PART 63.—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART EEEEE

* * * * *

| Citation | Subject | Applies to subpart EEEEE? | Explanation |
|---|---|---|---|
| * | * | * | * * * * |
| 63.9 | Notification requirements | Yes | Except: For opacity performance tests, Subpart EEEEE allows the notification of compliance status to be submitted with the semi-annual compliance report or the semiannual part 70 monitoring report. |
| * | * | * | * * * * |

[FR Doc. E7–7203 Filed 4–16–07; 8:45 am]

BILLING CODE 6560–50–P

# Notices

Federal Register
Vol. 72, No. 73
Tuesday, April 17, 2007

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

April 11, 2007.

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, Pub. L. 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 Marketing Service**

*Title:* Seed Service Testing Program.

*OMB Control Number:* 0581–0140.

*Summary of Collection:* The Agricultural Marketing Act (AMA) of 1946, as amended by 7 U.S.C. 1621 authorizes the Secretary to inspect and certify the quality of agricultural products and collect such fees as reasonable to cover the cost of service rendered. The purpose of the voluntary program is to promote efficient, orderly marketing of seeds and assist in the development of new and expanding markets. Under the program, samples of agricultural and vegetable seeds submitted to the Agricultural Marketing Service (AMS) are tested for factors such as purity and germination at the request of the applicant for the service. The Testing Section of the Seed Regulatory and Testing Branch of AMS that test the seed and issues the certificates is the only Federal seed testing facility that can issue the Federal Seed Analysis Certificate.

*Need and Use of the Information:* Applicants generally are seed firms who use the seed analysis certificates to represent the quality of seed lots to foreign customers according to the terms specified in contracts of trade. The only information collected is information needed to provide the service requested by the applicant. Applicants must provide information such as the kind and quantity of seed, tests to be performed, and seed treatment if present, along with a sample of seed in order for AMS to provide the service. Only authorized AMS employees used the information collected to track, test, and report test results to the applicant. If the information were not collected, AMS would not know which test to conduct or would not be able to relate the test results with a specific lot of seed.

*Description of Respondents:* Business or other for-profit; Farms; State, Local or tribal Government.

*Number of Respondents:* 53.

*Frequency of Responses:* Reporting; On occasion.

*Total Burden Hours:* 682.

**Agricultural Marketing Service**

*Title:* Tart Cherries Grown in the states of MI, NY, PA, OR, UT, WA, and WI.

*OMB Control Number:* 0581–0177.

*Summary of Collection:* Marketing Order No. 930 (7 CFR part 930) regulates the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin. The Agricultural Marketing Agreement Act of 1937 was designed to permit regulation of certain agricultural commodities for the purpose of providing orderly marketing conditions in inter- and intrastate commerce and improving returns to growers. The primary objective of the Order is to stabilize the supply of tart cherries. Only tart cherries that will be canned or frozen will be regulated. An 18-member Board comprised of producers, handlers and one public member with each member serving for a three-year term office administer the Order.

*Need and Use of the Information:* Various forms were developed by the Board for persons to file required information relating to tart cherry inventories, shipments, diversions and other needed information to effectively carry out the requirements of the Order. The information collected is used to ensure compliance, verify eligibility, and vote on amendments, monitor and record grower's information. Authorized Board employees and the industry are the primary users of the information.

*Description of Respondents:* Business or other for profit; Not-for-profit institutions.

*Number of Respondents:* 953.

*Frequency of Responses:* Reporting: On occasion.

*Total Burden Hours:* 853.

**Charlene Parker,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. E7–7217 Filed 4–16–07; 8:45 am]

BILLING CODE 3410–02–P

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

April 11, 2007

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, Pub. L. 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.

**Rural Business-Cooperative Service**

*Title:* Annual Survey of Farmer Cooperatives.

*OMB Control Number:* 0570–0007.

*Summary of Collection:* The Rural Business Cooperative Service (RBS) was mandated the responsibility to acquire and disseminate information pertaining to agricultural cooperatives under the Cooperative Marketing Act of 1926: 7 U.S.C. 451–457 and Pub. L. 450. The primary objective of RBS is to promote understanding, use and development of the cooperative form of business as a viable option for enhancing the income of agricultural producers and other rural residents. The annual survey collects basic statistics on cooperative business volume, net income, members, financial status, employees, and other selected information to support RBS' objective and role. RBS will use a variety of forms to collect information.

*Need and Use of the Information:* RBS uses the information collected to summarize for program planning, evaluation service work and cooperative analysis and education. The information collected and published in the annual report on farmer cooperatives supports and enhances most of the major functions of RBS. By not collecting this information, the RBS would have difficulties in carrying out its policy on farmer cooperatives.

*Description of Respondents:* Business or other for-profit.

*Number of Respondents:* 1,588.

*Frequency of Responses:* Reporting: Annually.

*Total Burden Hours:* 1,534.

**Charlene Parker,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. E7–7219 Filed 4–16–07; 8:45 am]

BILLING CODE 3410–XT–P

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

April 12, 2007.

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.

**Rural Utilities Service**

*Title:* Environmental Policies and Procedures (7 CFR part 1794).

*OMB Control Number:* 0572–0117.

*Summary of Collection:* In December 1998, the Rural Utilities Service (RUS) published its revised Environmental Policies and Procedures and in 2003 revisions were made to clarify policy on certain environmental review processes. The rule promulgated environmental regulations that cover all RUS Federal actions taken by RUS' electric, telecommunications, water and environmental programs. The regulation was necessary to ensure continued RUS compliance with the Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA) (40 CFR parts 1500–1508), and certain related Federal environmental laws, statutes, regulations, and Executive Orders. RUS electric, telecommunications, water and environmental program borrowers provide environmental documentation to assure that policy contained in NEPA is followed.

*Need and Use of the Information:* RUS will collect information to evaluate the cost and feasibility of the proposed project and the environmental impact. If the information is collected, the agency would not be in compliance with NEPA and CEQ regulations.

*Description of Respondents:* Non-for-profit institutions; Business or other for-profit.

*Number of Respondents:* 1,339.

*Frequency of Responses:* Reporting: On occasion.

*Total Burden Hours:* 486,440.

**Charlene Parker,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. E7–7233 Filed 4–16–07; 8:45 am]

BILLING CODE 3410–15–P

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2007–0045]**

### Notice of Request for Extension of Approval of an Information Collection; Pseudorabies Accelerated Eradication Program; Payment of Indemnity

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Extension of approval of an information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations for the payment of indemnity for the domestic pseudorabies accelerated eradication program.

**DATES:** We will consider all comments that we receive on or before June 18, 2007.

**ADDRESSES:** You may submit comments by either of the following methods:

Federal eRulemaking Portal: *Go to http://www.regulations.gov,* select ''Animal and Plant Health Inspection Service'' from the agency drop-down menu, then click ''Submit.'' In the Docket ID column, select APHIS–2007–0045 to submit or view public comments and to view supporting and related materials available electronically. Information on using Regulations.gov, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's ''User Tips'' link.

Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. APHIS–2007–0045, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2007–0045.

*Reading Room:* You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov*.

**FOR FURTHER INFORMATION CONTACT:** For information regarding an information collection associated with regulations for the payment of indemnity for the domestic pseudorabies accelerated eradication program, contact Dr. John Korslund, Senior Staff Veterinarian, Aquaculture, Swine, Equine, and Poultry Programs, NCAHP, VS, APHIS, 4700 River Road Unit 46, Riverdale, MD 20737; (301) 734–5914. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS's Information Collection Coordinator, at (301) 734–7477.

**SUPPLEMENTARY INFORMATION:**

*Title:* Pseudorabies Accelerated Eradication Program; Payment of Indemnity.

*OMB Number:* 0579–0137.

*Type of Request:* Extension of approval of an information collection.

*Abstract:* Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the United States Department of Agriculture (USDA) has authority for, among other things, preventing the interstate spread of pests and diseases of livestock within the United States and for conducting eradication programs. In connection with this mission, the Animal and Plant Health Inspection Service (APHIS), USDA, established an accelerated pseudorabies eradication program, including the payment of indemnity, to further pseudorabies eradication efforts in cooperation with States and industry and to protect swine not infected with pseudorabies from the disease.

Pseudorabies is a contagious, infectious, and communicable disease of livestock, primarily swine. The disease, also known as Aujeszky's disease, mad itch, and infectious bulbar paralysis, is caused by a herpes virus, and is known to cause reproductive problems, including abortion and stillborn death, and death in neonatal pigs, and occasional death losses in breeding and finishing hogs.

The regulations in 9 CFR part 85 govern the interstate movement of swine and other livestock (cattle, sheep, and goats) in order to help prevent the spread of pseudorabies. These regulations authorize the payment of indemnity to herd owners for the depopulation of swine known to be infected with pseudorabies and require the collection of information that includes an appraisal and agreement form, a movement permit, and a report of net salvage proceeds. Additionally, the swine must be moved to slaughter in a means of conveyance sealed with an official seal.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies, *e.g.*, permitting electronic submission of responses.

*Estimate of burden:* The public reporting burden for this collection of information is estimated to average 1.1333 hours per response.

*Respondents:* Swine herd owners, State animal health authorities, and accredited veterinarians.

*Estimated annual number of respondents:* 10.

*Estimated annual number of responses per respondent:* 3.

*Estimated annual number of responses:* 30.

*Estimated total annual burden on respondents:* 34 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.) All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 11th day of April 2007.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. E7–7244 Filed 4–16–07; 8:45 am]

BILLING CODE 3410–34–P

## DEPARTMENT OF AGRICULTURE

### Grain Inspection, Packers and Stockyards Administration

### United States Standards for Beans

**AGENCY:** Grain Inspection, Packers and Stockyards Administration, USDA.

**ACTION:** Notice; request for public comment.

**SUMMARY:** We plan to revise the U.S. standards for Beans to provide applicants for service with an optional grade designation for bean certification; and remove the requirements that the percentage of high moisture and, in the case of Mixed beans, the percentage of each class in the mixture be shown on the grade line.

**DATES:** We will consider comments that we receive by May 17, 2007.

**ADDRESSES:** We invite you to submit comments on this notice. You may submit comments by any of the following methods:

- E-mail: Send comments via electronic mail to *comments.gipsa@usda.gov.*
- Mail: Send hardcopy written comments to Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1647–S, Washington, DC 20250–3604.
- Fax: Send comments by facsimile transmission to: (202) 690–2755.
- Hand Delivery or Courier: Deliver comments to: Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1647–S, Washington, DC 20250–3604.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- Instructions: All comments should refer to the date and page number of this issue of the **Federal Register**.
- Read Comments: All comments will be available for public inspection in the above office during regular business hours (7 CFR 1.27(b)).

**FOR FURTHER INFORMATION CONTACT:** Beverly A. Whalen at USDA, GIPSA, FGIS, FMD, Suite 180, STOP 1404, 6501 Beacon Drive, Kansas City, Missouri 64133; Telephone (816) 823–4648; Fax Number (816) 823–4644; e-mail *Beverly.A.Whalen@usda.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background

The Agricultural Marketing Act of 1946, as amended (AMA), directs and authorizes the Secretary of Agriculture to develop and improve standards for agricultural products (7 U.S.C. 1622). These are standards of quality, condition, quantity, grade, and packaging. The intent of such standards is to encourage uniformity and consistency in commercial practices.

We establish and maintain a variety of quality and grade standards for agricultural commodities. These standards serve as the fundamental starting point to define commodity quality in the domestic and global marketplace. We provide official procedures for how inspectors determine the various grading factors in supporting handbooks, such as the Bean Handbook. The AMA standards and supporting procedures are voluntary and widely used in private contracts, government procurement, marketing communication, and, for some commodities, consumer information.

Standards developed under the AMA include rice, whole dry peas, split peas, feed peas, lentils, and beans. The U.S. standards for Whole Dry Peas, Split Peas, Feed Peas, Lentils, and Beans do not appear in the Code of Federal Regulations (although the process by which we develop these standards is specified through the regulations in 7 CFR 868.102, Procedures for establishing and revising grade standards); however, the standards are available on the GIPSA Web site at *http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=grpi&topic=sq-ous* and by contacting the Field Management Division (FMD) at the above address. We provide the official procedures for how inspectors determine the various grading factors in various supporting handbooks, such as the Bean Handbook, which you may view and print from the GIPSA Web site at *http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=lr&topic=hb-bi.*

### Optional Grade Designation and Certification Procedures

We work closely with the National Dry Bean Council (NDBC) and others in the bean industry to examine the effectiveness of the U.S. standards for Beans in today's marketing environment. It appears that the current standards continue to meet consumer/processor needs; however, both the rice and grain industries have optional certification procedures. We have determined that these certification procedures could be beneficial to the bean industry, as well.

Currently, inspectors certify beans offered for inspection as a specific quality (U.S. grade) for example, U.S. No. 2 Pinto Beans. Certifying a specific grade is commonly referred to in the rice and grain industries as ''Option 1'' grade designation. This works well most of the time, however, there are exceptions. At times, sellers find when preparing to load beans for shipment that the supply of a particular grade of bean may be insufficient to meet the quality and quantity requirements specified in the sales contract. When this happens, the seller may find it necessary to ship beans of a better quality. However, current inspection procedures do not allow the flexibility to describe or certify superior quality beans as being of a lower quality. If the lot presented for inspection is not uniform in quality for the declared grade, the inspector certifies each portion separately according to quality. That is, if a consignment consists of both U.S. No. 1 and 2 Pinto beans, current procedure requires that the quantity representing each of the different qualities receive separate certification. Such certification may not meet the terms of sale for the contract.

The U.S. standards for rice and grains offer an alternative approach that is termed ''Option 2'' grade designation. When a contract specifies an Option 2 grade designation, the applicant may specifically request Option 2 certification. Under Option 2 certification, there is no limitation placed on the amount of better quality grain in the lot. When a lot meets or is of better quality than the declared grade, inspectors include the term ''or better'' immediately following the numerical or sample grade designation.

We would like to offer the Option 2 grade designation and certification approach for beans. Under such an approach, beans that are a better quality than that specified by the contract would be certified as a specific grade ''or better'' (for example, U.S. No. 2, or better, Pinto Beans). The applicant for inspection can obtain the optional certification procedure by requesting it on the application for inspection. The applicant would file the request for the optional certification prior to the beginning of inspection so the inspector knows how to certify the lot. We believe that Option 2 grade designation and certification will better align the bean industry with the rice and grain industries, provide sellers with the flexibility to ship beans of better quality, and provide buyers with the desirable option of receiving better quality.

### High Moisture and Mixed Beans

We also plan to remove the requirements that the percentage of high moisture and, in the case of Mixed beans, the percentage of each class in the mixture be shown on the grade-line. The special grade designation ''High moisture'' is applicable to all classes of

beans containing over 18.0 percent moisture. While we will continue to show the special grade designation High moisture'' on the grade line, we intend to eliminate the requirement that the percentage of moisture be shown on the grade line. Rather, we plan to enter the percentage of moisture, if applicable, in the ''Results'' section of the certificate. Additionally, for the class of Mixed beans, we currently require inspectors to include the breakdown of the different classes, in order of predominance, on the grade line of the certificate. Instead of showing this information on the grade line, we plan to enter such information in the ''Results'' section of the certificate. This approach will not change the grade of the product. We intend for these changes to improve the readability of the certificate. The grade line will provide the grade designation, which includes special grade designations, when applicable, and other related information will be provided in the Remarks section of the certificate. Further, this change in the U.S. standards for Beans will better align certification requirements in beans with other graded commodities such as rice.

**Comments**

We are requesting comments for 30 days. All comments received within the comment period will be made part of the public record we maintain, will be available to the public for review, and will be considered before we take final action.

**Authority:** 7 U.S.C. 1621–1627.

**James E. Link,**

*Administrator, Grain Inspection, Packers and Stockyards Administration.*

[FR Doc. E7–7242 Filed 4–16–07; 8:45 am]

**BILLING CODE 3410–KD–P**

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## DEPARTMENT OF AGRICULTURE

### Grain Inspection, Packers and Stockyards Administration

### United States Standards for Whole Dry Peas, Split Peas, and Lentils

**AGENCY:** Grain Inspection, Packers and Stockyards Administration, USDA.

**ACTION:** Notice; request for public comment.

**SUMMARY:** We plan to revise the U.S. standards for Whole Dry Peas, Split Peas, and Lentils to provide applicants for service with an optional grade designation for pea and lentil certification and to remove the requirement that, in the case of Mixed Dry Peas, the percentage of each class in the mixture be shown on the grade line.

**DATES:** We will consider comments that we receive by May 17, 2007.

**ADDRESSES:** We invite you to submit comments on this notice. You may submit comments by any of the following methods:

- E-mail: Send comments via electronic mail to *comments.gipsa@usda.gov*.
- Mail: Send hardcopy written comments to Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1647–S, Washington, DC 20250–3604.
- Fax: Send comments by facsimile transmission to: (202) 690–2755.
- Hand Delivery or Courier: Deliver comments to: Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1647–S, Washington, DC, 20250–3604.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- Instructions: All comments should refer to the date and page number of this issue of the **Federal Register**.
- Read Comments: All comments will be available for public inspection in the above office during regular business hours (7 CFR 1.27 (b)).

**FOR FURTHER INFORMATION CONTACT:** Beverly A. Whalen at USDA, GIPSA, FGIS, FMD, Suite 180, STOP 1404, 6501 Beacon Drive, Kansas City, Missouri 64133; Telephone (816) 823–4648; Fax Number (816) 823–4644; e-mail *Beverly.A.Whalen@usda.gov*.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Agricultural Marketing Act of 1946, as amended (AMA), directs and authorizes the Secretary of Agriculture to develop and improve standards for agricultural products (7 U.S.C. 1622). These are standards of quality, condition, quantity, grade, and packaging. The intent of such standards is to encourage uniformity and consistency in commercial practices.

We establish and maintain a variety of quality and grade standards for agricultural commodities. These standards serve as the fundamental starting point to define commodity quality in the domestic and global marketplace. We provide official procedures for how inspectors determine the various grading factors in supporting handbooks, such as the Pea and Lentil Handbook. The AMA standards and supporting procedures are voluntary and widely used in private contracts, government procurement, marketing communication, and, for some commodities, consumer information.

Standards developed under the AMA include rice, whole dry peas, split peas, feed peas, lentils, and beans. The U.S. standards for Whole Dry Peas, Split Peas, Feed Peas, Lentils, and Beans do not appear in the Code of Federal Regulations (although the process by which we develop these standards is specified through the regulations in 7 CFR 868.102, Procedures for establishing and revising grade standards); however, the standards are available on the GIPSA Web site at *http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=grpi&topic=sq-ous* and by contacting the Field Management Division (FMD) at the above address. We provide the official procedures for how inspectors determine the various grading factors in various supporting handbooks, such as the Pea and Lentil Handbook, which you may view and print from the GIPSA Web site at *http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=lr&topic=hb-pl*.

**Optional Grade Designation and Certification Procedures**

We work closely with the U.S. Dry Pea and Lentil Council (USDPLC) and others in the pea and lentil industries to examine the effectiveness of the U.S. standards in today's marketing environment. It appears that the current standards continue to meet consumer and processor needs; however, both the rice and grain industries have optional certification procedures. We have determined that these certification procedures could be beneficial to the pea and lentil industries, as well.

Currently, inspectors certify peas and lentils offered for inspection as a specific quality (U.S. grade), such as U.S. No. 2 Smooth Green Dry Peas. Certifying a specific grade is commonly referred to in the rice and grain industries as ''Option 1'' grade designation. This works well most of the time, however, there are exceptions. At times, sellers find when preparing to load peas or lentils for shipment that the supply of a particular grade of pea or lentil may be insufficient to meet the quality and quantity requirements specified in the sales contract. When this happens, the seller may find it necessary to ship peas or lentils of a better quality. However, current inspection procedures do not allow the flexibility to describe or certify superior quality peas or lentils as being of a lower quality. If the lot presented for inspection is not uniform in quality for the declared grade, the inspector

certifies each portion separately according to quality. That is, if a consignment consists of both U.S. No. 1 and 2 Smooth Green Dry Peas, current procedure requires that the quantity representing each of the different qualities receive separate certification. Such certification may not meet the terms of sale for the contract.

The U.S. standards for rice and grains offer an alternative approach that is termed ''Option 2'' grade designation. When a contract specifies an Option 2 grade designation, the applicant may specifically request Option 2 certification. Under Option 2 certification, there is no limitation placed on the amount of better quality grain in the lot. When a lot meets or is of better quality than the declared grade, inspectors include the term ''or better'' immediately following the numerical or sample grade designation.

We would like to offer the Option 2 grade designation and certification approach for peas and lentils. Under such an approach, peas or lentils that are a better quality than that specified by the contract would be certified as a specific grade ''or better;'' (for example, U.S. No. 2, or better, Smooth Dry Peas). The applicant for inspection can obtain the optional certification procedure by requesting it on the application for inspection. The applicant would file the request for the optional certification prior to the beginning of inspection so the inspector knows how to certify the lot. We believe that Option 2 grade designation and certification will better align the pea and lentil industries with the rice and grain industries, provide sellers with the flexibility to ship peas and lentils of better quality, and provide buyers with the desirable option of receiving better quality.

**Mixed Whole Dry Peas**

We also intend to eliminate the requirement that certain grade related information be shown on the grade line of the certificate for the class of Mixed Whole Dry Peas. Currently, the U.S. standards for Whole Dry Peas require a breakdown of the different classes, in order of predominance, be shown on the grade line of the certificate, in addition to the regular grade designation information, when the peas are classed as Mixed peas. Instead of showing this information on the grade line, we plan to enter such information in the ''Results'' section of the certificate. This approach will not change the grade of the product. We intend for the change to improve the readability of the certificate. The grade line will provide the grade designation and other related information will be provided in the ''Results'' section of the certificate. Further, this change in the U.S. standards for Whole Dry Peas will better align certification requirements in peas with other graded commodities such as rice, beans, and lentils.

**Comments**

We are requesting comments for 30 days. All comments received within the comment period will be made part of the public record we maintain, will be available to the public for review, and will be considered before we take final action.

**Authority:** 7 U.S.C. 1621–1627.

**James E. Link,**

*Administrator, Grain Inspection, Packers and Stockyards Administration.*

[FR Doc. E7–7241 Filed 4–16–07; 8:45 am]

BILLING CODE 3410–KD–P

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

### Foreign Availability Procedures and Criteria

**AGENCY:** Bureau of Industry and Security, Department of Commerce.

**ACTION:** Proposed information collection; comment request.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments must be submitted on or before June 18, 2007.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Larry Hall, BIS ICB Liaison, Department of Commerce, Room 6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

**SUPPLEMENTARY INFORMATION:**

**I. Abstract**

This information is collected in order to respond to requests by Congress and industry to make foreign availability determinations. Exporters are urged to submit data regarding the foreign product's technical characteristics and the availability of these products in foreign markets to determine if similar U.S. products should be decontrolled.

**II. Method of Collection**

Written submission.

**III. Data**

*OMB Number:* 0694–0004.

*Form Number:* None.

*Type of Review:* Regular submission.

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

*Estimated Number of Respondents:* 2.

*Estimated Time per Response:* 255 hours.

*Estimated Total Annual Burden Hours:* 510.

*Estimated Total Annual Cost:* $0.

**IV. Request for Comments**

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. In addition, the public is encouraged to provide suggestions on how to reduce and/or consolidate the current frequency of reporting.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they will also become a matter of public record.

Dated: April 11, 2007.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E7–7211 Filed 4–16–07; 8:45 am]

BILLING CODE 3510–DT–P

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

### Special Comprehensive License

**AGENCY:** Bureau of Industry and Security, Department of Commerce.

**ACTION:** Proposed information collection; comment request.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments must be submitted on or before June 18, 2007.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230, (or via the internet at *DHynek@doc.gov.*).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Larry Hall, BIS ICB Liaison, Department of Commerce, Room 6703, 14th and Constitution Avenue, NW., Washington, DC 20230.

**SUPPLEMENTARY INFORMATION:**

### I. Abstract

The Special Comprehensive License procedure authorizes multiple shipments of items from the U.S. or from approved consignees abroad who are approved in advance by the Bureau of Industry and Security to conduct the following activities: servicing, support services, stocking spare parts, maintenance, capital expansion, manufacturing, support scientific data acquisition, reselling and reexporting in the form received, and other activities as approved on a case-by-case basis.

### II. Method of Collection

Submitted on forms.

### III. Data

*OMB Number:* 0694–0089.
*Form Number:* BIS–748P and BIS–752P.
*Type of Review:* Regular submission.
*Affected Public:* Business or other for-profit organizations.
*Estimated Number of Respondents:* 867.
*Estimated Time per Response:* 1 to 6 hours.
*Estimated Total Annual Burden Hours:* 1,017.
*Estimated Total Annual Cost:* $0.

### IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. In addition, the public is encouraged to provide suggestions on how to reduce and/or consolidate the current frequency of reporting.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they will also become a matter of public record.

Dated: April 11, 2007.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E7–7212 Filed 4–16–07; 8:45 am]

BILLING CODE 3510–DT–P

## DEPARTMENT OF COMMERCE

## International Trade Administration

## Commercial Service—Strategic User Satisfaction Survey

**ACTION:** Proposed information collection; comment request.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burdens, invites the general public and other Federal agencies to take this opportunity to comment on the continuing information collections, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3506 (2) (A)).

**DATES:** Written comments must be submitted on or before June 18, 2007.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 or via the Internet at *dHynek@doc.gov.*

**FOR FURTHER INFORMATION CONTACT:** Request for additional information or copies of the information collection instrument and instructions should be directed to: Joseph Carter, 14th and Constitution Avenue, NW., Washington, DC 20230; Phone number: (202) 482–3342; E-mail: *joseph.carter@mail.doc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Abstract

The International Trade Administration's U.S. Commercial Service (CS) is mandated by Congress to help U.S. businesses, particularly small and medium-sized companies, export their products and services to global markets. As part of its mission, the CS currently uses transactional user satisfaction surveys to collect feedback from U.S. business clients that use CS pay-for-use products/events provided by the organization's international offices. These surveys ask the client to evaluate the CS on its customer service delivery for a specific transaction. The results from these transactional user satisfaction surveys are used to ensure that clients' needs and expectations are met and service delivery is consistent across the organization. In addition to conducting user satisfaction surveys on a transactional basis for pay-for-use products/events provided by the CS's international offices, the CS would like to conduct a strategic user satisfaction survey on an annual basis to collect more in-depth user satisfaction feedback from CS clients in order to assess the importance or relative impact of specific service delivery processes and attributes on overall customer satisfaction. Survey responses would enable the CS to prioritize the allocation of time, budget and resources using performance-importance diagrams. Without this information, CS is unable to systematically determine the actual and relative levels of performance for attributes, processes and subprocesses, identify the drivers or determinants of overall satisfaction, and provide clear, actionable insights for managerial intervention. This information will be used for program improvement, strategic planning, and allocation of resources.

### II. Method of Collection

The data collection method for the CS is an e-mail message delivering a hot link to a web-enabled survey. If the client does not respond to the survey within two weeks, another e-mail reminder is sent to the client.

### III. Data

*OMB Number:* None.
*Form Number:* None.
*Type of Review:* Regular submission.
*Affected Public:* Business or other for-profit organizations.
*Estimated Number of Respondents:* 1,500.
*Estimated Time per Response:* 30 minutes.

*Estimated Total Annual Burden Hours:* 750.

*Estimated Total Annual Costs:* $45,000.

**IV. Request for Comments**

Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and costs) 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 forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: April 11, 2007.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E7–7209 Filed 4–16–07; 8:45 am]

**BILLING CODE 3510–FP–P**

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## DEPARTMENT OF COMMERCE

### International Trade Administration

### Information for Self-Certification Under FAQ 6 of the United States European Union Safe Harbor Privacy Framework

**AGENCY:** International Trade Administration, United States Department of Commerce.

**ACTION:** Proposed information collection; comment request.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burdens, invites the general public and other Federal agencies to take this opportunity to comment on the continuing information collections, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

**DATES:** Written comments must be submitted on or before June 18, 2007.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork, Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to: Damon Greer, U.S. Department of Commerce, International Trade Administration, Room 2003, 1401 Constitution Avenue, NW., Washington, DC 20230; Phone number: (202) 482–5023 and fax number: (202) 482–5522.

**SUPPLEMENTARY INFORMATION:**

**I. Abstract**

In response to the European Union Directive on Data Protection that restricts transfers of personal information from Europe to countries whose privacy practices are not deemed ''adequate,'' the U.S. Department of Commerce (DOC) has developed a ''Safe Harbor'' framework that will allow U.S. organizations to satisfy the European Directive's requirements and ensure that personal data flows to the United States are not interrupted. In this process, the DOC repeatedly consulted with U.S. organizations affected by the European Directive and interested non-government organizations. On July 27, 2000, the European Commission issued its decision in accordance with Article 25.6 of the Directive that the Safe Harbor Privacy Principles provide adequate privacy protection. The Safe Harbor framework bridges the differences between the European Union (EU) and U.S. approaches to privacy protection. The complete set of Safe Harbor documents and additional guidance materials may be found at *http://export.gov/safeharbor.*

Once the Safe Harbor was deemed ''adequate'' by the European Commission on July 27, 2000, DOC began working on the requirements that are necessary to put this accord into effect. The European Member States implemented the decision made by the Commission within 90 days. Therefore, the Safe Harbor became operational on November 1, 2000. The DOC created a list for U.S. organizations to sign up to the Safe Harbor and provided guidance on the mechanics of signing up to this list. As of March 1, 2007, 1,100 U.S. organizations have been placed on the Safe Harbor List, located at *http://export.gov/safeharbor.*

Organizations that have signed up to this list are deemed ''adequate'' under the Directive and do not have to provide further documentation to European officials. This list will be used by EU organizations to determine whether further information and contracts will be needed for a U.S. organization to receive personally identifiable information. This list is necessary to make the Safe Harbor accord operational, and was a key demand of the Europeans in agreeing that the Principles were providing ''adequate'' privacy protection.

The Safe Harbor provides a number of important benefits to U.S. firms. Most importantly, it provides predictability and continuity for U.S. organizations that receive personal information from the European Union. Personally identifiable information is defined as any information that can be identified to a specific person, for example an employee's name and extension would be considered personally identifiable information. All 15 member countries are bound by the European Commission's finding of ''adequacy''. The Safe Harbor also eliminates the need for prior approval to begin data transfers, or makes approval from the appropriate EU member countries automatic. The Safe Harbor principles offer a simpler and cheaper means of complying with the adequacy requirements of the Directive, which should particularly benefit small and medium enterprises.

The decision to enter the Safe Harbor is entirely voluntary. Organizations that decide to participate in the Safe Harbor must comply with the safe harbor's requirements and publicly declare that they do so. To be assured of Safe Harbor benefits, an organization needs to reaffirm its self-certification annually to the Department of Commerce that it agrees to adhere to the safe harbor's requirements, which includes elements such as notice, choice, access, data integrity, security and enforcement.

This list will be most regularly used by European Union organizations to determine whether further information and contracts will be needed by a U.S. organization to receive personally identifiable information. It will be used by the European Data Protection Authorities to determine whether a company is providing ''adequate'' protection, and whether a company has requested to cooperate with the Data Protection Authority. This list will be accessed when there is a complaint logged in the EU against a U.S. organization. This will be on a monthly basis. It will be used by the Federal Trade Commission and the Department of Transportation to determine whether a company is part of the Safe Harbor. This will be accessed if a company is practicing ''unfair and deceptive'' practices and has misrepresented itself to the public. It will be used by the Department of Commerce and the European Commission to determine if organizations are signing up to the list.

## II. Method of Collection

The self-certification form is provided via the Internet at *http://export.gov/safeharbor* and by mail to requesting U.S. firms.

## III. Data

*OMB Number:* 0625–0239.
*Form Number:* None.
*Type of Review:* Regular submission.
*Affected Public:* Business or other for-profit organizations.
*Estimated Number of Respondents:* 500.
*Estimated Time per Response:* Web site, 20 minutes; and paper format, 40 minutes.
*Estimated Total Annual Burden Hours:* 400.
*Estimated Total Annual Costs to Public:* $20,000.

## IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and costs) 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 forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: April 11, 2007.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E7–7215 Filed 4–16–07; 8:45 am]

BILLING CODE 3510–DR–P

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## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–888]**

### Floor–Standing, Metal–Top Ironing Tables and Parts Thereof from the People's Republic of China: Extension of the Time Limit for the Preliminary Results of the 2005/2006 Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**EFFECTIVE DATE:** April 17, 2007.

**FOR FURTHER INFORMATION CONTACT:** Anya Naschak or Bobby Wong, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–6375 or (202) 482–0409, respectively.

**SUPPLEMENTARY INFORMATION:**

### Background

On August 6, 2004, the Department of Commerce (''Department'') published in the **Federal Register** an antidumping duty order on floor standing, metal–top ironing tables and parts thereof from the People's Republic of China (''PRC''). *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Floor–Standing, Metal–Top Ironing Tables and Certain Parts Thereof From the People's Republic of China*, 69 FR 47868 (August 6, 2004). The Department received timely requests from Since Hardware (Guangzhou) Co., Ltd. (''Since Hardware'') and Foshan Shunde Yongjian Housewares & Hardware Co., Ltd. (''Foshan Shunde''), in accordance with 19 CFR 351.213(b)(2), for an administrative review of the antidumping duty order on ironing tables and parts thereof from the PRC, which has an August annual anniversary month. Home Products International Inc., the petitioner, also requested, in accordance with 19 CFR 351.213(b)(1), an administrative review of the antidumping duty order on ironing tables and parts thereof from the PRC for Since Hardware. On September 26, 2006, the Department initiated an administrative review with respect to Since Hardware and Foshan Shunde. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 71 FR 57465 (September 29, 2006).

On January 23, 2007, the Department rescinded the administrative review with respect to Foshan Shunde because it withdrew its request for an administrative review in a timely manner, pursuant to 19 CFR 351.213(d)(1). *See Floor–Standing, Metal–Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 2856 (January 23, 2007).

The deadline for completion of the preliminary results in the administrative review for Since Hardware is currently May 3, 2007.

### Extension of Time Limits for Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act''), and section 351.213(h)(1) of the Department's regulations require the Department to issue the preliminary results of an administrative review within 245 days after the last day of the anniversary month of the order or suspension agreement for which the administrative review was requested, and the final results of the review within 120 days after the date on which the notice of the preliminary results was published in the **Federal Register**. However, if the Department determines that it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act and section 351.213(h)(2) of the Department's regulations allow the Department to extend the 245-day period to 365 days and the 120-day period to 180 days.

Pursuant to section 751(a)(3)(A) of the Act and section 351.213(h) of the Department's regulations, we determine that it is not practicable to complete this administrative review within the statutory time limit of 245 days. The Department requires additional time to analyze questionnaire responses, issue supplemental questionnaires, and possibly conduct verification. In particular, there are complex factors of production methodology issues that the Department requires additional time to review. Therefore, in accordance with section 751(a)(3)(A) of the Act and section 351.213(h)(2) of the Department's regulations, the Department is extending the time limit for the completion of these preliminary results by an additional 120 days to August 31, 2007. The final results, in turn, will be due 120 days after the date of issuance of the preliminary results, unless extended.

Dated: April 11, 2007.

**Stephen J. Claeys,**

*Deputy Assistant Secretaryfor Import Administration.*

[FR Doc. E7–7286 Filed 4–16–07; 8:45 am]

BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–848]**

### Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results And Rescission, In Part, of 2004/2005 Antidumping Duty Administrative and New Shipper Reviews

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On October 10, 2006, the Department of Commerce (''the Department'') published the preliminary results of its administrative and new shipper reviews of the antidumping duty order on freshwater crawfish tail meat from the People's Republic of China (''PRC''). *See Freshwater Crawfish Tail Meat From the People's Republic of China: Preliminary Results and Partial Rescission of the 2004/2005 Administrative and New Shipper Reviews*, 71 FR 59432 (October 10, 2006) (*Preliminary Results*). Based on our analysis of the record, including information obtained since the preliminary results, we have made changes to the margin calculations for Xiping Opeck Food Co., Ltd. (''Xiping Opeck''), Xuzhou Jinjiang Foodstuffs Co., Ltd. (''Xuzhou Jinjiang'') and Qingdao Jinyongxiang Aquatic Foods Co., Ltd. (''Qingdao JYX''). See Final Results of Review section, below.

**EFFECTIVE DATE:** April 17, 2007.

**FOR FURTHER INFORMATION CONTACT:** Scot Fullerton or Erin Begnal, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–1386 or (202) 482–1442, respectively.

**SUPPLEMENTARY INFORMATION:**

### Background

On October 10, 2006, the Department published the preliminary results of its administrative and new shipper reviews of the antidumping duty order on freshwater crawfish tail meat from the PRC, and invited parties to comment on the preliminary results. *See Preliminary Results*. The administrative review covers six exporters or producer/exporters: (1) Jiangsu Jiushoutang Organisms–Manufactures Co., Ltd. (''Jiangsu JOM''); (2) Shanghai Sunbeauty Trading Co., Ltd. (''Shanghai Sunbeauty''); (3) Qingdao JYX; and (4) Qingdao Wentai Trading Co., Ltd. (''Qingdao Wentai''); (5) Yancheng Hi–King Agriculture Developing Co., Ltd. (''Yancheng Hi–King''); and (6) Xuzhou Jinjiang.[1] The period of review (''POR'') for all respondents subject to this administrative review is September 1, 2004, through August 31, 2005.[2] The new shipper review covers two producer/exporters: (1) Xiping Opeck; and (2) Xuzhou Jinjiang. The period of review for Xiping Opeck is September 1, 2004, through August 31, 2005, while the period of review for Xuzhou Jinjiang is September 1, 2004, through October 5, 2005.

On October 30, 2006, subsequent to the issuance of the Preliminary Results, the Department received publicly available information, for purposes of valuing factors of production, from the Crawfish Processors Alliance, the Louisiana Department of Agriculture and Forestry, and Bob Odom, Commissioner (collectively, ''Domestic Parties''), pursuant to 19 CFR 351.301(c)(3). *See* Letter to the U.S. Department of Commerce, from Domestic Parties, regarding *Freshwater Crawfish Tail Meat from the People's Republic of China: 2004–05 Administrative Review* (October 30, 2006); *see also Freshwater Crawfish Tail Meat from the People's Republic of China: 2004–05 New Shipper Review* (October 30, 2006). On November 9, 2006, Xuzhou Jinjiang submitted rebuttal surrogate value information responding to Domestic Parties' October 30, 2006, surrogate value information. *See* Letter to the U.S. Department of Commerce, from Xuzhou Jinjiang, regarding *Freshwater Crawfish Tail Meat from the People's Rep. of China; Surrogate Value Rebuttal* (November 9, 2006).

On November 9, 2006, the Department also received case briefs from Domestic Parties as well as Xuzhou Jinjiang. *See* Case Brief from Domestic Parties, regarding *Freshwater Crawfish Tail Meat from the People's Republic of China: 2004–05 Administrative Review* (November 9, 2006), Case Brief from Domestic Parties, regarding *Freshwater Crawfish Tail Meat from the People's Republic of China: 2004–05 New Shipper Review* (November 9, 2006), Case Brief from Xuzhou Jinjiang, regarding *Freshwater Crawfish Tail Meat from the People's Republic Of China; Comment on the Preliminary Results* (November 9, 2006). Additionally, on November 14, 2006, we received rebuttal briefs from Domestic Parties and Xuzhou Jinjiang. *See Freshwater Crawfish Tail Meat From the People's Republic of China: Petitioner's Rebuttal Brief* (April 14, 2006); *see also* Rebuttal Brief from Domestic Parties, regarding *Freshwater Crawfish Tail Meat from the People's Republic of China: 2004–05 New Shipper Review* (November 14, 2006); and Rebuttal Brief from Xuzhou Jinjiang, regarding *Freshwater Crawfish Tail Meat from the People's Rep. Of China; Comment on the Preliminary Results* (November 14, 2006). No case briefs were submitted by Jiangsu JOM, Shanghai Sunbeauty, or Qingdao Wentai. Although petitioners initially requested a hearing in the administrative and new shipper reviews, this request was subsequently withdrawn.

On February 2, 2007, the Department placed revised expected non–market economy (''NME'') wage rates on its website, (see http://ia.ita.doc.gov/wages/index.html) and offered interested parties an opportunity to submit comments on these revised wage rates, as the period for submission of case briefs and rebuttal briefs had already passed. On February 7, 2007, Xuzhou Jinjiang submitted comments on the revised wage rates. *See* Xuzhou Jinjiang Wage Rate Comments, dated February 7, 2007. No other comments on the revised wage rates were submitted.

### Scope of Order

The product covered by this antidumping duty order is freshwater crawfish tail meat, in all its forms (whether washed or with fat on, whether purged or unpurged), grades, and sizes; whether frozen, fresh, or chilled; and regardless of how it is packed, preserved, or prepared. Excluded from the scope of the order are live crawfish and other whole crawfish, whether boiled, frozen, fresh, or chilled. Also excluded are saltwater crawfish of any type, and parts thereof. Freshwater crawfish tail meat is currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers 1605.40.10.10 and 1605.40.10.90, which are the HTSUS numbers for prepared foodstuffs, indicating peeled crawfish tail meat and other, as introduced by U.S. Customs

[1] Xuzhou Jinjiang is a participant in both the administrative review and new shipper review.

[2] On July 3, 2006, the Department issued its notice of rescission of antidumping duty new shipper reviews of Jiangsu JOM, Shanghai Sunbeauty and Qingdao Wentai, for the period September 1, 2004, and February 28, 2005. *See Notice of Rescission of Antidumping Duty New Shipper Reviews: Freshwater Crawfish Tail Meat from the People's Republic of China*, 71 FR 37902 (July 3, 2006) (''*Rescission of New Shipper Review*''). Accordingly, this administrative review only covers these companies' entries not already covered by the above-referenced new shipper reviews. Therefore, this administrative review, for Jiangsu JOM, Shanghai Sunbeauty and Qingdao Wentai, covers entries from March 1, 2005, through August 31, 2005.

and Border Protection (''CBP'') in 2000, and HTSUS numbers 0306.19.00.10 and 0306.29.00.00, which are reserved for fish and crustaceans in general. The HTSUS subheadings are provided for convenience and customs purposes only. The written description of the scope of this order is dispositive.

**Separate Rates**

Qingdao JYX, Xiping Opeck, and Xuzhou Jinjiang have requested separate, company–specific antidumping duty rates. In our preliminary results, we found that Qingdao JYX, Xiping Opeck, and Xuzhou Jinjiang had met the criteria for the application of a separate antidumping duty rate. *See Preliminary Results*. We have not received any information since the *Preliminary Results* with respect to Qingdao JYX, Xiping Opeck, and Xuzhou Jinjiang which would warrant reconsideration of our separate–rates determinations with respect to these companies. Therefore, for these final results, we will continue to calculate company–specific separate rates for these respondents.

**Partial Rescission of Administrative Review**

In the *Preliminary Results*, the Department stated its intention to partially rescind the administrative review for Yancheng Hi–King, as the firm informed the Department that it did not export the subject merchandise to the United States during the POR. The Department also stated its intention to rescind the administrative review for Qingdao Wentai, as the Department determined that Qingdao Wentai's single sale, covered by both the new shipper review and administrative review, was not *bona fide* and could not serve as the basis for the calculation of a dumping margin. *See Rescission of New Shipper Review*. No comments on the Department's intention to rescind the administrative review for Yancheng Hi–King and Qingdao Wentai were submitted by any interested party. Therefore, for the reasons stated above, we are rescinding the administrative review with respect to Yancheng Hi–King and Qingdao Wentai. *See* 19 CFR 351.213(d)(3).

**Adverse Facts Available - Jiangsu JOM & Shanghai Sunbeauty**

For purposes of the *Preliminary Results*, the Department applied facts available to sales by Jiangsu JOM and Shanghai Sunbeauty, as Jiangsu JOM would not permit the Department to verify information placed on the record, and Shanghai Sunbeauty informed the Department that it would not participate further in this review and did not respond to the Department's requests for information. Therefore, we determined that neither company cooperated to the best of its ability. *See* Memorandum to James C. Doyle, Director, from Christopher D. Riker, Program Manager, regarding *Freshwater Crawfish Tail Meat from the People's Republic of China: Preliminary Application of Adverse Facts Available to Shanghai Sunbeauty Trading Co., Ltd.*, dated October 2, 2006, and Memorandum to James C. Doyle, Director, from Christopher D. Riker, Program Manager, regarding *Freshwater Crawfish Tail Meat from the People's Republic of China: Preliminary Application of Adverse Facts Available to Jiangsu Jiushoutang Organisms–Manufacturers Co., Ltd.*, dated October 2, 2006. No comments on this determination were submitted by any interested party. Therefore, for the reasons stated above, we find it appropriate, pursuant to sections 776(a)(2)(D) and 776(b) of the Tariff Act of 1930, as amended (''the Act''), to use adverse facts available (''AFA'') as the basis for the final results of review for Jiangsu JOM and Shanghai Sunbeauty, which are part of the PRC–wide entity, as the Department was unable to verify Jiangsu JOM's and Shanghai Sunbeauty's questionnaire responses concerning their eligibility for a separate rate. Consistent with the statute, court precedent, and its normal practice, the Department has assigned the rate of 223.01 percent, the highest rate on the record of any segment of the proceeding, to the PRC–wide entity (including Shanghai Sunbeauty and Jiangsu JOM) as AFA. *See, e.g., Freshwater Crawfish Tail Meat From the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 19546 (April 22, 2002). As discussed further below, this rate has been corroborated.

**Corroboration of Secondary Information**

Section 776(c) of the Act provides that, when the Department relies on the facts otherwise available and on ''secondary information,'' the Department shall, to the extent practicable, corroborate that information from independent sources reasonably at the Department's disposal. To ''corroborate'' means to determine that the information used has probative value. *See* Statement of Administrative Action (''SAA'') accompanying the Uruguay Round Agreements Act (''URAA''), H.R. Rep. No. 103–316 at 870 (1994). The Department has determined that to have probative value, information must be reliable and relevant. *See* SAA at 870; *see also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from Japan*, 61 FR 57391, 57392 (November 6, 1996). The *SAA* also states that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. *See Preliminary Determination of Sales at Less Than Fair Value: High and Ultra–High Voltage Ceramic Station Post Insulators from Japan*, 68 FR 35627 (June 16, 2003), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: High and Ultra–High Voltage Ceramic Station Post Insulators from Japan*, 68 FR 62560 (November 5, 2003); and *Final Determination of Sales at Less Than Fair Value: Live Swine from Canada*, 70 FR 12181 (March 11, 2005).

The reliability of the AFA rate was determined by the calculation of the margin based on sales and production data of a respondent in a prior review, and on the most appropriate surrogate value information available to the Department, chosen from submissions by the parties in that review, as well as information gathered by the Department itself. Furthermore, the calculation of this margin was subject to comment from interested parties in the proceeding *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Revew, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 19546 (April 22, 2002) (''1999–2000 Review''). The Department has received no information to date that warrants revisiting the issue of the reliability of the rate calculation itself. This rate has been used as AFA in every subsequent segment of this proceeding and the Department has received no comments challenging the reliability of the margin. No information has been presented in the current review. Thus, the Department finds that the margin calculated in the 1999–2000 review is reliable.

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard the margin and determine an appropriate margin. For example, in *Fresh Cut Flowers from*

*Mexico: Final Results of Antidumping Administrative Review*, 61 FR 6812 (February 22, 1996), the Department disregarded the highest margin in that case as adverse best information available (the predecessor to facts available) because the margin was based on another company's uncharacteristic business expense resulting in an unusually high margin. Similarly, the Department does not apply a margin that has been discredited. *See D & L Supply Co. v. United States*, 113 F.3d 1220, 1221 (Fed. Cir. 1997) (the Department will not use a margin that has been judicially invalidated). None of these unusual circumstances are present here. As there is no information on the record of this review that indicates that this rate is not relevant as AFA for the PRC–wide entity, we determine that this rate is relevant. Because the rate is both reliable and relevant it has probative value. Accordingly, we determine that the highest rate determined in any segment of this administrative proceeding (*i.e.*, 223.01 percent) is corroborated (*i.e.*, it has probative value).

**Analysis of Comments Received**

In the case and rebuttal briefs received from the parties after the *Preliminary Results*, we received comments on the surrogate values used to value labor, overhead, selling, general and administrative expenses (''SG&A''), and profit. We also received comments regarding the *bona fides* of Xuzhou Jinjiang's POR sales. Moreover, we received additional comments from Xuzhou Jinjiang in response to the Department's February 2, 2007, request for comments on the revised expected NME wage rates. All issues raised in the case briefs and wage rate comments are addressed in the Memorandum to David Spooner, Assistant Secretary for Import Administration, from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, regarding *Issues and Decision Memorandum for the Final Results in the 2004/2005 Administrative and New Shipper Reviews of Freshwater Crawfish Tail Meat from the People's Republic of China* (April 9, 2007) (''*Issues and Decision Memorandum*''), which is hereby adopted by this notice. A list of the issues raised, all of which are in the *Issues and Decision Memorandum*, is attached to this notice as Appendix I. Parties can find a complete discussion of all issues raised in the briefs and the corresponding recommendations in this public memorandum on file in the Central Records Unit (''CRU''), room B–099 of the Herbert H. Hoover Building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Web at http://ia.ita.doc.gov. The paper copy and electronic version of the *Issues and Decision Memorandum* are identical in content.

**Changes Since the Preliminary Results**

Based on the comments received from the interested parties, we have made changes to the margin calculations for Qingdao JYX, Xiping Opeck, and Xuzhou Jinjiang. For the final results, we have updated the surrogate value for labor. For a discussion of these changes, see the *Issues and Decision Memorandum* at Comment 2.

**Final Results of Review**

We determine that the following antidumping duty margins exist:

FRESHWATER CRAWFISH TAIL MEAT FROM THE PRC

| Manufacturer/Exporter | Weighted–Average Margin (Percent) |
|---|---|
| Qingdao Jinyongxiang Aquatic Foods Co., Ltd. | 50.98 |
| Xiping Opeck Food Co., Ltd. | 34.85 |
| Xuzhou Jinjiang Foodstuffs Co., Ltd. | 0.00 |
| PRC–wide Rate(including Jiangsu Jiushoutang Organisms–Manufactures Co., Ltd. and Shanghai Sunbeauty Trading Co., Ltd.) | 223.01 |

For details on the calculation of the antidumping duty margin for Qingdao JYX, Xiping Opeck, and Xuzhou Jinjiang, see Memorandum to the File, through Christopher D. Riker, Program Manager from Scot Fullerton, Senior International Trade Analyst, regarding Freshwater Crawfish Tail Meat From the People's Republic of China - Analysis Memorandum for the Final Results of Administrative Review of Qingdao Jinyongxiang Aquatic Foods Co., Ltd. (April, 9, 2007), Memorandum to the File, through Christopher D. Riker, Program Manager, from Erin Begnal, Senior International Trade Analyst, regarding *Freshwater Crawfish Tail Meat From the People's Republic of China - Analysis Memorandum for the Final Results of New Shipper Review of Xiping Opeck Food Co., Ltd.* (April, 9, 2007), and Memorandum to the File, through Christopher D. Riker, Program Manager, from Scot Fullerton, Senior International Trade Analyst, regarding Freshwater Crawfish Tail Meat From the People's Republic of China - Analysis Memorandum for the Final Results of New Shipper Review of Xuzhou Jinjiang Foodstuffs Co., Ltd. (April, 9, 2007). Public versions of these memoranda are on file in the CRU.

**Assessment of Antidumping Duties**

The Department will determine, and CBP shall assess, antidumping duties on all appropriate entries. The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of the final results of this review. For assessment purposes for companies with a calculated rate, where possible, the Department calculated importer–specific assessment rates for freshwater crawfish tail meat from the PRC on a per–unit basis. Specifically, the Department divided the total dumping margins (calculated as the difference between normal value and export price) for each importer by the total quantity of subject merchandise sold to that importer during the POR to calculate a per–unit assessment amount. The Department will direct CBP to assess importer–specific assessment rates based on the resulting per–unit (i.e., per–kilogram) rates by the weight in kilograms of each entry of the subject merchandise during the POR.

**Cash Deposits**

The following cash–deposit requirements will be effective upon publication of the final results for shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results, as provided by section 751(a)(2)(C) of the Act: (1) for subject merchandise exported by Qingdao JYX, Xiping Opeck, and Xuzhou Jinjiang, we will establish a per–kilogram cash deposit rate which will be equivalent to the company–specific weighted–average margin established in this review; (2) the cash–deposit rate for PRC exporters

who received a separate rate in a prior segment of the proceeding will continue to be the rate assigned in that segment of the proceeding; (3) for all other PRC exporters of subject merchandise which have not been found to be entitled to a separate rate (including Shanghai Sunbeauty and Jiangsu JOM), the cash–deposit rate will be the PRC–wide rate of 223.01 percent; (4) for all non–PRC exporters of subject merchandise, the cash–deposit rate will be the rate applicable to the PRC exporter that supplied that exporter.

These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

**Notification to Importers**

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

These reviews and notice are in accordance with sections 751(a)(1), 751(a)(2) and 777(i)(1) of the Act and 19 CFR 351.221(b)(5).

Dated: April 9, 2007.

**David M. Spooner,**

*Assistant Secretaryfor Import Administration.*

**Appendix I**

**General Issues**

*Comment 1:* Surrogate Financial Ratios
*Comment 2:* Surrogate Wage Rate

**Company–Specific Issues**

*Comment 3: Bona Fides* of Xuzhou Jinjiang Foodstuffs Co., Ltd.'s Sales

[FR Doc. E7–7199 Filed 4–16–07; 8:45 am]

BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–357–812]**

### Honey from Argentina: Final Results of New Shipper Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On November 24, 2006, the Department of Commerce (the Department) published the preliminary results of review in this proceeding. *See Honey from Argentina: Preliminary Results of New Shipper Review*, 71 FR 67850 (November 24, 2006) (*Preliminary Results*). This new shipper review covers one exporter, Patagonik S.A. (Patagonik) and its affiliated supplier, Colmenares Santa Rosa (CSR), of subject merchandise to the United States. The period of review (POR) is December 1, 2004, to December 31, 2005. The petitioners are the Sioux Honey Association and the American Honey Producers Association. Based on our analysis of comments received, the margin calculation for these final results does not differ from the preliminary results.

**EFFECTIVE DATE:** April 17, 2007.

**FOR FURTHER INFORMATION CONTACT:** David Cordell or Robert James, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0408 or (202) 482–0649, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

On November 24, 2006, the Department published its *Preliminary Results* of this antidumping duty new shipper review of honey from Argentina. On December 15, 2006, the **Federal Register** published a correction notice due to typographical errors in the original preliminary results notice. *See Corrections Honey From Argentina: Preliminary Results of New Shipper Review (Corrections Notice)*, 71 FR 75614 (December 15, 2006). Subsequent to publication of the *Preliminary Results* and the *Corrections Notice*, the Department issued an additional cost questionnaire on December 20, 2006, to which Patagonik responded on January 3, 2007. In response to the Department's invitation to comment on the preliminary results, petitioners submitted their case brief on January 8, 2007, and Patagonik submitted its rebuttal brief on January 16, 2007.[1] On January 31, 2007, the Department extended the final results until April 16, 2007. *See Notice of Extension of Time Limit for Final Results of Antidumping Duty New Shipper Review: Honey from Argentina*, 72 FR 4486 (January 31, 2007).

**Scope of the Order**

The merchandise covered by the order is honey from Argentina. The products covered are natural honey, artificial honey containing more than 50 percent natural honey by weight, preparations of natural honey containing more than 50 percent natural honey by weight, and flavored honey. The subject merchandise includes all grades and colors of honey whether in liquid, creamed, comb, cut comb, or chunk form, and whether packaged for retail or in bulk form. The merchandise is currently classifiable under subheadings 0409.00.00, 1702.90.90, and 2106.90.99 of the *Harmonized Tariff Schedule of the United States* (HTSUS). Although the HTSUS subheadings are provided for convenience and Customs purposes, the Department's written description of the merchandise under this order is dispositive.

**Analysis of Comments Received**

All issues raised in the case and rebuttal briefs by parties to this new shipper review are addressed in the ''Issues and Decision Memorandum'' (Decision Memorandum) from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration. A list of issues addressed in the Decision Memorandum is appended to this notice. The Decision Memorandum is on file in the CRU and can be accessed directly on the web at http://www.ita.doc.gov/.

**Changes Since the Preliminary Results**

Based on our analysis of comments received, we have made no changes to our preliminary results.

**Final Results of Review**

We determine that the following dumping margins exist for the period December 1, 2004, through December 31, 2005.

| Exporter | Weighted Average Margin (percentage) |
|---|---|
| Patagonik S.A. /Colmenares Santa Rosa S.R.L ..... | 0.00 |

**Assessment**

The Department shall determine, and the CBP shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated importer–specific assessment rates for the merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales made during the POR to the total customs value of the sales used to calculate those duties. The Department will issue appropriate *ad valorem* assessment instructions directly to CBP 15 days after publication

[1] In response to requests from petitioners and Patagonik, the Department extended the deadline for case briefs to January 8, 2006, and for rebuttal briefs to January 16, 2006.

of these final results of review. We will direct CBP to assess the resulting assessment rate against the entered customs values for the subject merchandise on each of the importer's entries during the POR.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003 (68 FR 23954). This clarification will apply to entries of subject merchandise during the period of review produced by companies included in these final results of review for which the reviewed companies did not know their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all–others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, see *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

**Cash Deposit Requirements**

The following cash deposit requirements will be effective upon publication of the final results of this new shipper review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(1) of the Tariff Act of 1930, as amended (the Tariff Act):

(1) the cash deposit for Patagonik/CSR will be the rate established in the final results of this new shipper review;

(2) for any previously reviewed or investigated company not listed above, the cash deposit rate will continue to be the company–specific rate published in the most recent period;

(3) the cash deposit rate for entries of subject merchandise exported/produced by Patagonik/CSR but not produced by Patagonik/CSR will continue to be the ''all other's'' rate of 30.24 percent or the rate applicable to the producer/exporter if so established; and

(4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will be the ''all others'' rate from the LTFV investigation (30.24 percent). *See Notice of Antidumping Duty Order; Honey From Argentina*, 66 FR 63672 (December 10, 2001). These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

**Notification to Interested Parties**

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a 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, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation, which is subject to sanction. We are issuing and publishing this determination and notice in accordance with sections section 751(a)(1) and 777(i)(1) of the Tariff Act.

Dated: April 9, 2007.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

**Appendix: Issues and Decision Memorandum**

*Comment 1.* Bona Fide nature of the sale
Comment 2. Billing Adjustment
Comment 3. Averaging of Beekeeper Costs

Comment 4. Drum Costs
Comment 5. Feed Costs
Comment 6. Rent
Comment 7. Honey Collector's Salary

[FR Doc. E7–7288 Filed 4–16–07; 8:45 am]

BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

### Notice of Meeting Regarding IPv6 Test Materials for the United States Government

**AGENCY:** National Institute of Standards and Technology, Department of Commerce.

**ACTION:** Notice of meeting.

**SUMMARY:** The National Institute of Standards and Technology (NIST) Information Technology Laboratory (ITL) invites interested parties to attend a meeting pertaining to Internet Protocol version 6 (IPv6) Test Materials for the United States Government.

NIST will host a meeting open to the public on May 4th, 2007, in Lecture Room B of building 101 at 9 am to discuss establishing a framework for a sound and viable testing methodology for Internet Protocol version 6. The discussion will include: USG requirements for testing, attributes of potential administrative frameworks for test programs, potential sources of test suites to serve as a technical basis for a testing program, and potential test providers who could carry out and/or provide services in support of such programs.

**DATES:** The public meeting will be held on May 4th, 2007 at 9 a.m. Parties wishing to submit information should send their materials to NIST no later than April 30, 2007.

**ADDRESSES:** The public meeting will be held at: NIST Administration Building, 100 Bureau Drive, Lecture Room B, Gaithersburg, MD 20899. Submissions of information should be sent to: *sp–500–267–comments@antd.nist.gov.*

**FOR FURTHER INFORMATION CONTACT:** Stephen Nightingale, *night@nist.gov.*

**SUPPLEMENTARY INFORMATION:** Following publication of NIST Special Publication 500–267 *A Profile for IPv6 in the Federal Government—Version 1.0,* NIST has begun to consider the feasibility and form of a possible testing program to demonstrate claims of compliance. Such a testing program might have two components:

(1) Qualified test laboratories testing to public domain test suites and relevant test methods, and

(2) An Approved Products List.

The approved products list could identify Hosts, Routers and Network Protection Devices (including Firewalls) that have passed interoperability testing and conformance testing.

The objective of the meeting is to determine the following information:

(1) Whether there are test Suites for interoperability and conformance that can be placed in the public domain, free from intellectual property rights or other encumbrance and validated against the specifications, for use as the standard reference test suite for the U.S. Government IPv6 Profile.

(2) What test methods, being devices or procedural systems, can be validated in conjunction with the standard reference test suites.

(3) Whether there are testing facilities compliant with, or intending to be compliant with, ISO 17025 *General Requirements for the Competence of Calibration and Testing Laboratories,* which may conduct interoperability and

conformance testing of all or any integral part of the IPv6 Profile, in a forum open to all qualified applicants.

Other interested parties are also invited to submit written statements. All parties desiring to attend the meeting must register in advance, to help coordinate access to the NIST campus.

Draft NIST SP 500–267, the IPv6 profile, remains available electronically at *http://www.antd.nist.gov/usgv6-v1-draft.pdf.*

Dated: April 12, 2007.

**William Jeffrey,**

*Director.*

[FR Doc. E7–7287 Filed 4–16–07; 8:45 am]

BILLING CODE 3510–13–P

## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

### International Code Council: The Update Process for the International Codes

**AGENCY:** National Institute of Standards and Technology, Commerce.

**ACTION:** Notice of Final Action Hearings on U.S. Model Building Safety and Fire Prevention Codes, 2007 supplement to the 2006 editions.

**SUMMARY:** The International Code Council (ICC), under whose auspices the International Codes (''I-Codes'') are developed, maintains a process for updating these model codes based on receipt of proposals from interested individuals and organizations. The ICC's 14 separately published codes are each comprehensively updated and re-published every three years with a supplement released between each edition. The most current versions of the I-Codes are the 2006 editions. The 2007 supplement to the 2006 editions, the subject of this notice, will be released in July of 2007.

The purpose of this notice is to invite public participation in the Final Action Hearings of the present code development cycle that concludes in the publication of the 2007 supplement to the 2006 edition. Consistent with the procedures of the Governmental Consensus Process, following committee action taken at the Code Development Hearings held in September 2006, the ICC published the result of the hearings and invited and received public comment. At the Final Action Hearings contested proposals will again be publicly debated followed by membership action to approve or reject each scheduled item.

The publication of this notice by the National Institute of Standards and Technology (NIST) on behalf of ICC is being undertaken as a public service. NIST does not necessarily endorse, approve, or recommend any of the codes or standards referenced in the notice.

Session Dates: The Final Action Hearings of the 2006/2007 Code Development Cycle will occur between May 21 and May 26, 2007, at the Rochester Riverside Convention Center, Rochester, New York.

The agenda for the hearing as well as updates to the schedule are also posted on the ICC Web site at: *http://www.iccsafe.org.*

**FOR FURTHER INFORMATION CONTACT:** Mike Pfeiffer, PE, Vice President, Codes and Standards Development at ICC's Chicago District Office, 4051 West Flossmoor Road, Country Club Hills, Illinois 60478; Telephone 888–422–7233, Extension 4338; e-mail *mpfeiffer@iccsafe.org.*

**SUPPLEMENTARY INFORMATION:**

### Background

The ICC produces a family of Codes and Standards that are comprehensive, coordinated, and are widely used across the country in the regulation of the built environment. Local, State, and Federal agencies use these codes and standards as the basis for developing regulations concerning new and existing construction. ICC's model codes and standards are each developed and maintained through voluntary consensus development processes known as the Governmental Consensus Process. Consistent with the voluntary consensus requirements of the National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113), the Governmental Consensus Process incorporates a balance of involved interests, ensures due process, provides for conclusion by consensus, the resolution of objections by interested parties, the fair consideration of all public comments, and has a prescribed process for appeal of any action.

The ICC code development process is initiated when proposals from interested persons—supported by written data, views, or arguments—are solicited, received and then published in the Proposed Changes document. This document is distributed a minimum of 30 days in advance of the Code Development Hearings and serves as the agenda for that session.

At the Code Development Hearing the ICC Code Development Committee for each code or subject area of the code considers testimony and takes action on each proposal (Approval, Disapproval, or Approval as Modified). At the conclusion of committee action on each proposal, any member of the public assembly may make a motion for a vote by the ICC members in attendance (''assembly action'') to consider an action different than the committee action. Successful assembly actions on code changes become part of the record of public comments and are considered at the Final Action Hearing. Following the Code Development Hearing, the Report of the Public Hearing is published and identifies the disposition of each proposal, the reason for the committee's action, and successful assembly actions. Any person may provide additional comment on the committee actions in the public comment period following the first hearing. These comments are published and distributed in Final Action Agenda which serves as the agenda for the second public hearing in each cycle.

Proposals which are approved by a vote of the Governmental Members of ICC at the Final Action Hearing are incorporated in either the Supplement or Edition, as applicable, with the next 18-month cycle starting with the submittal deadline for proposals. Proponents of proposals will receive a copy of all documents (Proposed Changes, Report of the Public Hearing and Final Action Agenda). Any interested party may also request a copy, free of charge, by downloading the ''return coupon'' from the ICC website at *http://www.iccsafe.org* and forwarding it as directed.

The International Codes consist of the following:

International Building Code;
International Code Council Electrical Code Administrative Provisions;
International Energy Conservation Code;
International Existing Building Code;
International Fire Code;
International Fuel Gas Code;
International Mechanical Code;
ICC Performance Code for Buildings and Facilities;
International Plumbing Code;
International Private Sewage Disposal Code;
International Property Maintenance Code;
International Residential Code;
International Urban-Wildland Interface Code; and
International Zoning Code.

Dated: April 12, 2007.

**William Jeffrey,**

*Director.*

[FR Doc. E7–7276 Filed 4–16–07; 8:45 am]

BILLING CODE 3510–13–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Proposed Information Collection; Comment Request; Marine Mammal Stranding Report/Marine Mammal Rehabilitation Disposition Report

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA).

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be submitted on or before June 18, 2007.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Patricia Lawson, 301–713–2322 or *patricia.lawson@noaa.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Abstract

The marine mammal stranding report provides information on strandings so that the National Marine Fisheries Service (NMFS) can compile and analyze by region the species, numbers, conditions, and causes of illnesses and deaths in stranded marine mammals. The Agency requires this information to fulfill its management responsibilities under the Marine Mammal Protection Act (16 U.S.C. 1421a). The Agency is also responsible for the welfare of marine mammals while in rehabilitation status. The data from the marine mammal rehabilitation disposition report are required for monitoring and tracking of marine mammals held at various NMFS-authorized facilities. This information is submitted primarily by volunteer members of the marine mammal stranding networks who are authorized by the Agency.

#### II. Method of Collection

Paper applications, electronic reports, and telephone calls are required from participants, and methods of submittal include Internet through the NMFS National Marine Mammal Stranding Database and facsimile transmission of paper forms.

#### III. Data

*OMB Number:* 0648–0178.
*Form Number:* None.
*Type of Review:* Regular submission.
*Affected Public:* Not-for-profit institutions; and business or other for-profit organizations.
*Estimated Number of Respondents:* 400.
*Estimated Time per Response:* 30 minutes.
*Estimated Total Annual Burden Hours:* 2,400.
*Estimated Total Annual Cost to Public:* $78.44.

#### IV. Request for Comments

*Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: April 11, 2007.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E7–7216 Filed 4–16–07; 8:45 am]

BILLING CODE 3510–22–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Notice of Intent To Prepare and Environmental Impact Statement (EIS) for the Proposed Approval of a Coastal Management Program for the State of Illinois Under the Coastal Zone Management Act (CZMA) of 1972, As Amended

**AGENCY:** Office of Ocean and Coastal Resource Management (OCRM), National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce.

**ACTION:** Notice of intent to prepare an EIS; request for comments.

**SUMMARY:** Pursuant to the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4231, *et seq,*), the Council on Environmental Quality Regulations for implementing the procedural provisions of NEPA (40 Code of Federal Regulation (CFR) parts 1500–1508), and NOAA policy and procedures (NOAA Administrative Orders (NAO) 216–6), the NOS Office of Ocean and Coastal Resource Management (OCRM) is issuing this notice to advise the public of its intent to prepare an EIS evaluating potential environmental impacts associated with approving and providing annual funding for the State of Illinois' Coastal Management Program under the CZMA. Interested parties who wish to submit suggestions, comments on substantive information regarding the scope of content of the proposed DEIS, extent of the action, range of alternatives, and types of impacts, are invited to provide written comments to the designated officials below. Currently there are no scoping meetings planned, as many meetings and workshops have already been held for Federal, State and local agencies as well as the public in Illinois. The meetings and written comments will be documented and summarized in a scoping report included in the DEIS for public comment.

**SUPPLEMENTARY INFORMATION:** The National Coastal Zone Management (CZM) Program is a voluntary partnership between the Federal Government and U.S. coastal States and territories authorized by the CZMA. OCRM administers program at the Federal level and works with State coastal zone management partners to:

- Preserve, protect, develop and, where possible, restore and enhance the resources of the nation's coastal zone for this and succeeding generations;
- Encourage and assist the states to exercise effectively their responsibilities in the coastal zone to achieve wise use of land and water resources, giving full consideration to ecological, cultural, historic, and aesthetic values, as well as the need for compatible economic development;
- Encourage the preparation of special area management plans to provide increased specificity in protecting significant natural resources, reasonable coastal-dependent economic growth, improved protection of life and property in hazardous areas and improved predictability in government decisionmaking; and
- Encourage the participation, cooperation, and coordination of the

public, Federal, State, local, interstate and regional agencies, and governments affecting the coastal zone.

Of the 35 coastal States and island territories eligible to participate in the CMP, only Illinois has not joined. A total of 34 coastal States and five island territories and commonwealths have developed CZM programs representing more than 99.9 percent of the nation's 95,331 miles of oceanic and Great lakes coastline. Illinois has 63 miles of shoreline.

On November 4, 2004, Governor Blagojevich announced that Illinois would be seeking application into the National Coastal Zone Management Program. It is a voluntary program under which Illinois will be applying to NOAA for Federal program approval and Federal funding. The Illinois Department of Natural Resources has been designated as the lead State agency for developing the Lake Michigan Coastal Management Program for Illinois. The purpose of the Illinois Coastal Management Program (ICMP) will be to enhance the State's role in planning for and managing its natural and cultural resources in the coastal region. Many Federal, State, and local agencies manage resources in the coastal region of Illinois. This will not change, as the fundamental roles of the agencies will remain the same. The ICMP will encourage coordination of agency efforts in the coastal region and will provide opportunities for Federal, State, and local stakeholders to cooperatively identify priorities for the coastal region and to implement projects which address those priorities.

Upon ICMP approval, Illinois will be eligible to receive approximately $2 million/year in Federal CZMA funds, which will fund a grants program to assist in implementing projects and studies designed to protect and enhance the natural and cultural resources within Illinois' coastal zone. The ICMP will create ecological, recreational and economic opportunities for Illinois and may provide assistance in addressing the following issues: Water quality; protection of wetlands and other natural resources; planning for erosion control, utility access and energy development; improving public access for recreational purposes; redevelopment of deteriorating and underutilized urban waterfronts and ports; educational, interpretive, and research measures; documentation, monitoring and analysis of coastal land uses changes; and preservation and/or restoration of areas for their conservation, recreational, ecological, historical and aesthetic values.

The EIS will analyze the environmental impacts of two alternatives that are available to OCRM: (1) Approve the program and (2) do not approve the program, or the No Action alternative. Public participation is invited by providing written comments to NOS, and attending public meetings conducted by the State. OCRM reserves the right to hold additional scoping meetings should they prove necessary, and they will be noticed in the **Federal Register** and local newspapers 30 days in advance of their being held.

Oral and written comments presented at the public scoping meetings, as well as written comments received by OCRM during this scoping period and throughout the EIS process, will be considered in the preparation of the EIS. To ensure that OCRM has sufficient time to consider public input in preparation of the Draft EIS, written comments should be submitted to the address below by 29 June 2007. Letters and other written or oral comments received may be published in the EIS along with the names of the individuals making the comments (personal home addresses and phone numbers will not be published). As required by law, comments will be addressed in the EIS and made available to the public. Private addresses will only be used to develop a mailing list of those individuals requesting copies of the EIS.

**FOR FURTHER INFORMATION CONTACT:** Please direct any written comments or requests for information to: Diana Olinger, Coastal Programs Division, Office of Ocean and Coastal Resource Management, National Oceanic and Atmospheric Administration, 1305 East-West Highway, Silver Spring, Maryland 20910, E-mail: *Diana.Olinger@noaa.gov,* telephone number: (301) 563–1149.

**William Corso,**

*Deputy Assistant Administrator, Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration.*

(Federal Domestic Assistance Catalog 11.419 Coastal Zone Management Program Assistance)

[FR Doc. 07–1888 Filed 4–16–07; 8:45 am]

**BILLING CODE 3510–08–M**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 041107A]**

### Marine Mammals; File No. 1079–1828

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

**ACTION:** Notice; receipt of application.

**SUMMARY:** Notice is hereby given that NOAA Fisheries Office of Science and Technology (Principal Investigator: Dr. Brandon Southall), Silver Spring, MD, has applied in due form for a permit to conduct scientific research on marine mammals.

**DATES:** Written, telefaxed, or e-mail comments must be received on or before May 17, 2007.

**ADDRESSES:** The application and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521; *http://www.nmfs.noaa.gov/pr/permits/review.htm*; and

Southeast Region, NMFS, 263 13th Avenue South, Saint Petersburg, FL 33701; phone (727)824–5312; fax (727)824–5309.

Written comments or requests for a public hearing on this application should be mailed to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Comments may also be submitted by facsimile at (301)427–2521, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing e-mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: File No. 1079–1828.

**FOR FURTHER INFORMATION CONTACT:** Tammy Adams or Jolie Harrison, (301)713–2289.

**SUPPLEMENTARY INFORMATION:** The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of

endangered and threatened species (50 CFR parts 222–226).

The applicant proposes to observe behavioral responses in several deep-diving cetacean species exposed to natural and artificial underwater sounds and quantify exposure conditions associated with various effects. These behavioral response studies (BRS) would focus on beaked whales (*Ziphius cavirostris* and *Mesoplodon* spp.), but the responses of other odontocete species, including Risso's dolphins (*Grampus griseus*), pilot whales (*Globicephala macrorhynchus*), melon-headed whales (*Peponocephala electra*), and endangered sperm whales (*Physeter macrocephalus*), may also be monitored. Please refer to Table IV.C.2–1 of the application for a complete list of cetacean species that may be indirectly harassed during the BRS. The BRS would be conducted in the Tongue of the Ocean (east of Andros Island, Bahamas). During the BRS, subject whales would have scientific instruments (digital archival recording tags) temporarily attached via suction cup, be photographed for identification, and be exposed to controlled levels of natural and anthropogenic underwater sounds, including signals simulating mid-frequency sonar. Whales would be monitored visually and through passive acoustic monitoring (via an underwater hydrophone array), as well as through data from the tags, for responses to the sounds. Sloughed skin samples collected from the detached suction cup would be imported into the U.S. for analysis. The permit would be valid for a maximum of 5 years from date of issuance.

A draft Environmental Assessment (EA) has been prepared to examine whether significant environmental impacts could result from issuance of the proposed scientific research permit. The draft EA is available for review and comment simultaneous with the scientific research permit application.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: April 11, 2007.

**P. Michael Payne,**

*Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. E7–7294 Filed 4–16–07; 8:45 am]

**BILLING CODE 3510–22–S**

## PATENT AND TRADEMARK OFFICE

### Submission for OMB Review; Comment Request

The United States Patent and Trademark Office (USPTO) has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

*Agency:* United States Patent and Trademark Office (USPTO).

*Title:* Deposit of Biological Materials.

*Form Number(s):* N/A.

*Agency Approval Number:* 0651–0022.

*Type of Request:* Extension of a currently approved collection.

*Burden:* 3,501 hours annually.

*Number of Respondents:* 3,500 responses per year. The USPTO expects that 3,500 patent applications on inventions dealing with deposits of biological materials will be filed each year. It is estimated by the USPTO that one (1) depository will seek recognition every four years, or 0.25 depositories will seek recognition annually.

*Avg. Hours per Response:* The USPTO estimates that it will take one (1) hour for the average patent applicant respondent to collect and submit the necessary deposit information, and an average of 5 hours for the average depository seeking approval to store biological material to gather and submit the necessary approval information.

*Needs and Uses:* Information on the deposit of biological materials in depositories is required for (a) the USPTO determination of compliance with 35 U.S.C. 2(b)(2) and 112, and 37 CFR 1.801–1.809, where inventions sought to be patented rely on biological material subject to the deposit requirement, including notification to the interested public on where to obtain samples of deposits; and (b) in compliance with 37 CFR 1.803 to demonstrate that the depositories are qualified to store and test the biological material submitted to them under patent applications. This collection is used by the USPTO to determine whether or not the applicant has met the requirements of the patent regulations. In addition, the USPTO uses this information to determine the suitability of a respondent depository based upon administrative and technical competence, and the depository's agreement to comply with the requirements set forth by the USPTO. There are no forms in this collection.

*Affected Public:* Individuals or households; business or other for-profit; not-for-profit institutions.

*Frequency:* On occasion.

*Respondent's Obligation:* Required to obtain or retain benefits.

*OMB Desk Officer:* David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by any of the following:

- E-mail: Susan.Fawcet@uspto.gov. Include ''0651–0022 copy request'' in the subject line of the message.
- *Fax:* 571–273–0112, marked to the attention of Susan K. Fawcett.
- *Mail:* Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, Customer Information Services Group, Public Information Services Division, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Written comments and recommendations for the proposed information collection should be sent on or before May 17, 2007 to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: April 10, 2007.

**Susan K. Fawcett,**

*Records Officer, USPTO, Office of the Chief Information Officer, Customer Information Services Group, Public Information Services Division.*

[FR Doc. E7–7250 Filed 4–16–07; 8:45 am]

**BILLING CODE 3510–16–P**

## CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

### Information Collection; Submission for OMB Review, Comment Request

**AGENCY:** Corporation for National and Community Service.

**ACTION:** Notice.

**SUMMARY:** The Corporation for National and Community Service (hereinafter the ''Corporation''), has submitted a public information collection request (ICR) entitled AmeriCorps Enrollment Form, and AmeriCorps Exit Form, to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995, Pub. L. 104–13, (44 U.S.C. Chapter 35). Copies of this ICR, with applicable supporting documentation, may be obtained by calling the Corporation for National and Community Service, Bruce Kellogg at 202–606–6954. Individuals who use a telecommunications device for the deaf (TTY–TDD) may call (202) 565–2799 between 8:30 a.m. and 5 p.m. eastern time, Monday through Friday.

**ADDRESSES:** Comments may be submitted, identified by the title of the information collection activity, to the

Office of Information and Regulatory Affairs, Attn: Ms. Katherine Astrich, OMB Desk Officer for the Corporation for National and Community Service, by any of the following two methods within 30 days from the date of publication in this **Federal Register**:

(1) By fax to: (202) 395–6974, Attention: Ms. Katherine Astrich, OMB Desk Officer for the Corporation for National and Community Service; and

(2) Electronically by e-mail to: *Katherine_T._Astrich@omb.eop.gov.*

**SUPPLEMENTARY INFORMATION:** The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Propose ways to enhance the quality, utility, and clarity of the information to be collected; and
- Propose ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

**Comments**

A 60-day public comment Notice was published in the **Federal Register** on January 30, 2007. This comment period ended March 30, 2007. One public comment was received from this notice. This questioned whether the AmeriCorps member or the program's Certifying Official should certify a member's prior service. The Corporation determined that the member should self-certify this information as it may not be available to the certifying official. A further suggestion to delete names of inactive program types will be implemented as appropriate.

*Description:* Currently, the Corporation is soliciting comments concerning the proposed renewal of its AmeriCorps Enrollment Form and its AmeriCorps Exit Form. The enrollment and exit forms are completed jointly by members interested in performing a period of national service and by programs providing that opportunity. Upon successfully completing a term of service an AmeriCorps participant my receive an education award that may be used to pay for certain educational expenses or for qualified student loans. Enrollment and exit processing is completed electronically. The paper forms are retained by the programs for audit purposes.

*Type of Review:* Renewal

*Agency:* Corporation for National and Community Service.

*Title:* AmeriCorps Enrollment Form, and AmeriCorps Exit Form.

*OMB Number:* 3045–0006 (Enrollment) & 3045–0015 (Exit).

*Agency Number:* None.

*Affected Public:* Individuals about to participate in an AmeriCorps program (Enrollment) and AmeriCorps members who have ended their term of service (Exit).

*Total Respondents:* 73,000 annually for each form.

*Frequency:* Annually.

*Average Time per Response:* 7 minutes for each form (4 minutes for the AmeriCorps member to complete the form, and 3 minutes for the program staff).

*Estimated Total Burden Hours:* 17032 for both forms. (8516 each)

*Total Burden Cost (capital/startup):* None.

*Total Burden Cost (operating/maintenance):* None.

Dated: April 7, 2007.

**Cynthia Wooten,**

*Manager, National Service Trust.*

[FR Doc. E7–7213 Filed 4–16–07; 8:45 am]

BILLING CODE 6050–$$–P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Transmittal No. 07–14]**

### 36(b)(1) Arms Sales Notification

**AGENCY:** Department of Defense, Defense Security Cooperation Agency.

**ACTION:** Notice.

**SUMMARY:** The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

**FOR FURTHER INFORMATION CONTACT:** Ms. Brenda English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 07–14 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: April 11, 2007.

**L.M. Bynum,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

BILLING CODE 5001–06–M

DEFENSE SECURITY COOPERATION AGENCY

WASHINGTON, DC 20301-2800

APR 04 2007
In reply refer to:
I-07/002410

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515-6501

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 07-14, concerning the Department of the Navy's proposed Letter(s) of Offer and Acceptance to France for defense articles and services estimated to cost $260 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

Richard J. Millies
Deputy Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Same ltr to:

House
Committee on Foreign Affairs
Committee on Armed Services
Committee on Appropriations

Senate
Committee on Foreign Relations
Committee on Armed Services
Committee on Appropriations

Transmittal No. 07-14

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) Prospective Purchaser: France

(ii) Total Estimated Value:

| | |
|---|---|
| Major Defense Equipment* | $ 60 million |
| Other | $200 million |
| TOTAL | $260 million |

(iii) Description and Quantity or Quantities of Articles or Services under Consideration for Purchase: one (1) used E-2C aircraft with HAWKEYE 2000 Airborne Early Warning Suite, three (3) T-56-A-427 spare engines, spare and repair parts, support equipment, personnel training and training equipment, publications and technical data, system software development and installation, ground/flight testing of new systems and system modifications, U.S. Government and contractor engineering and logistics support services, and other related elements of logistics support.

(iv) Military Department: Navy (SBK)

(v) Prior Related Cases, if any:
FMS case SBI - $233 million - 28Nov00
FMS case SBG - $514 million - 28Apr95

(vi) Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: none

(vii) Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: See Annex attached

(viii) Date Report Delivered to Congress: MAR 30 2007

* as defined in Section 47(6) of the Arms Export Control Act.

## POLICY JUSTIFICATION

### France – Used E-2C Aircraft

The Government of France has requested a possible sale of one (1) used E-2C aircraft with HAWKEYE 2000 Airborne Early Warning (AEW) Suite, three (3) T-56-A-427 spare engines, spare and repair parts, support equipment, personnel training and training equipment, publications and technical data, system software development and installation, ground/flight testing of new systems and system modifications, U.S. Government and contractor engineering and logistics support services, and other related elements of logistics support. The estimated cost is $260 million.

This proposed sale will contribute to the foreign policy and national security objectives of the United States by improving the military capabilities of France while enhancing weapon system standardization and interoperability with U.S. forces.

France requires an additional E-2C aircraft to strengthen its AEW surveillance and enhanced command, control, and communications capabilities for both carrier and shore-based operations within their defense network. A fourth aircraft will ensure enhanced fleet communications and interoperability with North Atlantic Treaty Organization obligations. France will have no difficulty absorbing the additional E-2C aircraft into its armed forces.

This proposed sale will not adversely affect the military balance in the region.

The principal contractors will be:

| | |
|---|---|
| Northrop Grumman Corporation | Bethpage, New York |
| Rolls-Royce Corporation | Indianapolis, Indiana |

There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government and contractor representatives to France.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

**Transmittal No. 07-14**

**Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act**

**Annex**
**Item No. vii**

**(vii) Sensitivity of Technology:**

**1. The E-2C aircraft contains sensitive state-of-the art technology. Some of the hardware, publications, performance specifications, operational capability, parameters, vulnerabilities to countermeasures, and software documentation are classified Secret. The classified information to be provided is necessary for the operation, maintenance, and repair (through depot level) of the E-2C aircraft and it's installed systems and related software**

**2. The Hawkeye 2000 Airborne Early Warning (AEW) suite installed in the E-2C aircraft contains a mixture of newer and older technologies. Some of the hardware, publications, performance specifications, operational capability, parameters, vulnerabilities to countermeasures, and software documentation are classified Secret. The classified information to be provided consists of that which is necessary for the operation, maintenance and intermediate level repair of the E-2C airframe and the Hawkeye 2000 system as well as other installed and related software.**

**3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.**

[FR Doc. 07–1884 Filed 4–16–07; 8:45 am]
BILLING CODE 5001–06–C

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**[OMB Control No. 9000–0135]**

## Federal Acquisition Regulation; Information Collection; Prospective Subcontractor Requests for Bonds

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of request for public comments regarding an extension to an existing OMB clearance (9000–0135).

**SUMMARY:** Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection concerning subcontractor requests for bonds. The clearance currently expires on July 31, 2007.

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

**DATES:** Submit comments on or before June 18, 2007.

**ADDRESSES:** Submit comments, including suggestions for reducing this burden to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW., Room 4035, Washington, DC 20405.

**FOR FURTHER INFORMATION CONTACT** Ms. Cecelia Davis, Contract Policy Division, GSA (202) 219–0202.

**SUPPLEMENTARY INFORMATION:**

**A. Purpose**

Part 28 of the FAR contains guidance related to obtaining financial protection against damages under Government contracts (*e.g.*, use of bonds, bid guarantees, insurance etc.). Part 52 contains the texts of solicitation provisions and contract clauses. These regulations implement a statutory requirement for information to be provided by Federal contractors relating to payment bonds furnished under construction contracts which are subject to the Miller Act (40 U.S.C. 270a–270d). This collection requirement is mandated by Section 806 of the National Defense Authorization Act for Fiscal Years 1992 and 1993 (Pub. L. 102–190), as amended by Section 2091 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–335). The clause at 52.228–12, Prospective Subcontractor Requests for Bonds, implements Section 806(a)(3) of Pub. L. 102–190, as amended, which specifies that, upon the request of a prospective subcontractor or supplier offering to furnish labor or material for the performance of a construction contract for which a payment bond has been furnished to the United States pursuant to the Miller Act, the contractor shall promptly provide a copy of such payment bond to the requestor.

In conjunction with performance bonds, payment bonds are used in Government construction contracts to secure fulfillment of the contractor's obligations under the contract and to assure that the contractor makes all payments, as required by law, to persons furnishing labor or material in performance of the contract. This regulation provides prospective subcontractors and suppliers a copy of the payment bond furnished by the contractor to the Government for the performance of a Federal construction contract subject to the Miller Act. It is expected that prospective subcontractors and suppliers will use this information to determine whether to contract with that particular prime contractor. This information has been and will continue to be available from the Government. The requirement for contractors to provide a copy of the payment bond upon request to any prospective subcontractor or supplier under the Federal construction contract is contained in Section 806(a)(3) of Pub. L. 102–190, as amended by Sections 2091 and 8105 of Pub. L. 103–355.

**B. Annual Reporting Burden**

*Respondents:* 12,698.
*Responses Per Respondent:* 5.
*Total Responses:* 63,490.
*Hours Per Response:* .25.
*Total Burden Hours:* 15,872.50.
*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VIR), Room 4035, 1800 F Street, NW., Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control Number 9000–0135, Prospective Subcontractor Requests for Bonds, in all correspondence.

Dated: April 5, 2007.

**Ralph De Stefano,**

*Director, Contract Policy Division.*

[FR Doc. 07–1859 Filed 4–16–07; 8:45 am]

BILLING CODE 6820–EP–S

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## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[OMB Control No. 9000–0012]**

## Federal Acquisition Regulation; Information Collection; Termination Settlement Proposal Forms (Standard Forms 1435 through 1440)

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and SpaceAdministration (NASA).

**ACTION:** Notice of request for public comments regarding an extension to an existing OMB clearance (9000–0012).

**SUMMARY:** Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning termination settlement proposal forms (Standard Forms 1435 through 1440). A request for public comments was published in the **Federal Register** at 69 FR 9813 on March 2, 2004. No comments were received. The clearance currently expires on August 31, 2007.

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

**DATES:** Comments may be submitted on or before June 18, 2007.

**ADDRESSES:** Submit comments including suggestons for reducing this burden to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, a copy to the General Services Administration, FAR Secretariat (VIR), 1800 F Street, NW Room 4035, Washington, DC 20405.

**FOR FURTHER INFORMATION CONTACT:** Jeritta Parnell, Contract Policy Division, GSA (202) 501–4082.

**SUPPLEMENTARY INFORMATION:**

**A. Purpose**

The termination settlement proposal forms (Standard Forms 1435 through 1440) provide a standardized format for listing essential cost and inventory information needed to support the terminated contractor's negotiation position. Submission of the information assures that a contractor will be fairly reimbursed upon settlement of the terminated contract.

**B. Annual Reporting Burden**

*Respondents:* 872.

*Responses Per Respondent:*2.4.

*Total Responses:* 2,092.

*Hours Per Response:* 2.4.

*Total Burden Hours:* 5,023.

*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VIR), Room 4035, 1800 F Street, NW, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control Number 9000–0012, Termination Settlement Proposal Forms (SF's 1435 through 1440), in all correspondence.

Dated: March 28, 2007.

**Ralph De Stefano,**

*Director, Contract Policy Division.*

[FR Doc. 07–1860 Filed 4–16–07; 8:45 am]

BILLING CODE 6820–EP–S

## DEPARTMENT OF ENERGY

### Office of Energy Efficiency and Renewable Energy

**[Case No. RF–007]**

### Energy Conservation Program for Consumer Products: Publication of the Petition for Waiver of General Electric Company From the Department of Energy (DOE) Refrigerator and Refrigerator-Freezer Test Procedures

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Notice of Petition for Waiver and request for public comments.

**SUMMARY:** Today's notice announces General Electric Company's (GE's) Petition for Waiver (hereafter, ''Petition'') from parts of the DOE test procedure for determining the energy consumption of electric refrigerators and refrigerator-freezers. GE has developed a new product line of refrigerators and refrigerator-freezers that contain sensors to detect temperature and humidity, and which interact with controls to vary the effective wattage of anti-sweat heaters to evaporate excess moisture. The existing test procedure does not take ambient temperature, humidity, or adaptive control technology into account. Therefore, GE proposes an alternate test procedure that takes adaptive control technology into account when measuring energy consumption. DOE is soliciting comments, data, and information concerning GE's Petition and the proposed alternate test procedure.

**DATES:** DOE will accept comments, data, and information not later than May 17, 2007.

**ADDRESSES:** Please submit comments, identified by case number RF–007, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: Michael.raymond@ee.doe.gov.* Include case number RF–007, or ''GE Petition,'' or both in the subject line of the message.
- *Postal Mail:* Ms. Brenda Edwards-Jones, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Petition for Waiver Case No. RF–007, 1000 Independence Avenue, SW., Washington, DC 20585–0121, telephone: (202) 586–2945. Please submit one signed original paper copy.
- *Hand Delivery/Courier:* Ms. Brenda Edwards-Jones, U.S. Department of Energy, Building Technologies Program, Room 1J–018, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0121.

*Instructions:* All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (ASCII) file format. Avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. Absent an electronic signature, comments submitted electronically must be followed and authenticated by submitting the signed original paper document. DOE will not accept telefacsimiles (faxes). According to section 430.27(b)(1)(iv) of 10 CFR Part 430, any person submitting written comments must also send a copy of the comments to the Petitioner: Mr. Earl F. Jones, Senior Counsel, GE Consumer & Industrial, Appliance Park 2–225, Louisville, KY 40225.

Under 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: one copy of the document including all the information believed to be confidential, and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to that determination.

*Docket:* For access to the docket to read this notice, the petition for waiver, background documents, or comments received, go to the U.S. Department of Energy, Forrestal Building, Room 1J–018 (Resource Room of the Building Technologies Program), 1000 Independence Avenue, SW., Washington, DC, (202) 586–9127, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards-Jones at (202) 586–2945 for additional information regarding visiting the Resource Room. Please note that the DOE's Freedom of Information Reading Room (formerly Room 1E–190 in the Forrestal Building) is no longer housing rulemaking materials.

**FOR FURTHER INFORMATION CONTACT:** Dr. Michael G. Raymond, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–9611. E-mail: *Michael.Raymond@ee.doe.gov*, or Ms. Francine Pinto, Esq., U.S. Department of Energy, Office of General Counsel, Mail Stop GC–72, 1000 Independence Avenue, SW., Washington, DC 20585–0103, (202) 586–9507. E-mail: *Francine.Pinto@hq.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

I. Background and Authority
II. Petition for Waiver
III. Alternate Test Procedure
IV. Summary and Request for Comments

## I. Background and Authority

Title III of the Energy Policy and Conservation Act (''EPCA'') sets forth a variety of provisions concerning energy efficiency. Part B of Title III (42 U.S.C. 6291–6309) provides for the ''Energy Conservation Program for Consumer Products Other Than Automobiles.'' Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results which measure energy efficiency, energy use, or estimated operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for residential refrigerators and refrigerator-freezers is contained in 10 CFR Part 430, Subpart B, Appendix A1.

The regulations set forth in 10 CFR 430.27 contain provisions that enable a person to seek a waiver from the test procedure requirements for a covered consumer product. A waiver will be granted by the Assistant Secretary if it is determined that the basic model for which the Petition for Waiver was submitted contains a design characteristic which either prevents testing of the basic model according to the prescribed test procedures, or the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(l). In general, a waiver will remain in effect until final test procedure amendments become effective, thereby resolving the problem that is the subject of the waiver. 10 CFR Part 430.27(m).

## II. Petition for Waiver

On November 18, 2006, GE filed a Petition for Waiver from the uniform test method for measuring the energy consumption of electric refrigerators and electric refrigerator-freezers set forth at appendix A1 to subpart B of 10 CFR Part 430. GE subsequently modified its Petition; the final version was filed

December 21, 2006. (GE's original Petition was drafted in the form of a test procedure revision, with changes to the CFR. It also included an Application for Interim Waiver, which was not included in the final version). GE is designing new refrigerators and refrigerator-freezers that contain variable anti-sweat heater controls that detect and respond to a broad range of temperature and humidity conditions, and then activate adaptive heaters as needed to evaporate excess moisture. GE's alternate test procedure simulates the energy used by the adaptive heaters in a typical consumer household. Because the existing test procedure under 10 CFR Part 430 takes neither ambient humidity nor adaptive technology into account, it does not accurately measure the energy consumption of GE's new refrigerators and refrigerator-freezers that feature variable anti-sweat heater controls and adaptive heaters. Consequently, GE has submitted to DOE for approval an alternate test procedure to assure that it is correctly calculating the energy consumption of this new product line.

## III. Alternate Test Procedure

When test procedures for refrigerators and refrigerator-freezers under 10 CFR Part 430 were first developed, simple mechanical defrost timers were the norm. Today, GE's new line of refrigerators and refrigerator-freezers contains sensors that detect ambient temperature and humidity, and interact with controls that vary the effective wattage of anti-sweat heaters to evaporate excess moisture. In sum, GE proposes to ''run the energy-consumption test with the anti-sweat heater switch in the 'off' position and then, because the test chamber is not humidity-controlled, to add to that result the kilowatt hours per day derived by calculating the energy used when the anti-sweat heater is in the 'on' position.'' (GE Petition, page 4.) According to GE, the objective of the approach is to simulate the average energy used by the adaptive anti-sweat heaters as activated in typical consumer households across the United States. (Id.)

To determine the conditions in a typical consumer household, DOE understands that GE compiled historical data for the monthly average outdoor temperature and humidity for the top 50 metropolitan areas of the U.S. over approximately the last 30 years. Then, GE used the average exterior monthly temperature and humidity values to determine in-home conditions. In addition, GE includes in the test procedure a ''system-loss factor'' to calculate system losses attributed to operating anti-sweat heaters, controls, and related components.

## IV. Summary and Request for Comments

Today's notice announces GE's Petition to waive certain parts of the test procedures for its new line of refrigerators and refrigerator-freezers with variable anti-sweat heater controls and adaptive heaters. DOE is publishing the Petition under the provisions of 10 CFR 430.27(b)(1)(iv). DOE has deleted information that it considers to be confidential. The Petition includes an alternate test procedure and calculation methodology to determine the energy consumption of GE's new refrigerators and refrigerator-freezers with adaptive anti-sweat heaters. DOE is interested in receiving comments from interested parties on all aspects of the Petition and, in particular, the proposed alternate test procedure and calculation methodology. Any person submitting written comments to DOE must also send a copy of such comments to GE. See 10 CFR 430.27(b)(1)(iv).

Issued in Washington, DC, on April 9, 2007.

**Alexander A. Karsner,**

*Assistant Secretary, Energy Efficiency and Renewable Energy.*

## U.S. Department of Energy Petition for Waiver; Non-Confidential Version [Case No. RF–007]

*Submitted by:*

Earl F. Jones, Senior Counsel, GE Consumer & Industrial, Appliance Park 2–225, Louisville, KY 40225, *earl.f.jones@ge.com*, 502–452–3164 (voice), 502–452–0395 (fax).

## Introduction

GE Consumer & Industrial, an operating division of General Electric Co. (''GE''), is a leading manufacturer and marketer of household appliances, including, as relevant to this proceeding, refrigerators, files this Petition for Waiver (''Petition''). GE requests that the Assistant Secretary grant it a waiver from certain parts of the test procedure promulgated by the U.S. Department of Energy (''DOE'' or ''the Department'') for determining refrigerator-freezer energy consumption and allow GE to test its refrigerator-freezer pursuant to the modified procedure submitted herewith. This request is filed pursuant to 10 CFR 430.27.

## Background

GE is designing a new refrigerator. A total investment of $XXXX is being made for research, development, facility upgrade, acquisition of tooling and equipment and product testing. Significant effort will be required before the new product can be sold.

In order to be assured that it is correctly calculating the energy consumption of the product, that the product meets the minimum energy requirements for its product class and is properly labeled, GE seeks the Department's expeditious concurrence to its proposed amendment to the refrigerator test procedure.

Even a casual review of the refrigerator energy-consumption test procedure [12] reveals that this 1970's-era regulation has been overtaken by advances in technology, especially the increased use of electronic controls. In developing its new refrigerator, GE could have disregarded the test procedure's gaps, which could have resulted in a better energy test result. GE decided, however, to strive to attain the regulations' intent to obtain test results that more closely reflect the energy that would be consumed by the new model when used by consumers. Accordingly, GE has filed this Petition for Waiver to eliminate or modify the portions of the regulations that are inappropriate or irrelevant.

The Department's regulations provide that the Assistant Secretary will grant a Petition upon: ''determin[ation] that the basic model for which the waiver was requested contains a design characteristic which either prevents testing of the basic model according to the prescribed test procedures, or the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data.[13]''

GE requests that the Assistant Secretary grant this Petition on both grounds. First, because the refrigerator energy test procedure does not allow the energy used by GE's new refrigerator to be accurately calculated. The new refrigerator contains adaptive anti-sweat heaters, i.e., anti-sweat heaters that respond to humidity conditions found in consumers' homes. Since the test conditions specified by the test procedure neither define required humidity conditions nor otherwise take ambient humidity conditions into account in calculating energy consumption, the adaptive feature of GE's new model cannot be tested.

Second, if GE were to test its new smart-technology refrigerator per the test procedure, i.e., as if it contained old-technology ''dumb'' anti-sweat heaters, the results of the energy test so conducted would not accurately measure the energy used by the new models.

## The Refrigerator Energy Test Procedure

The test procedure for calculating energy consumption [14] specifies that the test chamber be maintained at 90°F. While clearly not typical of conditions in the typical consumer household, these conditions are intended to simulate the energy used by a refrigerator in a typical 72 °F household where the refrigerator door is opened several times a day.

But the test procedure does not specify test chamber humidity conditions. Humidity causes refrigerators to sweat. Manufacturers combat this excess moisture by installing anti-sweat heaters on mullions and other locations where sweat accumulates. Old-style ''dumb'' technology anti-sweat heaters

[12] 10 CFR Part 430, Subpart B, App. A1.

[13] 10 CFR Part 430.27(l).

[14] 10 CFR Part 430, Subpart B, App. A1.

achieve and are tested at a pre-set level, i.e., number of watts, and turned on or off regardless of the humidity or amount of excess moisture on the unit.

## GE's Proposed Modifications

In developing the approach proposed in this Petition, GE reviewed the Department's earlier decisions on waiver petitions, including the waiver granted In the Matter of Electrolux Home Appliances.[15] When the test procedure was originally developed, simple mechanical defrost timers were the norm. The Electrolux petition sought a test procedure waiver to accommodate its advanced defrost timer. The Assistant Secretary, in granting the waiver, acknowledged the role of technology advances in evaluating the need for test procedure waivers.

GE now seeks to change how it tests its new models[16] to take into account advances in sensing technology, i.e., sensors that detect temperature and humidity conditions and interact with controls to vary the effective wattage of anti-sweat heaters to evaporate excess moisture.[17]

GE proposes to run the energy-consumption test with the anti-sweat heater switch in the ''off'' position and then, because the test chamber is not humidity-controlled, to add to that result the kilowatt hours per day derived by calculating the energy used when the anti-sweat heater is in the ''on'' position. GE's proposed modification is further described on page 7. The objective of the proposed approach is to simulate the average energy used by the adaptive anti-sweat heaters as activated in typical consumer households across the United States.[18]

Extensive research went into determining what the average energy use of the adaptive feature would be. The top 50 metropolitan areas of the U.S., which represent 56% of the total U.S. population according to the 2000 Census[19], were selected. The monthly average exterior temperature and humidity for these cities over approximately the last 30 years was determined.[20]

GE used the average external monthly temperature and humidity values to determine in-home conditions.[21] And, in an effort to establish a national average of energy used by a variably controlled anti-sweat heater, the population-weighted humidity values were grouped into 10 bands, each with a range of 10% relative humidity. The table below sets out the percent probability that any U.S. household will experience the listed average humidity conditions during any month of the year.[22]

Ten population-weighted bands of ranges of relative humidity were created:

| % RH | Probability (percent) | Constant designation |
|---|---|---|
| 1. 0–10 | 3.4 | A1 |
| 2. 10–20 | 21.1 | A2 |
| 3. 20–30 | 20.4 | A3 |
| 4. 30–40 | 16.6 | A4 |
| 5. 40–50 | 12.6 | A5 |
| 6. 50–60 | 11.9 | A6 |
| 7. 60–70 | 6.9 | A7 |
| 8. 70–80 | 4.7 | A8 |
| 9. 80–90 | 0.8 | A9 |
| 10. 90–100 | 1.5 | A10 |

In recognition of the fact that there are system losses involved with operating anti-sweat heaters, GE proposes to include in the calculation a factor to account for such energy. This additional energy includes the electrical energy required to operate the anti-sweat heater control and related components, and the additional energy required to increase compressor run time to remove heat introduced into the refrigerator compartments by the anti-sweat heater, and is accounted for by the ''System-loss Factor,'' which, based on GE's historical experience, is 1.3.[23]

Simply stated, the Correction Factor that GE proposes to add to the energy-consumption test results obtained with the anti-sweat heater switch in the ''off'' position, is calculated as follows:

Correction Factor = (Anti-sweat Heater Power × System-loss Factor) × (24 hours/1 day) × (1 kW/1000 W)

In further explanation of this calculation, begin by calculating the national average power in watts used by the anti-sweat heaters. This is done by totaling the product of constants A1–A10 multiplied by the respective heater watts used by a refrigerator operating in the median percent relative humidity for that band and standard refrigerator conditions: ambient temperature of 72 °F, fresh food (FF) average temperature of 45 °F and freezer (FZ) average temperature of 5 °F.

Anti-sweat Heater Power = A1 * (Heater Watts at 5% RH) + A2 * (Heater Watts at 15% RH) + A3 * (Heater Watts at 25% RH) + A4 * (Heater Watts at 35% RH) + A5 * (Heater Watts at 45% RH) + A6 * (Heater Watts at 55% RH) + A7 * (Heater Watts at 65% RH) + A8 * (Heater Watts at 75% RH) + A9 * (Heater Watts at 85% RH) + A10 * (Heater Watts at 95% RH)

As explained above, bands A1–A10 were selected as representative of humidity conditions of all U.S. households. Therefore, in developing its design for optimum anti-sweat heater performance, GE and manufacturers using adaptive anti-sweat heaters must submit, as part of their data submission under section 430.62(a)(4)(xii), the watts used at the relative humidity specified in each band. By reviewing this information, the Department, competitors and other stakeholders can be assured that the calculated energy attributed to this adaptive feature is accurate.

Based on the above, GE proposes to test its new models as if the test procedure were modified to calculate the energy of the unit with the anti-sweat heaters in the on position as equal to the energy of the unit tested with the anti-sweat heaters in the off position plus the Anti-Sweat Heater Power times the System Loss Factor (expressed in KWH/YR).

## Conclusion

GE urges the Assistant Secretary to grant this Petition and allow GE to test its new refrigerator models (PGCS1NJW, PGCS1NFW, PGSS5NJW, PGSS5NFW, PGCF1NJW, PGCF1NFW, PGSF5NJW, PGSF5NFW, PFIC1NFW and PFIC1NFX) as described above. We believe that granting our request will encourage the introduction of advanced technologies that neither penalize innovation by over-calculating energy used by the new feature nor encourage the creation of special energy-test modes that avoid accounting for that energy.

Approving this Petition will also help ensure that consumers can continue to rely on the Department's test procedures—and the level playing field that they help create—to evaluate energy use among competing products. A favorable ruling on this Petition is necessary for GE to avoid the hardship that otherwise would be imposed if its production design and development plan is delayed and commitments to suppliers cannot be assured.

Finally, granting the Petition will send a clear message to manufacturers that the Department's waiver process should be used to ensure that energy-using features are properly measured.

Respectfully submitted,

Earl F. Jones, Senior Counsel, GE Consumer & Industrial, Appliance Park 2–225,

[15] FR Vol. 66 40689 et. seq. (Aug. 3, 2001).

[16] The GE models subject to this Petition are PGCS1NJW, PGCS1NFW, PGSS5NJW, PGSS5NFW, PGCF1NJW, PGCF1NFW, PGSF5NJW, PGSF5NFW, PFIC1NFW, PFIC1NFX. These models have GE's new temperature-humidity sensor.

[17] GE could have devised a control that did not energize the anti-sweat heaters when on test, thereby not counting energy used by these features even though it is foreseeable that they would be energized when used by most consumers. We have chosen instead to file this Petition.

[18] The Association of Home Appliance Manufacturers, the appliance industry's trade association, has forwarded to the Department its recently agreed-to state of principles that should govern any revision of the refrigerator test procedure. Crafted in response to the DOE's concerns about energy test practices that may circumvent the regulatory purpose that energy tests yield results that correlate to typical consumer energy use, AHAM members endorsed the use of calculation in appropriate circumstances. See Exhibit A.

[19] *http://www.census.gov/population/www/cen2000/phc-t3.html.*

[20] DEPT. OF METEOROLOGY AT THE UNIVERSITY OF UTAH Web site, *http://www.met.utah.edu/jhorel/html/wx/climo.html*, *http://www.met.utah.edu/jhorel/html/wx/climate/normtemp.html*, and *http://www.met.utah.edu/jhorel/html/wx/climate/rh.html.*

[21] The outside temperature and humidity were converted to internal household conditions with the assumption that (1) The absolute humidity remained constant. and (2) average monthly ambient outdoor temperatures below 71 degrees were increased to 71 and average ambient outdoor temperatures above 75 degrees were cooled to 75. The energy-saving benefits of dehumidification due to air conditioning have not been taken into account. This resulted in an over-estimation of the energy used by the refrigerator.

[22] See discussion at p. 6, infra, for validity of using 10 bands to calculate national average anti-sweat heater wattage.

[23] GE's experience with previous anti-sweat heater applications shows that system losses associated with such features can cause an increase in energy use, e.g., by harnesses, boards, additional compressor run-time, etc., than added by the operation of the heater alone. To account for these ''systems losses'' GE has used a multiplier of 1.3 in calculating the Correction Factor.

Louisville, KY 40225, *earl.f.jones@ge.com*, 502–452–3164 (voice), 502–452–0395 (fax).

**Affected Persons**

Primary affected persons in the refrigerator-freezer category include BSH Home Appliances Corp. (Bosch-Siemens Hausgerate GmbH), Electrolux Home Products, Equator, Fisher & Paykel Appliances, Inc., Gorenje USA, Haier America Trading, L.L.C., Heartland Appliances, Inc., Kelon Electrical Holdings Col, Ltd., Liebherr Hausgerate, LG Electronics USA Inc., Northland Corporation, Samsung Electronics America, Inc., Sanyo Fisher Company, Sears, Sub-Zero Freezer Company, U-Line, Viking Range, and Whirlpool Corporation. The Association of Home Appliance Manufacturers is also generally interested in energy efficiency requirements for appliances. Consumers' Union, ACEEE, NRDC, Alliance to Save Energy are not manufacturers but have an interest in this matter. GE will notify all these organizations as required by the Department's rules and provide them with a non-confidential version of this Petition.

## Exhibit A—AHAM Statement on Interpretation of HRF–1 and DOE Refrigerator-Freezer Test Procedure

(As revised during 9/15/06 conference call of AHAM's DOE Test Procedures Task Force)

AHAM's position is that the following principles of interpretation should be applied to the existing refrigerator-freezer test procedure, and should apply to and guide any revisions to the test procedure. The intent of the energy test procedure is to simulate typical room conditions (approximately 70 °F) with door openings, by testing at 90 °F without door openings.

Except for operating characteristics that are affected by ambient temperature (for example, compressor percent run time), the unit, when tested under this standard, shall operate equivalent to the unit in typical room conditions. The energy used by the unit shall be calculated when a calculation is provided by the standard.

Energy-consuming components that operate in typical room conditions (including as a result of door openings, or a function of humidity), and that are not exempted by this standard, shall operate in an equivalent manner during energy testing under this standard, or be accounted for by all calculations as provided for in the standard.

Examples:

1. Energy saving features that are designed to operate when there are no door openings for long periods of time shall not be functional during the energy test.
2. The defrost heater should not either function or turn off differently during the energy test than it would when in typical room conditions.
3. Electric heaters that would normally operate at typical room conditions with door openings should also operate during the energy test.
4. Energy used during adaptive defrost shall continue to be tested and adjusted per the calculation provided for in this standard.

[FR Doc. E7–7232 Filed 4–16–07; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Sunshine Act Notice

April 12, 2007.

The following notice of meeting is published pursuant to section 3(a) of the government in the Sunshine Act (Pub. L. No. 94–409), 5 U.S.C 552b:

**AGENCY HOLDING MEETING:** Federal Energy Regulatory Commission.

**DATE AND TIME:** April 19, 2007, 10 a.m.

**PLACE:** Room 2C, 888 First Street, NE., Washington, DC 20426.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** Agenda.

**Note:** Items listed on the agenda may be deleted without further notice.

**FOR FURTHER INFORMATION CONTACT:** Kimberly D. Bose, Secretary, Telephone (202) 502–8400. For a recorded message listing items Struck from or added to the meeting, call (202) 502–8627.

This is a list of matters to be considered by the Commission. It does not include a listing of all documents relevant to the items on the agenda. All public documents, however, may be viewed on line at the Commission's Web site at *http://www.ferc.gov* using the eLibrary link, or may be examined in the Commission's Public Reference Room.

**917TH—Meeting**

*Regular Meeting*

April 19, 2007, 10 a.m.

| Item No. | Docket No. | Company |
|---|---|---|
| | **Administrative** | |
| A–1 | AD02–1–000 | Agency Administrative Matters. |
| A–2 | AD02–7–000 | Customer Matters, Reliability, Security and Market Operations. |
| A–3 | AD06–3–000 | Energy Market Update. |
| | **Electric** | |
| E–1 | RR06–1–006 | North American Electric Reliability Corporation. |
| E–2 | RR06–3–001 | North American Electric Reliability Corporation. |
| E–3 | RM06–4–002 | Promoting Transmission Investment through Pricing Reform. |
| E–4 | ER06–615–001, ER06–615–002, ER02–1656–027, ER02–1656–029, ER02–1656–031. | California Independent System Operator Corporation. |
| E–5 | EL07–33–000 | California Independent System Operator Corporation. |
| E–6 | EL07–37–000 | Californians for Renewable Energy, Inc. v. California Public Utilities Commission, Southern California Edison, and Long Beach Generation, L.L.C. |
| | EL07–40–000 | Californians for Renewable Energy, Inc. v. California Public Utilities Commission, Pacific Gas and Electric Company, Metcalf Energy Center, L.L.C. and the Los Medanous Energy Center, L.L.C. |
| E–7 | OMITTED. | |
| E–8 | EL05–121–000, EL05–121–002 | PJM Interconnection, L.L.C. |
| E–9 | EL06–102–000 | American Electric Power Service Corporation. |
| E–10 | EL05–102–002 | Southern Company Services, Inc., Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Savannah Electric and Power Company and Southern Power Company. |
| E–11 | ER07–568–000 | Pacific Gas and Electric Company. |
| E–12 | ER07–543–000 | Linden VFT, L.L.C. |

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| E–13 | EL02–23–008, EL02–23–009, EL02–23–010, EL02–23–011, EL02–23–012. | Consolidated Edison Company of New York, Inc. v. Public Service Electric and Gas Company, PJM Interconnection, L.L.C., and New York Independent System Operator, Inc. |
| E–14 | RM07–14–000 | Electronic Filing of FERC Form No. 714. |
| E–15 | RM05–5–003 | Standards for Business Practices and Communication Protocols for Public Utilities. |
| E–16 | RM07–2–000 | Accounting and Reporting Requirements for Nonoperating Public Utilities and Licensees. |
| E–17 | RM01–8–006 | Revised Public Utility Filing Requirements for Electric Quarterly Reports. |
| E–18 | OMITTED. | |
| E–19 | RR06–1–004 | North American Electric Reliability Council, North American Electric Reliability Corporation. |
| | RR07–1–000 | Delegation Agreement Between the North American Electric Reliability Corporation and Texas Regional Entity, a division of ERCOT. |
| | RR07–2–000 | Delegation Agreement Between the North American Electric Reliability Corporation and Midwest Reliability Organization. |
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| E–20 | EL03–3–002, ER02–1472–006 | Entergy Gulf States, Inc. |
| E–21 | OMITTED. | |
| E–22 | EL02–23–003 | Consolidated Edison Company of New York, Inc. v. Public Service Electric and Gas Company, PJM Interconnection, L.L.C., and New York Independent System Operator, Inc. |
| E–23 | ER06–1271–003, ER06–954–004, ER06–456–008. | PJM Interconnection, L.L.C. |
| | ER06–880–005 | PJM Transmission Owners |
| E–24 | EL01–106–001 | Old Dominion Electric Cooperative v. PJM Interconnection, L.L.C. |
| E–25 | OMITTED. | |
| E–26 | ER06–700–002, ER06–700–003 | California Independent System Operator Corporation. |
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| C–3 | CP06–452–000 | Trunkline Gas Company, L.L.C. |

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| C–5 | CP06–435–000 | Columbia Gas Transmission Corporation. |
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| C–6 | CP06–469–000 | Dominion Cove Point LNG, LP. |
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A free webcast of this event is available through *http://www.ferc.gov.* Anyone with Internet access who desires to view this event can do so by navigating to *www.ferc.gov's* Calendar of Events and locating this event in the Calendar. The event will contain a link to its webcast. The Capitol Connection provides technical support for the free webcasts. It also offers access to this event via television in the DC area and via phone bridge for a fee. If you have any questions, visit *http://www.CapitolConnection.org* or contact Danelle Perkowski or David Reininger at 703–993–3100.

Immediately following the conclusion of the Commission Meeting, a press briefing will be held in the Commission Meeting Room. Members of the public may view this briefing in the designated overflow room. This statement is intended to notify the public that the press briefings that follow Commission meetings may now be viewed remotely at Commission headquarters, but will not be telecast through the Capitol Connection service.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E7–7334 Filed 4–16–07; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–RCRA–2007–0231, FRL–8300–7]**

## Agency Information Collection Activities: Proposed Collection; Comment Request; 2007 Hazardous Waste Report, EPA ICR Number 0976.12, OMB Control Number 2050–0024

**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 EPA is planning to submit a continuing Information Collection Request (ICR) to the Office of Management and Budget (OMB). This is a request for an existing approved collection. This ICR is scheduled to expire on October 31, 2007. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

**DATES:** Comments must be submitted on or before June 18, 2007.

**ADDRESSES:** Submit your comments, referencing docket ID number EPA–HQ–RCRA–2007–0231, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- E-mail: *rcra-docket@epa.gov.*
- Fax: 202–566–0272.
- Mail: RCRA Docket (5305T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.
- Hand Delivery: 1301 Constitution Ave., NW., Room B102, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–RCRA–2007–0231. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

**FOR FURTHER INFORMATION CONTACT:** Peggy Vyas, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–308–5477; fax number: 703–308–8433; e-mail address: *vyas.peggy@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### How Can I Access the Docket and/or Submit Comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–RCRA–2007–0231, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the RCRA Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for RCRA Docket is (202) 566–0270.

Use *www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

### What Information Is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

**What Should I Consider When I Prepare My Comments for EPA?**

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

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Offer alternative ways to improve the collection activity.
6. Make sure to submit your comments by the deadline identified under **DATES**.
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

**What Information Collection Activity or ICR Does This Apply To?**

*Affected entities:* Entities potentially affected by this action are private sector and State, local, or tribal governments.

*Title:* 2007 Hazardous Waste Report.

*ICR numbers:* EPA ICR No. 0976.13, OMB Control No. 2050–0024.

*ICR status:* This ICR is currently scheduled to expire on October 31, 2007. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

*Abstract:* This ICR renews an ongoing information collection from hazardous waste generators and hazardous waste treatment, storage, or disposal facilities. This collection is done on a two-year cycle as required by sections 3002 and 3004 of RCRA. The information is collected via a mechanism known as the Hazardous Waste Report for the required reporting year [EPA Form 8700–13 A/B] (also known as the Biennial Report). Both RCRA Sections 3002 and 3004 require EPA to establish standards for recordkeeping and reporting of hazardous waste generation and management. Section 3002 applies to hazardous waste generators and Section 3004 applies to hazardous waste treatment, storage, and disposal facilities. The implementing regulations are found at 40 CFR 262.40(b) and (d); 262.41(a)(1)–(5), (a)(8), and (b); 264.75(a)–(e) and (j); 265.75(a)–(e) and (j); and 270.30(l)(9). This is mandatory reporting by the respondents.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 18.26 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

*Estimated total number of potential respondents:* 9,106.

*Frequency of response:* one-time.

*Estimated total average number of responses for each respondent:* 62.5.

*Estimated total annual burden hours:* 166,297 hours.

*Estimated total annual costs:* $10,042,978. This includes an estimated burden cost of $10,013,381 for labor, $0 for capital/start-up and $29,597 for operation and maintenance costs.

**What Is the Next Step in the Process for This ICR?**

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: April 3, 2007.

**Matthew Hale,**

*Director, Office of Solid Waste.*

[FR Doc. E7–7277 Filed 4–16–07; 8:45 am]

BILLING CODE 6560–50–P

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## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–RCRA–2007–0232, FRL–8300–8]**

## Agency Information Collection Activities: Proposed Collection; Comment Request; Land Disposal Restrictions, EPA ICR Number 1442.19, OMB Control Number 2050–0085

**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 EPA is planning to submit a continuing Information Collection Request (ICR) to the Office of Management and Budget (OMB). This is a request for an existing approved collection. This ICR is scheduled to expire on August 31, 2007. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

**DATES:** Comments must be submitted on or before June 18, 2007.

**ADDRESSES:** Submit your comments, referencing docket ID number EPA–HQ–

RCRA–2007–0232, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: rcra-docket@epa.gov.*
- *Fax:* 202–566–0272.
- *Mail:* RCRA Docket (5305T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.
- *Hand Delivery:* 1301 Constitution Ave., NW., Room B102, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–RCRA–2007–0232. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

**FOR FURTHER INFORMATION CONTACT:**

Peggy Vyas, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–308–5477; fax number: 703–308–8433; e-mail address: *vyas.peggy@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## How Can I Access the Docket and/or Submit Comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–RCRA–2007–0232, which is available for online viewing at *www.regulations.gov,* or in person viewing at the RCRA Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for RCRA Docket is (202) 566–0270.

Use www.regulations.gov to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

## What Information Is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

## What Should I Consider When I Prepare My Comments for EPA?

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

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Offer alternative ways to improve the collection activity.
6. Make sure to submit your comments by the deadline identified under **DATES.**
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

## What Information Collection Activity or ICR Does This Apply to?

*Affected entities:* Entities potentially affected by this action are private sector and State, Local, or Tribal governments.

*Title:* Land Disposal Restrictions.

*ICR numbers:* EPA ICR No. 1442.19, OMB Control No. 2050–0085.

*ICR status:* This ICR is currently scheduled to expire on August 31, 2007. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

*Abstract:* Section 3004 of the Resource Conservation and Recovery Act (RCRA), as amended, requires that EPA develop standards for hazardous waste treatment, storage, and disposal as may be necessary to protect human health and the environment. Subsections 3004(d), (e), and (g) require EPA to promulgate regulations that prohibit the land disposal of hazardous waste unless it meets specified treatment standards described in subsection 3004(m).

The regulations implementing these requirements are codified in the *Code of*

*Federal Regulations* (CFR) Title 40, part 268. EPA requires that facilities maintain the data outlined in this ICR so that the Agency can ensure that land disposed waste meets the treatment standards. EPA strongly believes that the recordkeeping requirements are necessary for the agency to fulfill its congressional mandate to protect human health and the environment.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 5.79 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

*Estimated total number of potential respondents:* 129,584.

*Frequency of response:* on occasion.

*Estimated total average number of responses for each respondent:* 1.1.

*Estimated total annual burden hours:* 822,994 hours.

*Estimated total annual costs:* $108,980,482. This includes an estimated burden cost of $49,097,044 for labor, $31,703 for capital/start-up and $59,851,735 for operation and maintenance costs.

### What Is the Next Step in the Process for This ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: April 3, 2007.

**Matthew Hale,**

*Director, Office of Solid Waste.*

[FR Doc. E7–7278 Filed 4–16–07; 8:45 am]

**BILLING CODE 6560–50–P**

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## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OAR–2007–0262; FRL–8300–9]**

## Protection of Stratospheric Ozone: Request for Critical Use Exemption Applications for the Years 2009 and 2010

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of Solicitation of Applications and Information on Alternatives.

**SUMMARY:** EPA is soliciting applications for the critical use exemption from the phaseout of methyl bromide for 2010 and beyond. In addition, those applicants who missed last year's deadline to submit a critical use application for an exemption in the year 2009 may file a supplemental application in response to this notice. This exemption is an annual exemption and all entities interested in obtaining a critical use exemption must provide EPA with technical and economic information to support a ''critical use'' claim and must do so by the deadline specified in this notice even if they have previously applied for an exemption. Today's notice also invites interested parties to provide EPA with new data on the technical and economic feasibility of methyl bromide alternatives.

**DATES:** Applications for the critical use exemption must be postmarked on or before July 10, 2007. The response period reflects the clarifications and reduction of burden in the application.

**ADDRESSES:** Applications for the methyl bromide critical use exemption should be submitted in duplicate (two copies) by mail to: U.S. Environmental Protection Agency, Office of Air and Radiation, Stratospheric Protection Division, Attention Methyl Bromide Review Team, Mail Code 6205J, 1200 Pennsylvania Ave, NW., Washington, DC 20460 or by courier delivery (other than U.S. Post Office overnight) to: U.S. Environmental Protection Agency, Office of Air and Radiation, Stratospheric Protection Division, Attention Methyl Bromide Review Team, 1310 L St., NW., Room 1047D, Washington DC 20005. EPA also encourages users to submit their applications electronically to Aaron Levy, Stratospheric Protection Division, at *levy.aaron@epa.gov*. If the application is submitted electronically, applicants must fax a signed copy of Worksheet 1 to Aaron Levy at 202–343–2338 by the application deadline.

**FOR FURTHER INFORMATION CONTACT:**

*General Information:* U.S. EPA Stratospheric Ozone Information Hotline, 1–800–296–1996; also *http://www.epa.gov/ozone/mbr*.

*Technical Information:* Pre-plant Information: Nikhil Mallampalli, U.S. Environmental Protection Agency, Office of Pesticide Programs (7503P), 1200 Pennsylvania Ave., NW., Washington, DC 20460, 703–308–1924. E-mail: *mallampalli.nikhil@epa.gov*. Post Harvest Information: Colwell Cook, U.S. Environmental Protection Agency, Office of Pesticide Programs (7503P), 1200 Pennsylvania Ave., NW., Washington, DC 20460, 703–308–8146. E-mail: *cook.colwell@epa.gov*.

*Economic Information:* Elisa Rim, U.S. Environmental Protection Agency, Office of Pesticide Programs (7503P), 1200 Pennsylvania Ave., NW., Washington, DC 20460, 703–308–8123. E-mail: *rim.elisa@epa.gov*.

*Regulatory Information:* Aaron Levy, U.S. Environmental Protection Agency, Stratospheric Protection Division (6205J), 1200 Pennsylvania Ave., NW., Washington, DC 20460, 202–343–9215. E-mail: *levy.aaron@epa.gov*.

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- B. What is the Montreal Protocol authority for granting a critical use exemption after the methyl bromide phaseout?

III. How is the U.S. implementing the critical use exemption?

A. When will the exemption become available to U.S. users of methyl bromide?
B. What is the projected timeline for the critical use exemption application process?

## I. What do I need to know to respond to this request for applications?

*A. Who can respond to this request for information?*

Entities interested in obtaining a critical use exemption must fill out the application form available at *http://www.epa.gov/ozone/mbr*. The application form may be submitted either by a consortium representing multiple users who have similar circumstances or by individual users who anticipate needing methyl bromide in 2010 and beyond and believe there are no technically and economically feasible alternatives. EPA encourages groups of users with similar circumstances of use to submit a single application (for example, any number of pre-plant users with similar soil, pest, and climactic conditions can join together to submit a single application). In some instances, state agencies will assist users with the application process (see discussion of voluntary state involvement in Part I.B. below).

In addition to requesting information from applicants for the critical use exemption, this solicitation for information provides an opportunity for any interested party to provide EPA with information on methyl bromide alternatives (e.g. technical and/or economic feasibility research). The application form for the methyl bromide critical use exemption and other information on research relevant to alternatives must be sent to the addresses specified above or e-mailed to the address specified above. The applicant's signature, which is required in order for EPA to process your application, is on Worksheet 1 of the application. If the application is submitted electronically, applicants must fax a signed copy of Worksheet 1 to Aaron Levy at 202–343–2338 by the application deadline.

*B. Whom can I contact to find out if a consortium is submitting an application form for my methyl bromide use?*

Please contact your local, state, regional or national commodity association to find out if they plan on submitting an application on behalf of your commodity group.

Additionally, you should contact your state regulatory agency (generally this will be the State Department of Agriculture or State Environmental Protection Agency) to receive information about their involvement in the process. If your state agency has chosen to participate, EPA encourages all applicants to first submit their applications to the state regulatory agency, which will then forward them to EPA. The National Pesticide Information Center Web site is one resource available for identifying the lead pesticide agency in each state (*http://ace.orst.edu/info/npic/state1.htm*).

*C. How do I obtain an application form for the methyl bromide critical use exemption?*

An Application Form for the methyl bromide critical use exemption can be obtained either in electronic or hard-copy form. EPA encourages use of the electronic form. Applications can be obtained in the following ways:

1. PDF format and Microsoft Excel at EPA's Web site: *http://www.epa.gov/ozone/mbr*;
2. Hard copy ordered through the Stratospheric Ozone Protection Hotline at 1–800–296–1996;
3. Hard-copy format at DOCKET ID No. EPA–HQ–OAR–2007–0262. The docket can be accessed at the *http://www.regulations.gov* site. To obtain copies of materials in hard copy, please call the EPA Docket Center at 202–564–1744 between the hours of 8:30 a.m.–4:30 p.m. E.S.T., Monday–Friday, excluding holidays, to schedule an appointment. The EPA Docket Center's Public Reading Room address is EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20460, [OPP1].

*D. What alternatives must applicants address when applying for a critical use exemption?*

To support the assertion that a specific use of methyl bromide is ''critical,'' applicants are expected to demonstrate that there are no technically and economically feasible alternatives available to the user of methyl bromide. The Parties to the Montreal Protocol have developed an ''International Index'' of methyl bromide alternatives, which lists chemical and non-chemical alternatives, by crop. In February 2007, the United States submitted an index of alternatives, which includes the current registration status of available and potential alternatives, that is available on the Ozone Secretariat Web site (*http://ozone.unep.org/Exemption_Information/Critical_use_nominations_for_ methyl_bromide/MeBr_Submissions/USA-ExI_4_1_2007.pdf*). [OPP2] More information about alternatives is available in the 2006 Report of the Methyl Bromide Technical Options Committee ([OPP3] *http://ozone.unep.org/teap/Reports/MBTOC/MBTOC–2006-Assessment%20Report.pdf*).

Applicants must address technical, regulatory, and economic issues that limit the adoption of ''chemical alternatives'' and combinations of ''chemical'' and ''non-chemical alternatives'' listed for their crop within the ''U.S. Index'' of Methyl Bromide Alternatives. Applicants must also address technical, regulatory, and economic issues that limit the adoption of ''non-chemical alternatives'' and combinations of ''chemical'' and ''non-chemical alternatives'' listed for their crop in the ''International Index.''

*E. What portions of the applications will be considered confidential business information?*

The person submitting information to EPA in response to this Notice may assert a business confidentiality claim covering part or all of the information by placing on (or attaching to) the information, at the time it is submitted to EPA, a cover sheet, stamped or typed legend, or other suitable form of notice employing language such as ''trade secret,'' ''proprietary,'' or ''company confidential.'' Allegedly confidential portions of otherwise non-confidential documents should be clearly identified by the applicant, and may be submitted separately to facilitate identification and handling by EPA. If the applicant desires confidential treatment only until a certain date or until the occurrence of a certain event, the notice should so state. Information covered by a claim of confidentiality will be disclosed by EPA only to the extent, and by means of the procedures, set forth under 40 CFR part 2, subpart B; 41 FR 36752, 43 FR 40000, 50 FR 51661. If no claim of confidentiality accompanies the information when it is received by EPA, it may be made available to the public by EPA without further notice to the applicant.

If you are asserting a business confidentiality claim covering part or all of the information in the application, please submit a non-confidential version that EPA can place in the public docket for reference by other interested parties. Do not include on the ''Worksheet Six: Application Summary'' page of the application any information that you wish to claim as confidential business information. Any information on Worksheet 6 shall not be considered confidential and will not be treated as such by the Agency. A copy of Worksheet 6 will be placed in the public domain by EPA. Applications that are

not confidential business information will be placed in the Docket in their entirety. Please note, claiming business confidentiality may delay the ability of EPA to review your application.

*F. Must I submit a ''Notice of Intent to Apply''?*

A ''Notice of Intent to Apply'' is not required, but would facilitate the organization of the application review during the critical use exemption process. If EPA is aware of the consortia and the individuals who intend to submit applications 30 days before the application deadline, the technical experts will be better positioned to review the application. This Notice may be submitted to Aaron Levy via e-mail at *levy.aaron@epa.gov* or via U.S. mail to U.S. Environmental Protection Agency, Office of Air and Radiation, Stratospheric Protection Division, 1200 Pennsylvania Ave., NW., 6205J, Washington, DC 20460 or by courier to U.S. Environmental Protection Agency, Office of Air and Radiation, Stratospheric Protection Division, 1310 L St., NW., Room 1047D, Washington, DC 20005.

*G. What if I submit an incomplete application?*

EPA will not accept any applications postmarked after July 10, 2007. If the application is postmarked by the deadline but is incomplete or missing any data elements, EPA will not accept the application and will not include the application in the U.S. nomination submitted for international consideration. If the application is substantially complete with only minor errors, corrections will be accepted. EPA reviewers may also call applicants for further clarification of their application, even if it is complete.

All consortia or users who have not applied to EPA in the previous year (2006) must submit an entire completed application with all Worksheets.

*H. What if I applied for a critical use exemption in a previous year?*

In March 2004 and in November 2004, the Parties decided that critical use exemptions would be granted for one year. As a result, users must apply to EPA for critical use exemptions on an annual basis. However, if a user group submitted a complete application to EPA in 2006, the user is only required to submit revised copies of the certain Worksheets listed below, though the entire application with all Worksheets must be on file with EPA. The following worksheets must be completed in full regardless of whether you submitted an application in 2006: 1, 2B, 2C, 2D, 4, 5 and 6. The remaining worksheets must only be completed if any information has changed since 2006. If a user has previously submitted a critical use exemption application to EPA in 2002, 2003, 2004 or 2005 (first, second, third or fourth rounds) but did not submit an application in 2006 (fifth round) then all of the worksheets in the application must be submitted again in their entirety.

## II. What is the legal authority for the critical use exemption?

*A. What is the Clean Air Act (CAA) authority for implementing the critical use exemption to the methyl bromide phaseout?*

In October 1998, the U.S. Congress amended the Clean Air Act by adding CAA Sections 604(d)(6), 604(e)(3), and 604(h) (Section 764 of the 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (Pub. L. 105–277; October 21, 1998)). The amendment requires EPA to conform the U.S. phaseout schedule for methyl bromide to the provisions of the Montreal Protocol for industrialized countries. Specifically, the amendment requires EPA to make regulatory changes to implement the following phaseout schedule:

25% reduction (from 1991 baseline) in 1999
50% reduction in 2001
70% reduction in 2003
100% reduction in 2005

EPA published regulations in the **Federal Register** on June 1, 1999 (64 FR 29240) and November 28, 2000 (65 FR 70795), instituting the phaseout reductions in the production and import of methyl bromide in accordance with the schedule listed above. Additionally, the 1998 amendment allowed EPA to exempt the production and import of methyl bromide from the phaseout for critical uses starting January 1, 2005 ''to the extent consistent with the Montreal Protocol'' (Section 764 of the 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (Pub. L. 105–277, October 21, 1998), Section 604(d)(6) of the Clean Air Act).

*B. What is the Montreal Protocol authority for granting a critical use exemption after the methyl bromide phaseout?*

The Montreal Protocol provides an exemption to the phaseout of methyl bromide for critical uses in Article 2H, paragraph 5. The Parties to the Protocol included provisions for such an exemption in recognition that substitutes for methyl bromide may not be available by 2005 for certain uses of methyl bromide agreed by the Parties to be ''critical uses''.

In their Ninth Meeting (1997), the Parties to the Protocol agreed to Decision IX/6, setting forth the following criteria for a ''critical use'' determination:

(a) That a use of methyl bromide should qualify as ''critical'' only if the nominating Party [e.g. U.S.] determines that:

(i) The specific use is critical because the lack of availability of methyl bromide for that use would result in a significant market disruption; and

(ii) There are no technically and economically feasible alternatives or substitutes available to the user that are acceptable from the standpoint of environment and health and are suitable to the crops and circumstances of the nomination.

(b) That production and consumption, if any, of methyl bromide for a critical use should be permitted only if:

(i) All technically and economically feasible steps have been taken to minimize the critical use and any associated emission of methyl bromide;

(ii) Methyl bromide is not available in sufficient quantity and quality from existing stocks of banked or recycled methyl bromide, also bearing in mind the developing countries' need for methyl bromide;

(iii) It is demonstrated that an appropriate effort is being made to evaluate, commercialize and secure national regulatory approval of alternatives and substitutes, taking into consideration the circumstances of the particular nomination * * *. Non-Article 5 Parties [e.g., the U.S.] must demonstrate that research programmes are in place to develop and deploy alternatives and substitutes * * *.

In the context of the phaseout program, the use of the term consumption may be misleading. Consumption does not mean the ''use'' of a controlled substance, but rather is defined as the formula: consumption = production + imports − exports, of controlled substances (Article 1 of the Protocol and Section 601 of the CAA). A Class I controlled substance that was produced or imported through the expenditure of allowances prior to its phaseout date can continue to be used by industry and the public after that specific chemical's phaseout under EPA's phaseout regulations, unless otherwise precluded under separate regulations.

In addition to the language quoted above, the Parties further agreed to request the TEAP to review nominations and make recommendations for approval based on the criteria

established in paragraphs (a)(ii) and (b) of Decision IX/6.

### III. How is the U.S. implementing the critical use exemption?

*A. When will the exemption become available to U.S. users of methyl bromide?*

Under the provisions of both the CAA and the Montreal Protocol, the critical use exemption became available to approved users on January 1, 2005. Until that date, all production and import of methyl bromide (except for those quantities that qualify for the quarantine and preshipment exemption) was required to conform to the phaseout schedule listed above (see Supplementary Information Section II A). Allowances for subsequent years are authorized through regulations. For more information on the quarantine and preshipment exemption, please refer to 68 FR 238 (January 2, 2003).

*B. What is the projected timeline for the critical use exemption application process?*

There is both a domestic and international component to the critical use exemption process. The following outline projects a timeline for the process for the next three years.

| | |
|---|---|
| April 17, 2007 | Solicit applications for the methyl bromide critical use exemption for 2009 and 2010. |
| July 10, 2007 | Deadline for submitting critical use exemption applications to EPA. |
| Fall 2007 | U.S. government (EPA, Department of State, U.S. Department of Agriculture, and other interested federal agencies) create U.S. Critical Use Nomination package. |
| January 24, 2008 | Deadline for U.S. government to submit U.S. nomination package to the Protocol Parties. |
| Early 2008 | Review of the nomination packages for critical use exemptions by the Technical and Economic Assessment Panel (TEAP) and Methyl Bromide Technical Options Committee (MBTOC). |
| Mid 2008 | Parties consider TEAP/MBTOC recommendations. |
| November 2008 | Parties authorize critical use exemptions for methyl bromide for production and consumption in 2009 (supplemental request) and 2010. |
| Early-Mid 2009 | EPA publishes proposal and final rule for 2009 supplemental request, if applicable. |
| Mid 2009 | EPA publishes proposed rule for allocating critical use exemptions in the U.S. for 2010. |
| Late 2009 | EPA publishes final rule allocating critical use exemptions in the U.S. for the 2010 control period. |
| January 1, 2010 | Critical use exemption permits the limited production and import of methyl bromide beyond the phaseout date for specific uses for the 2010 control period. |

**Authority:** 42 U.S.C. 7414, 7601, 7671–7671q.

Dated: April 9, 2007.

**Brian J. McLean,**

*Director, Office of Atmospheric Programs.*

[FR Doc. E7–7279 Filed 4–16–07; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8300–2]**

## Request for Nominations to the Children's Health Protection Advisory Committee (CHPAC)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of request for nominations.

**SUMMARY:** The U.S. Environmental Protection Agency invites nominations to fill vacancies on its Children's Health Protection Advisory Committee (CHPAC). The Agency seeks qualified senior-level decisionmakers from diverse sectors throughout the United States to be considered for appointments. EPA encourages interested applicants to send their resumes and qualifications as soon as possible. Additional avenues and resources may be utilized in the solicitation of nominees.

**ADDRESSES:** Submit nominations via e-mail or fax to Carolyn Hubbard, Designated Federal Officer, *Hubbard.carolyn@epa.gov*, 202–564–2733 (fax), Office of Children's Health Protection, U.S. Environmental Protection Agency (1107A), 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

*Background:* The CHPAC is a Federal advisory committee under the Federal Advisory Committee Act, Pub. L. 92463. The U.S. Environmental Protection Agency established the CHPAC in 1998 to provide independent advice to the EPA Administrator on regulations, research, and communications issues relevant to children's environmental health. CHPAC consists of representatives from industry, private foundations, pediatricians, nurses, scientists, environmental organizations, citizens organizations/networks, Federal Government, environmental justice community, State/local/tribal governments, outreach groups, user/processors (i.e., foods), and economists.

Members are appointed by the Administrator of EPA for two year terms with the possibility of reappointment for up to 6 years. The Committee usually meets 3–4 times annually (with additional teleconference meetings as needed) and the average workload for the members is approximately 10 to 15 hours per month. Members serve on the Committee in a voluntary capacity; however, EPA provides reimbursement for travel expenses associated with official government business.

Potential candidates should possess the following qualifications: Occupy a senior position within their organization; Broad experience outside of their current position; Experience dealing with public policy issues affecting children; Membership in broad-based networks; Recognized expert in matters affecting children's health to be addressed by the CHPAC.

EPA is seeking nominees for representation from all sectors, in particular Federal, State, local and tribal agencies, academia, healthcare, public health, industry, environmental justice, and non-governmental organizations.

Nominations for membership must include a resume and short biography describing the educational and professional qualifications of the nominee and the nominee's current business address and daytime telephone number.

**FOR FURTHER INFORMATION CONTACT:** Carolyn Hubbard, Office of Children's Health Protection, USEPA, MC 1107A, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 564–2189, *Hubbard.carolyn@epa.gov.*

Dated: April 11, 2007.

**Carolyn Hubbard,**

*Designated Federal Official.*

[FR Doc. E7–7272 Filed 4–16–07; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8300–6]**

### Clean Air Act Advisory Committee (CAAAC): Notice of Meetings and Clean Air Excellence Award Ceremony

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of meeting.

**SUMMARY:** The Environmental Protection Agency (EPA) established the Clean Air Act Advisory Committee (CAAAC) on November 19, 1990, to provide independent advice and counsel to EPA on policy issues associated with implementation of the Clean Air Act of 1990. The Committee advises on economic, environmental, technical scientific, and enforcement policy issues.

**DATES & ADDRESSES:** Open meeting notice; Pursuant to 5 U.S.C. App. 2 Section 10(a)(2), notice is hereby given that the Clean Air Act Advisory Committee will hold its next open meeting on Wednesday May 9 from 3 p.m. to 5 p.m. at the National Museum of the American Indian in Washington DC and on Thursday, May 10, 2007, from approximately 8:30 a.m. to 4:30 p.m. at the DoubleTree Hotel at 300 Army Navy Drive, in Arlington, Virginia. Seating will be available on a first come, first served basis. The Air Quality Management subcommittee will meet on May 9, 2007 from approximately 9:30 a.m to 11:30 p.m. The Permits, New Source Review and Toxics subcommittee will meet on May 9, 2007 from approximately 12 p.m. to 2 p.m. These meetings will also be at the Double Tree Hotel. The Economic Incentives and Regulatory Innovations subcommittee and The Mobile Source Technical Review subcommittee will not meet at this time. There will be a special Tribal Air Quality Forum and the 7th annual Clean Air Excellence Awards program on May 9, 2007 at the National Museum of American Indian. The Tribal Air Quality Forum will start approximately at 3 p.m. and finishing at 5 p.m. The Clean Air Excellence Awards program will start at 6:30 p.m. and end at 8:30 p.m. The agenda for the CAAAC full committee meeting, Tribal Air Quality Forum and Clean Air Excellence Awards will be posted on the CAAAC Web site: *http://www.epa.gov/oar/caaac/.*

Inspection of Committee Documents: The Committee agenda and any documents prepared for the meeting will be publicly available at the meeting. Thereafter, these documents, together with CAAAC meeting minutes, will be available by contacting the Office of Air and Radiation Docket and requesting information under docket OAR–2004–0075. The Docket office can be reached by telephoning 202–260–7548; FAX 202–260–4400.

**FOR FURTHER INFORMATION CONTACT:** Concerning the CAAAC, please contact Pat Childers, Office of Air and Radiation, U.S. EPA (202) 564–1082, FAX (202) 564–1352 or by mail at U.S. EPA, Office of Air and Radiation (Mail code 6102 A), 1200 Pennsylvania Avenue, NW., Washington, DC 20004. For information on the Subcommittees and Awards Program, please contact the following individuals: (1) Permits/NSR/Toxics Integration—Debbie Stackhouse, (919) 541–5354; and (2) Air Quality Management—Jeff Whitlow, (919) 541–5523 (3) Economic Incentives and Regulatory Innovations—Carey Fitzmaurice, (202)564–1667 (4) Mobile Source Technical Review—John Guy, (202) 343–9276 (5) Clean Air Excellence Award Program—Pat Childers at (202) 564–1082. Additional Information on these meetings, CAAAC, its Subcommittees and the awards program can be found on the CAAAC Web site: *http://www.epa.gov/oar/caaac/.*

For information on access or services for individuals with disabilities, please contact Mr. Pat Childers at (202) 564–1082 or *childers.pat@epa.gov.* To request accommodation of a disability, please contact Mr. Childers, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: April 12, 2007.

**Pat Childers,**

*Designated Federal Official, Clean Air Act Advisory Committee, Office of Air and Radiation.*

[FR Doc. E7–7275 Filed 4–16–07; 8:45 am]

BILLING CODE 6560–50–P

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/.*

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 11, 2007.

**A. Federal Reserve Bank of Dallas** (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

*1. Community Bancshares, Inc.*, Bridgeport, Texas; to become a bank holding company by acquiring 100 percent of the voting shares of The Community Bank, Bridgeport, Texas, a *de novo* bank.

Board of Governors of the Federal Reserve System, April 12, 2007.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E7–7281 Filed 4–16–07; 8:45 am]

BILLING CODE 6210–01–S

## FEDERAL RESERVE SYSTEM

### Sunshine Act Meeting

**AGENCY HOLDING THE MEETING:** Board of Governors of the Federal Reserve System.

**TIME AND DATE:** 11:30 a.m., Monday, April 23, 2007.

**PLACE:** Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, N.W., Washington, D.C. 20551.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:**

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

**FOR FURTHER INFORMATION CONTACT:** Michelle Smith, Director, or Dave Skidmore, Assistant to the Board, Office of Board Members at 202–452–2955.

**SUPPLEMENTARY INFORMATION:** You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at *http://www.federalreserve.gov* for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Board of Governors of the Federal Reserve System, April 13, 2007.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 07–1918 Filed 4–13–07; 1:57 pm]

**BILLING CODE 6210–01–S**

## GENERAL SERVICES ADMINISTRATION

**[FMR Bulletin PBS–2007–B1]**

### Federal Management Regulation; Redesignations of Federal Buildings

**AGENCY:** Public Buildings Service (P), GSA.

**ACTION:** Notice of a bulletin.

**SUMMARY:** The attached bulletin announces the redesignation of a Federal Building.

**DATES:** *Expiration Date:* This bulletin expires August 5, 2007. However, the building redesignation announced by this bulletin will remain in effect until canceled or superseded.

**FOR FURTHER INFORMATION CONTACT:** General Services Administration, Public Buildings Service (P), Attn: Anthony E. Costa, 1800 F Street, NW, Washington, DC 20405, e-mail at *anthony.costa@gsa.gov,* (202) 501–1100.

Dated: February 28, 2007.

**Lurita Doan,**

*Administrator of General Services.*

**U.S. GENERAL SERVICES ADMINISTRATION**

**[FMR BULLETIN PBS-2007-B1]**

**REDESIGNATIONS OF FEDERAL BUILDINGS**

TO: Heads of Federal Agencies

SUBJECT: Redesignations of Federal Buildings

1. *What is the purpose of this bulletin?* This bulletin announces the redesignation of a Federal Building.

2. *When does this bulletin expire?* This bulletin expires August 5, 2007. However, the building redesignation announced by this bulletin will remain in effect until canceled or superseded.

3. *Redesignation.* The former and new names of the redesignated building are as follows:

| Former Name | New Name |
|---|---|
| United States Post Office and Courthouse, 700 Grant Street, Pittsburgh, PA 15219. | United States Courthouse, 700 Grant Street, Pittsburgh, PA 15219. |

4. *Who should we contact for further information regarding redesignation of this Federal Building?* U.S. General Services Administration, Public Buildings Service (P),Attn: Anthony E. Costa, 1800 F Street, NW, Washington, DC 20405, telephone number: (202) 501–1100, e-mail at *anthony.costa@gsa.gov.*

Dated: February 28, 2007.

**Lurita Doan,**

*Administrator of General Services.*

[FR Doc. E7–7230 Filed 4–16–07; 8:45 am]

**BILLING CODE 6820–23–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### President's Council on Physical Fitness and Sports

**AGENCY:** Department of Health and Human Services, Office of the Secretary.

**ACTION:** Notice of meeting.

**SUMMARY:** As stipulated by the Federal Advisory Committee Act, the Department of Health and Human Services (DHHS) is hereby giving notice that the President's Council on Physical Fitness and Sports will hold a meeting. This meeting is open to the public. A description of the Council's functions is included with this notice.

**DATES:** May 3, 2007, from 8:30 a.m. to 4 p.m.

**ADDRESSES:** Department of Health and Human Services, Hubert H. Humphrey Building, Room 800, 200 Independence Avenue, SW., Washington, DC 20201 from 8:30 a.m.–11:30 a.m., and the Hilton Washington Embassy Row Hotel, 2015 Massachusetts Avenue, NW., Washington, DC 20036 from 1:30 p.m.–4 p.m. (There will be limited seating for the afternoon session, so reservations are required. Please RSVP by May 1, 2007—202–690–5184.)

**FOR FURTHER INFORMATION CONTACT:** Melissa Johnson, Executive Director, President's Council on Physical Fitness and Sports, Hubert H. Humphrey Building, Room 738H, 200 Independence Avenue, SW., Washington, DC 20201, (202) 690–5187.

**SUPPLEMENTARY INFORMATION:** The President's Council on Physical Fitness and Sports (PCPFS) was established originally by Executive Order 10673, dated July 16, 1956. PCPFS was established by President Eisenhower after published reports indicated that American boys and girls were unfit compared to the children of Western Europe. Authorization to continue Council operations was given at appropriate intervals by subsequent Executive Orders. The Council has undergone two name changes and several reorganizations. Presently, the PCPFS is a program office located organizationally in the Office of Public Health and Science within the Office of the Secretary in the U.S. Department of Health and Human Services.

On June 6, 2002, President Bush signed Executive Order 13256 to reestablish the PCPFS. Executive Order 13256 was established to expand the focus of the Council. This directive instructed the Secretary to develop and coordinate a national program to enhance physical activity and sports participation. The Council currently operates under the stipulations of the new directive. The primary functions of the Council include: (1) To advise the President, through the Secretary, on the progress made in carrying out the provisions of the enacted directive and recommend actions to accelerate progress; (2) to advise the Secretary on ways and means to enhance opportunities for participation in physical fitness and sports, and, where possible, to promote and assist in the facilitation and/or implementation of such measures; (3) to advise the Secretary regarding opportunities to extend and improve physical activity/fitness and sports programs and services at the national, state and local levels; and (4) to monitor the need for the enhancement of programs and educational and promotional materials

sponsored, overseen, or disseminated by the Council and advise the Secretary, as necessary, concerning such needs.

The PCPFS holds at a minimum, one meeting in the calendar year to (1) assess ongoing Council activities and (2) discuss and plan future projects and programs.

Dated: April 12, 2007.

**Melissa Johnson,**

*Executive Director, President's Council on Physical Fitness and Sports.*

[FR Doc. E7–7251 Filed 4–16–07; 8:45 am]

BILLING CODE 4150–35–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Committee on Vital and Health Statistics: Meeting

Pursuant to the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) announces the following advisory committee meeting.

*Name:* National Comittee on Vital and Health Statistics (NCVHS) Subcommittee on Privacy and Confidentiality.

*Time and Date:* April 17, 2007, 9 a.m.–5 p.m.

*Place:* Hilton Embassy Row, 2015 Massachusetts Avenue, NW., Washington, DC 20036.

*Status:* Open.

*Purpose:* The purpose of this session will be to discuss consumer controls for sensitive health records.

*For Further Information Contact:* Substantive program information as well as summaries of meetings and a roster of committee members may be obtained from Maya A. Berstein, Lead Staff for Subcommittee on Privacy and Confidentiality, Office of the Assistant Secretary for Planning and Evaluation, 434E Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201; telephone (202) 690–7100; or Marjorie S. Greenberg, Executive Secretary, NcVHS, National Center for Health Statistics, Centers for Disease Control and Prevention, 3311 Toledo Road, Room 2402, Hyattsville, Maryland 20782; telephone (301) 458–4245. Information also is available on the NCVHS home page of the HHS Web site: *http://www.ncvhs.hhs.gov/,* where further information including an agenda will be posted when available.

Should you require reasonable accommodation, please contact the CDC Office of Equal Employment Opportunity on (301) 458–4EEO (4336) as soon as possible.

Dated: April 10, 2007.

**James Scanlon,**

*Deputy Assistant Secretary for Planning and Evaluation (OSDP), Office of the Assistant Secretary for Planning and Evaluation.*

[FR Doc. 07–1885 Filed 4–16–07; 8:45am]

BILLING CODE 4151–05–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Agency for Healthcare Research and Quality

### Nominations of Topics for Evidence-based Practice Centers

**AGENCY:** Agency for Healthcare Research and Quality (AHRQ), HHS.

**ACTION:** Nomination of topics for evidence reports, technology assessments, and comparative and effectiveness reviews.

**SUMMARY:** AHRQ invites nominations of topics for evidence reports, technology assessments, and comparative and effectiveness reviews conducted by its Evidence-based Practice Centers (EPC) Program relating to the prevention, diagnosis, treatment and management of common diseases and clinical conditions, as well as topics relating to the organization and financing of health care. Previous evidence reports and comparative effectiveness reviews can be found at *http://www.ahrq.gov/clinic/epcix.htm* and *http://effectivehealthcare.ahrq.gov/products/progress.cfm,* respectively.

**DATES:** Topic nominations for general evidence reports should be submitted by May 14, 2007, in order to be considered for fiscal year 2007 selection. Topic nominations for comparative and effectiveness reviews are accepted on an on going basis at: *http://effectivehealthcare.ahrq.gov/topicNomination/nominationsForm.cfm.* In addition to timely responses to this request for nominations, AHRQ also accepts topic nominations on an ongoing basis for consideration for future years. Topics submitted for consideration as general evidence reports will concurrently be considered as comparative effectiveness reviews as appropriate. AHRQ will not reply to individual responses, but will consider all nominations during the selection process. Those who submit topics that are selected will be notified by AHRQ.

**ADDRESSES:** Topics nominations should be submitted to Beth A. Collins Sharp, Ph.D., R.N., Director, Evidence-based Practice Centers (EPC) Program, Center for Outcomes and Evidence, AHRQ, 540 Gaither Road, Rockville, MD 20850. Electronic submissions to *epc@ahrq.gov* are preferred.

**FOR FURTHER INFORMATION CONTACT:** Beth A. Collins Sharp, Ph.D., R.N., Center for Outcomes and Evidence, AHRQ, 540 Gaither Road, Rockville, MD 20850; Phone: (301) 427–1503; Fax: (301) 427–1640; E-mail: *beth.collinssharp@ahrq.hhs.gov.*

Arrangement for Public Inspection: All nominations will be available for public inspection by appointment at the Center for Outcomes and Evidence, telephone (301) 427–1600, weekdays between 8:30 a.m. and 5 p.m. (Eastern time).

**SUPPLEMENTARY INFORMATION:**

**1. Background**

Under Title IX of the Public Health Service Act, AHRQ is charged with enhancing the quality, appropriateness, and effectiveness of health care services and access to such services. AHRQ accomplishes these goals through scientific research, including evaluative medical literature reviews and technology assessments, and through the promotion of improvements in clinical practice and health systems practices.

**2. Purpose and Overview**

The purpose of this notice is to solicit topic nominations for evidence reports, technology assessments, and comparative and effectiveness reviews. Professional societies, health systems, employers, insurers, providers, and consumer groups are encouraged to nominate topics and then collaborate with AHRQ, as it carries out its mission to promote the practice of evidence-based health care. In this endeavor, AHRQ serves as a science partner with private-sector and public organizations in their efforts to improve the quality, effectiveness, and appropriateness of health care delivery in the United States, and to expedite the translation of evidence-based research findings into improved health care services. To undertake scientific analyses and evidence syntheses on topics of high priority to its public and private health care partners and the health care community generally, AHRQ awards task order contracts to its Evidence-based Practice Centers (EPCs).

The EPCs produce systematic reviews of the scientific literature—evidence reports, technology assessments, and comparative and effectiveness reviews—that provide to public and private organizations the foundation for developing and implementing their own practice guidelines, performance

measures, educational programs, and other strategies to improve the quality of health care and decision-making related to the effectiveness and appropriateness of specific health care technologies and services. The evidence reports, technology assessments, and comparative and effectiveness reviews also may be used to inform coverage and reimbursement policies. As the body of scientific studies related to organization and financing of health care grows, systematic review and analysis of these studies, in addition to clinical and behavioral research, can provide health system organizations with a scientific foundation for developing or improving system-wide policies and practices.

Currently, AHRQ supports approximately nine general evidence reports per year, in collaboration with non-federal partners, and 4–10 comparative effectiveness reviews. Nominations of general topics from non-Federal partners are solicited annually through a notice in the **Federal Register**. However, topic nominations are accepted on an ongoing basis. All nominations received in the previous year as well as topics that were previously submitted but not selected are considered for the upcoming year.

Reports and assessments usually require about 12 months for completion once assigned to an EPC. AHRQ widely disseminates the EPC evidence reports and technology assessments, both electronically and in print. The EPC evidence reports, technology assessments and comparative and effectiveness reviews do not make clinical recommendations or recommendations regarding reimbursement and coverage policies.

**3. Role/Responsibilities of Partners for General Topics**

Nominators of topics selected for development of an EPC evidence report assume the role of Partners of AHRQ and the EPCs. Partners have defined roles and responsibilities. AHRQ places high value on these cooperative relationships, and takes into consideration a Partner organization's past performance of these responsibilities when considering whether to accept additional topics nominated by that organization in subsequent years. Specifically, Partners are expected to serve as resources to EPCs as they develop the evidence reports related to the nominated topic; serve as external peer reviewers of relevant draft evidence reports and assessments; and commit to timely translation of the EPC reports and assessments into their town quality improvement tolls (e.g., clinical practice guidelines, performance measures), educational programs, or reimbursement policies; and dissemination of these derivative products to their membership or other health care stakeholders, as appropriate. AHRQ also is interested in all the uses of these derivative products and the products' impact on enhanced health care. AHRQ looks to its Partners to provide use and impact data on products that are based on EPC evidence reports and technology assessments.

**4. Topics for Reports**

The EPCs prepare evidence reports, technology assessments, and comparative and effectiveness reviews on topics for which there is significant demand for information by health care providers, insurers, purchasers, health-related societies, and patient advocacy organizations. Such topics may include the prevention, diagnosis and/or treatment of particular clinical and behavioral conditions, use of alternative or complementary therapies, and appropriate use of commonly provided services, procedures, or technologies. Topics also may include issues related to the organization and financing of care such as risk adjustment methodologies, market performance measures, provider payment mechanisms, and insurance purchasing tools, as well as measurement or evaluation of provider integration of new scientific findings regarding health care and delivery innovations. Previous reports and reviews can be found at *http://www.ahrg.gov/clinic/epcix.htm* and *http://effectivehealthcare.ahrg.gov/products/progress.cfm.*

AHRQ is very interested in receiving topic nominations from professional societies and organizations composed of members of minority populations, as well as topic nominations that have significant impact on AHRQ priority populations including low income groups, minority groups, women, children, the elderly, and individuals with special health care needs, such as those with disabilities, those who need chronic care or end-of-life healthcare, or those who live in inner-city and rural areas.

**5. Topic Nomination**

Nominations of topics for AHRQ evidence reports, technology assessments, and comparative effectiveness reviews should focus on specific aspects of prevention, diagnosis, treatment and/or management of a particular condition; an individual procedure, treatment, or technology; or a specific healthcare organizational or financial strategy. The processes that AHRQ employs to select clinical and behavioral topics as well as organization and financing topics nominated by the EPCs are described below. For each topic, the nominating organization must provide the following information:

A. Rationale and supporting evidence on the relevance and importance of the topic;

B. Three to five focused questions on the topic to be addressed;

C. Plans for rapid translation of the evidence reports and technology assessments into clinical guidelines, performance measures, educational programs, or other strategies for strengthening the quality of health care services, or plans to inform development of reimbursement or coverage policies;

D. Plans for use and/or dissemination of these derivative products, e.g., to membership and others, if appropriate; and,

E. Process by which the nominating organization will measure the use of these products and impact of such use.

**6. Topic Selection**

Factors that will be considered in the selection of topics for AHRQ evidence reports, technology assessments, and comparative and effectiveness reviews and which should/may be addressed in nomination material, include:

A. Burden of related disease(s) including severity, incidence and/or prevalence or relevance of the organizational/financial topic to the general population and/or AHRQ's or the Secretary's priorities which are available at *http://www.effectivehealthcare.ahrq.gov*;

B. Total costs associated with a condition, procedure, treatment, technology, or organization/financial topic taking into account the number of people needing such care, the unit cost of care, and related or indirect costs;

C. Relevance to the needs of the Medicare, Medicaid and other Federal healthcare programs;

D. Controversy or uncertainty about the topic and availability of scientific data to support the systematic review and analysis of the topic;

E. Potential for reducing clinically significant variations in the prevention, diagnosis, treatment, or management of a disease or condition; or in changing the use of a procedure or technology; informing and improving patient and/or provider decisionmaking; improving health outcomes; and/or reducing costs; and,

F. Nominating organization's plan to disseminate derivative products, measure use and impact of these products on outcomes, or otherwise

incorporate the report into its managerial or policy decision making.

**7. Submission of Nominations**

Topics nominations for general topics should be submitted to Beth A. Collins Sharp, PhD, R.N., Director, Evidence-based Practice Centers (EPC) Program, Center for Outcomes and Evidence, AHRQ, 540 Gaither Road, Rockville, MD 20850. Electronic submissions to *epc@ahrq.gov* are preferred. Topic nominations for comparative effectiveness reviews should be submitted to *http://www.effectivehealthcare.ahrq.gov*.

Dated: April 5, 2007.

**Carolyn M. Clancy,**

*Director.*

[FR Doc. 07–1813 Filed 4–16–07; 8:45 am]

**BILLING CODE 4160–90–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60Day–07–0672]**

### 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 404–639–5960 and send comments to Joan Karr, CDC Acting 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**

Indicators of the Performance of Local and State and Education Agencies in HIV-prevention and Coordinated School Health Program Activities for Adolescent and School Health Programs (0920–0672)—(Extension)—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

The proposed project is an annual Web-based questionnaire to assess programmatic activities among local education agencies (LEA) and state and territorial education agencies (SEA and TEA) funded by the Division of Adolescent and School Health (DASH), Centers for Disease Control and Prevention.

Currently, there is no standardized annual reporting process for HIV prevention activities or coordinated school health program (CSHP) activities among LEAs and SEAs/TEAs funded by DASH. Data being gathered will be in the form of four questionnaires, which will: (1) Provide standardized information about how HIV prevention, asthma management, and CSHP funds are used by LEAs and SEAs; (2) assess the extent to which programmatic adjustments are indicated; (3) provide descriptive and process information about program activities; and (4) provide greater accountability for use of public funds. These questionnaires are to be completed within ninety days after the end of the fiscal year by the DASH-funded partners on a Web site managed by DASH.

Of the four Web-based questionnaires corresponding to the specific funding source: Two (2) questionnaires will pertain to HIV-prevention program activities among LEAs and SEAs/TEAs; one (1) will pertain to asthma management activities among LEAs; and one (1) will pertain to CSHP activities among SEAs.

The HIV questionnaires will include questions on:

- Distribution of, professional development and individualized technical assistance on school policies.
- Distribution of professional development and individualized technical assistance on education curricula and instruction.
- Distribution of professional development and individualized technical assistance assessment on student standards.
- Collaboration with external partners.
- Targeting priority populations.
- Planning and improving projects.
- Information about additional program activities.

The asthma questionnaire will ask the questions above, but will focus on asthma management activities.

The CSHP questionnaire will also ask the questions above, but focused on physical activity, nutrition, and tobacco-use prevention activities (PANT), and include additional questions on:

- Joint activities of the State Education Agency and State Health Agency (SHA).
- Activities of the CSHP state-wide coalition.
- Health promotion programs and environmental approaches to PANT.

There are no costs to respondents except their time to participate in the survey.

ESTIMATED ANNUALIZED BURDEN HOURS

| Respondents | Form name | Number of respondents | Number of responses per respondent | Average burden per response (in hours) | Total burden (in hours) |
|---|---|---|---|---|---|
| HIV—Local Education Agency (LEA) Official. | Indicators for School Health Programs: HIV Prevention. | 18 | 1 | 7.2 | 129 |
| State & Territorial Educational Agency (SEA & TEA) Officials. | Indicators for School Health Programs: HIV Prevention. | 55 | 1 | 7.2 | 396 |
| Asthma—Local Educational Agency (LEA) Officials. | Indicators for School Health Programs: Asthma Management. | 10 | 1 | 7.2 | 72 |

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

| Respondents | Form name | Number of respondents | Number of responses per respondent | Average burden per response (in hours) | Total burden (in hours) |
|---|---|---|---|---|---|
| CSHP—State Education Agency (SEA) Officials. | Indications for School Health Programs: Coordinated School Health Programs (CSHPs); Physical Activity, Nutrition, and Tobacco Use (PANT). | 23 | 1 | 9.5 | 218 |
| Total | | 106 | | | 816 |

Dated: April 10, 2007.

**Joan F. Karr,**

*Acting Reports Clearance Officer, Centers for Disease Control and Prevention.*

[FR Doc. E7–7235 Filed 4–16–07; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60Day–07–0338]**

### 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 404–639–5960 and send comments to Joan Karr, CDC Acting 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**

List of Ingredients Added to Tobacco in the Manufacture of Smokeless Tobacco Products (OMB No. 0920–0338)—Extension—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

The Comprehensive Smokeless Tobacco Health Education Act of 1986 (15 U.S.C. 4401 *et seq.*, Pub. L. 99–252) requires each person who manufactures, packages, or imports smokeless tobacco (SLT) to provide the Secretary of Health and Human Services (HHS) with a list of ingredients added to tobacco in the manufacture of smokeless tobacco products. This legislation also authorizes HHS to undertake research, and submit an annual report to Congress (as deemed appropriate) discussing the health effects of the ingredients in smokeless tobacco products. HHS has delegated responsibility for the implementation of this Act to CDC's Office on Smoking and Health (OSH). The oral use of SLT represents a significant health risk which can cause cancer and a number of non-cancerous oral conditions, and can lead to nicotine addition and dependence. Furthermore, SLT use is not a safe substitute for cigarette smoking. The total cost to respondents is their time to complete survey.

ESTIMATED ANNUALIZED BURDEN HOURS

| Respondents | No. of respondents | No. of responses per respondent | Average burden per response (in hrs.) | Total burden (in hours) |
|---|---|---|---|---|
| Tobacco Manufacturers | 11 | 1 | 42 | 462 |

Dated: April 11, 2007.

**Joan F. Karr,**

*Acting Reports Clearance Officer, Centers for Disease Control and Prevention.*

[FR Doc. E7–7237 Filed 4–16–07; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60Day–07–0210]**

### 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 404–639–5960 and send comments to Joan Karr, CDC Acting 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**

List of Ingredients Added to Tobacco in the Manufacture of Cigarette Products (OMB No. 0920–0210)—Extension—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

The Comprehensive Smoking Education Act of 1984 (15 U.S.C. 1336 or Pub. L. 98–474) requires each person who manufactures, packages, or imports cigarettes to provide the Secretary of Health and Human Services (HHS) with a list of ingredients added to tobacco in the manufacture of cigarettes. This legislation also authorizes HHS to undertake research, and to report to the Congress (as deemed appropriate) discussing the health effects of these ingredients.

HHS has delegated responsibility for the implementation of this Act to CDC's Office on Smoking and Health (OSH). OSH has collected ingredient reports on cigarette products since 1986. Cigarette smoking is the leading preventable cause of premature death and disability in our Nation. Each year more than 400,000 premature deaths occur as the result of cigarette smoking related diseases.

The Centers for Disease Control and Prevention (CDC), Office on Smoking and Health (OSH) has been delegated the authority for implementing major components of the Department of Health and Human Services (HHS) tobacco and health program, including collection of tobacco ingredients information. HHS's overall goal is to reduce death and disability resulting from cigarette smoking and other forms of tobacco use through programs of information, education and research. There is no cost to the respondents other than their time to complete the survey.

ESTIMATED ANNUALIZED BURDEN HOURS

| Respondents | No. of respondents | No. of responses per respondent | Average burden per response (in hours) | Total burden (in hours) |
|---|---|---|---|---|
| Cigarettes Manfacturers | 38 | 1 | 37 | 1406 |

Dated: April 11, 2007.

**Joan F. Karr,**

*Acting Reports Clearance Officer, Centers for Disease Control and Prevention.*

[FR Doc. E7–7238 Filed 4–16–07; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Disease, Disability, and Injury Prevention and Control Special Emphasis Panel ''Health Promotion and Disease Prevention Research Centers: Special Interest Project Competitive Supplements (Panel 8),'' Request for Application Number (RFA) DP07–002

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces a meeting of the aforementioned Special Emphasis Panel.

*Time and Date:* 12 p.m.–4 p.m., June 12, 2007 (Closed).

*Place:* Teleconference.

*Status:* The meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

*Matters To Be Discussed:* The meeting will include the review, discussion, and evaluation of research grant applications in response to RFA DP07–002, ''Health Promotion and Disease Prevention Research Centers: Special Interest Project Competitive Supplements (Panel 8).''

**FOR FURTHER INFORMATION CONTACT:** Maurine Goodman, M.A., M.P.H., Scientific Review Administrator, Centers for Disease Control and Prevention, 1600 Clifton Road, NE., MS D72, Atlanta, GA 30333, telephone 404–639–4737.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: April 10, 2007.

**Elaine L. Baker,**

*Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. E7–7245 Filed 4–16–07; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### National Institute for Occupational Safety and Health (NIOSH)Advisory Board on Radiation and Worker Health (ABRWH or Advisory Board)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention announces the following committee meeting:

*Name:* Advisory Board on Radiation and Worker Health, National Institute for Occupational Safety and Health.

*Committee Meeting Times and Dates:*

8 a.m.–5 p.m., May 2, 2007.
8 a.m.–5:30 p.m., May 3, 2007.
8 a.m.–12:15 p.m., May 4, 2007.

*Public Comment Times and Dates:*

5 p.m.–6 p.m., May 2, 2007.
7:30 p.m.–9 p.m., May 3, 2007.

*Place:* Westin Westminster, 10600 Westminster Boulevard, Westminster, Colorado 80020, Phone 303.410.5000, Fax 303.410.5005.

*Status:* Open to the public, limited only by the space available. The meeting space accommodates approximately 75 people.

*Background:* The Advisory Board was established under the Energy Employees Occupational Illness Compensation Program (EEOICP) Act of 2000 to advise the President on a variety of policy and technical functions

required to implement and effectively manage the new compensation program. Key functions of the Advisory Board include providing advice on the development of probability of causation guidelines which have been promulgated by the Department of Health and Human Services (HHS) as a final rule, advice on methods of dose reconstruction which have also been promulgated by HHS as a final rule, advice on the scientific validity and quality of dose estimation and reconstruction efforts being performed for purposes of the compensation program, and advice on petitions to add classes of workers to the Special Exposure Cohort (SEC).

In December 2000, the President delegated responsibility for funding, staffing, and operating the Advisory Board to HHS, which subsequently delegated this authority to CDC. NIOSH implements this responsibility for CDC. The charter was issued on August 3, 2001, renewed at appropriate intervals, and will expire on August 3, 2007.

*Purpose:* This Advisory Board is charged with (a) providing advice to the Secretary, HHS, on the development of guidelines under Executive Order 13179; (b) providing advice to the Secretary, HHS, on the scientific validity and quality of dose reconstruction efforts performed for this program; and (c) upon request by the Secretary, HHS, advising the Secretary on whether there is a class of employees at any Department of Energy facility who were exposed to radiation but for whom it is not feasible to estimate their radiation dose, and on whether there is reasonable likelihood that such radiation doses may have endangered the health of members of this class.

*Matters To Be Discussed:* The agenda for the Advisory Board meeting includes SEC Petitions for Rocky Flats, Los Alamos National Laboratory, Bethlehem Steel, Sandia National Lab-Livermore, WR Grace, Dow, Y–12 and Chapman Valve; Use of Data from ''Other'' Sites; Global Science Issues including OroNasal Breathing, Ingestion, and Welding Rods; Program Updates from NIOSH, Department of Energy, and Department of Labor; Selection of 8th Round of Individual Dose Reconstructions for Review; Timeliness in the Energy Employees Occupational Illness Compensation Program (EEOICP); Working Group Updates; and Board Working Time.

The agenda is subject to change as priorities dictate. In the event an individual cannot attend, written comments may be submitted. Any written comments received will be provided at the meeting and should be submitted to the contact person below well in advance of the meeting.

*For Further Information Contact:* Dr. Lewis V. Wade, Executive Secretary, NIOSH, CDC, 4676 Columbia Parkway, Cincinnati, Ohio 45226, Telephone 513.533.6825, Fax 513.533.6826.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: April 10, 2007.

**Elaine L. Baker,**

*Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. E7–7253 Filed 4–16–07; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Proposed Information Collection Activity; Comment Request

### Proposed Projects

*Title:* Mentoring Children of Prisoners Online Data Collection (OLDC)

*OMB No.:* 0970–0266.

*Description:* The Promoting Safe and Stable Families Amendments of 2001 (Pub. L. 107–133) amended Title IV–B of the Social Security Act (42 U.S.C. 629–629e) to provide funding for nonprofit agencies that recruit, screen, train, and support mentors for children with an incarcerated parent or parents. The Family and Youth Services Bureau (FYSB) within the Administration for Children and Families (ACF), United States Department of Health and Human Services, administers the Mentoring Children of Prisoners (MCP) program. The MCP program creates lasting, high quality, one-on-one relationships that provide young people with caring adult role models. Information from the Mentoring Children of Prisoners Online Data Collection is necessary for ACF's reporting and planning under the Government Performance and Results Act (GPRA), and to support evaluation requirements within GPRA. Information collected will be used for accountability monitoring, management improvement, and research. Data collection ensures that ACF knows if grantees of the MCP program are meeting the established targets (established based on research and benchmarks) recorded in the grant application as required by the GPRA, and that mentoring activities are faithful to characteristics established by research as essential to success. Data collected will also support grantees as they carry out ongoing responsibilities, maintain program service, and manage information for internal uses.

*Respondents:* Public, faith-based and community organizations receiving funding to implement the MCP program.

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| MCP Online Data Collection | 238 | 4 | 12 | 11,424 |

*Estimated Total Annual Burden Hours:* 11,424.

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments 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) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: April 11, 2007.

**Robert Sargis,**

*Reports Clearance Officer.*

[FR Doc. 07–1879 Filed 4–16–07; 8:45 am]

BILLING CODE 4184–01–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Submission for OMB Review; Comment Request

*Title:* Annual Survey of Refugees.

*OMB No.:* 0970–0033.

*Description:* The Annual Survey of Refugees collects information on the social and economic circumstances of a random sample of refugees, Amerasians, and entrants who arrived in the United States in the five years prior to the date of the survey. The survey focuses on the refugees' training, labor force participation, and welfare utilization rates. Dates are segmented by region of origin, State of resettlement, and number of months since arrival. From the responses, the Office of Refugee Resettlement reports on the economic adjustment of refugees to the American economy. These data are used by Congress in its annual deliberations or refugee admissions and funding and by program managers in formulating policies for the future direction of the Refugee Resettlement Program.

*Respondents:* Refugees, entrants, Amerasians, and Havana parolees.

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| ORR–9 | 2,000 | 1 | .666666 | 1,333 |

*Estimated Total Annual Burden Hours:* 1,222.

*Additional Information:* Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov.*

*OMB Comment:* OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register.** Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Attn: Desk Officer for ACF, Fax: 202–395–6974.

Dated: April 11, 2007.

**Robert Sargis,**

*Reports Clearance Officer.*

[FR Doc. 07–1880 Filed 4–16–07; 8:45 am]

BILLING CODE 4184–01–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

### Statement of Organization, Functions, and Delegations of Authority

Part M of the Substance Abuse and Mental Health Services Administration (SAMHSA) Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services at 72, Number 62, page 15708, April 2, 2007 is amended to reflect a title correction. The title for the Center for Substance Abuse Treatment (MT), Division of State and Community Systems Development (MTE) is replaced with the following: Division of State and Community Assistance (MTE).

*Delegations of Authority.* All delegations and redelegations of authority to officers and employees of SAMHSA which were in effect immediately prior to the effective date of this reorganization shall continue to be in effect pending further redelegations, providing they are consistent with the reorganization.

These organizational changes are effective April 10, 2007.

Dated: April 10, 2007.

**Terry L. Cline,**

*Administrator.*

[FR Doc. E7–7240 Filed 4–16–07; 8:45 am]

BILLING CODE 4160–01–P

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5122–N–02]**

### Notice of Proposed Information Collection: Comment Request Quality Assurance Plans

**AGENCY:** Office of Healthy Homes and Lead Hazard Control, HUD.

**ACTION:** Notice.

**SUMMARY:** The information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

**DATES:** *Comments Due Date:* June 18, 2007.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Katina Jordan, Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street, SW., Room 8236, Washington, DC 20410.

**FOR FURTHER INFORMATION CONTACT:** Lillian Deitzer, Reports Management Officer, Q, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; (202) 708–2374. (This is not a toll-free number. Hearing- or speech-impaired persons may access the number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.)

**SUPPLEMENTARY INFORMATION:** The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

*Title of Proposal:* Office of Healthy Homes and Lead Hazard Control Data Collection-Quality Assurance Plans.

*OMB Control Number:* N/A.

*Description of the need for the information and proposed use:* HUD's Office of Healthy Homes and Lead Hazard Control requires its Healthy Homes Demonstration and Technical Studies grantees, Lead Technical Studies grantees, and selected contractors to submit quality assurance plans to the Office for approval before they initiate data collection. This is required because the respondents are conducting research or significant evaluation activities, and quality assurance procedures are required to ensure the accuracy and validity of data. The use of quality assurance plan templates helps to ensure that quality assurance activities are well planned and thorough, and standardizes the formatting of the plans, which aids both HUD staff in their review and the respondents in plan development. The use of different templates for technical studies and demonstration projects was designed to reduce respondent burden by requiring more detailed information for the technical studies (research) projects; consistent with their more rigorous quality assurance requirements.

*Agency Form Numbers:* N/A.

*Members of Affected Public:* Academic, not-for-profit and for-profit institutions located in the U.S., state and units of general local government, and federally recognized Native American tribes:

*Total Burden Estimate (annual): Number of respondents:* 20; *Frequency of response:* 1; *Hours per response:* 24; *Total Burden Hours:* 480.

*Status of the Proposed Information Collection:* This is a new collection.

*Additional Information:* The obligation to respond to this information collection is mandatory.

**Authority:** Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: April 3, 2007.

**Jon L. Gant,**

*Director, Office of Healthy Homes and Lead Hazard Control.*

[FR Doc. 07–1909 Filed 4–16–07; 8:45 am]

**BILLING CODE 4210–67–M**

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## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5117–N–30]**

## Notice of Submission of Proposed Information Collection to OMB; Family Self-Sufficiency Program (FSS)

**AGENCY:** Office of the Chief Information Officer, HUD

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Housing agencies enter into a Contract of Participation with each eligible family that opts to participate in the program; consult with local officials to develop an Action Plan; and report annually to HUD on implementation of FSS program. PHAs may apply for funding to pay the salary of a FSS program coordinator.

**DATES:** Comments Due Date: May 17, 2007.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2577–0178) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

**FOR FURTHER INFORMATION CONTACT:** Lillian Deitzer, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410; e-mail *Lillian_L._Deitzer@HUD.gov* or telephone (202) 708–2374. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer or from HUD's Web site at *http://www5.hud.gov:63001/po/i/icbts/collectionsearch.cfm*.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

*Title of Proposal:* Family Self-Sufficiency Program (FSS).

*OMB Approval Number:* 2577–0178.

*Form Numbers:* HUD–52650, HUD–52651, HUD–52652, SF–424, SF-LLL, HUD–50058, HUD–96010, HUD–2880, HUD–2994–A ,HUD–2991.

*Description of the Need for the Information and its Proposed Use:* Housing agencies enter into a Contract of Participation with each eligible family that opts to participate in the program; consult with local officials to develop an Action Plan; and report annually to HUD on implementation of FSS program. PHAs may apply for funding to pay the salary of a FSS program coordinator.

*Frequency of Submission:* On occasion, Annually.

| | Number of respondents | Annual responses | × | Hours per response | = | Burden hours |
|---|---|---|---|---|---|---|
| Reporting Burden | 750 | 62 | | 0.77 | | 36,202 |

*Total Estimated Burden Hours:* 36,202.

*Status:* Revision of a currently approved collection.

**Authority:** Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: April 10, 2007.

**Lillian L. Deitzer,**

*Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.*

[FR Doc. E7–7204 Filed 4–16–07; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5121–N–12]**

## Notice of Proposed Information Collection: Comment Request; Assessment of FHA Lender Customer Satisfaction—Survey of Businesses

**AGENCY:** Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

**DATES:** *Comments Due Date:* June 18, 2007.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian Deitzer, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW., Room 4178, Washington, DC 20410 or *Lillian_L_Deitzer@hud.gov.*

**FOR FURTHER INFORMATION CONTACT:** James Beavers, Assistant Director, Office of Single Family Program Development, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 402–2205 (this is not a toll free number) for copies of the proposed forms and other available information.

**SUPPLEMENTARY INFORMATION:** The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

*Title of Proposal:* Assessment of FHA Lender Customer Satisfaction—Survey of Businesses.

*OMB Control Number, if applicable:* 2502–NEW.

*Description of the need for the information and proposed use:* FHA has recently undertaken efforts to modernize programs and processes in order to maintain a strong lending position with unserved and underserved borrowers. A customer satisfaction survey will be conducted to assist FHA in first assessing the level of satisfaction that lenders have with their financing programs and then monitor the changes in satisfaction as the enhancements to their programs are put in place. By compiling quantitative data regarding customer satisfaction, steps can be taken to improve FHA's standing in the lending market. The initial survey will serve as a baseline from which to measure improvement in satisfaction levels as the survey is completed on an annual basis.

In 2005, the ''Studies of the Barriers of the Use of FHA Programs and the Use of Third-Party Originators for FHA-Insured Loans'' reported that the key factors contributing to the decline of FHA-insured product use in the lending market were the product itself, FHA processes, and customer relations. From these results, it was recommended that FHA undertake steps to enhance its products and processes and to improve its customer service. In an effort to reinvigorate its programs, re-engineer its processes, and increase responsiveness to mortgagees, FHA has begun to roll out new changes in its programs and methods. FHA is in need of a successful mechanism through which they can address their progress in removing the barriers that were mentioned in the study. A customer satisfaction survey serves as a useful method of assessing the levels of satisfaction of new programs and also identifying areas that still need more attention. This survey will address specific items and access respondents' levels of satisfaction or dissatisfaction so that FHA can take the appropriate actions while reforming their programs and processes. Through conducting this survey on an annual basis, FHA will have a consistent and quantitative measure of the level of customer satisfaction and also determine if the overall sentiment regarding FHA has changed versus prior years.

*Agency form numbers, if applicable:* None.

*Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:* The number of burden hours is 167. The number of respondents is 668, the frequency of response is annually, and the burden hour per response is 15 minutes.

*Status of the proposed information collection:*

**Authority:** The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: April 11, 2007.

**Frank L. Davis,**

*General Deputy Assistant Secretary for Housing—Deputy Federal Housing Commissioner.*

[FR Doc. E7–7283 Filed 4–16–07; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket Number FR–5099–N–02]**

## Public Housing Operating Fund Program; Guidance on Implementation of Asset Management

**AGENCY:** Office of the Assistant Secretary for Public and Indian Housing; HUD.

**ACTION:** Notice.

**SUMMARY:** Under HUD's regulations for the Public Housing Operating Fund Program, public housing agencies (PHAs) with 250 or more units are required to convert to asset management. PHAs with less than 250 units may elect to convert but are not required to do so. On September 6, 2006, HUD published a **Federal Register** notice providing interim guidance to assist PHAs in the conversion to asset management. On that same date, HUD posted on its Web site Public and Indian Housing (PIH) Notice 2006–33, Changes in Financial Management and Reporting Requirements for Public Housing Agencies Under the New Operating Fund Rule (24 CFR part 990), that provided interim guidance on changes in PHA financial management and reporting necessitated by the conversion to asset management. Both the September 6, 2006, **Federal Register** notice and PIH Notice 2006–33 were issued for public comment. This notice advises the public that HUD has posted its final guidance for both subject areas on the HUD Web site. The final guidance takes into consideration the public comments received on both sets of interim guidance, and responds to the significant issues raised by the public commenters.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Hanson, Deputy Assistant Secretary, Departmental Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone 202–475–7949 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

## I. Background

HUD's regulations for the Public Housing Operating Fund Program at 24 CFR part 990 provide the formula for distributing operating subsidy to public housing agencies (PHAs) and establish requirements for PHAs to convert to asset management. Subpart H of the part 990 regulations (§§ 990.255 to 990.290) establishes the requirements regarding asset management. Under § 990.260(a), PHAs that own and operate 250 or more dwelling rental units must operate using an asset management model consistent with the subpart H regulations. PHAs with fewer than 250 dwelling rental units may elect to transition to asset management, but are not required to do so. PHAs are required to implement property-based management, property-based budgeting, and property-based accounting, which are all defined in the subpart H regulations and are essential components of asset management.

On September 6, 2006 (71 FR 52710), HUD published a notice in the **Federal Register** providing interim guidance pertaining to various aspects of a PHA's conversion to asset management. Also on September 6, 2006, HUD posted on its Web site Public and Indian Housing (PIH) Notice 2006–33, providing interim guidance on changes in PHA financial management and reporting that result from the conversion to asset management. Both the September 6, 2006, **Federal Register** notice and PIH Notice 2006–33 were issued for public comment.

## II. This Notice

This notice advises the public that HUD has posted its final guidance on the HUD Web site. The final guidance takes into consideration the public comments received on the interim guidance. Given the similarity in subject matter, the posted guidance incorporates the subject matter of the September 6, 2006, **Federal Register** notice and PIH Notice 2006–33. HUD has also posted a summary of the comments received on the two interim guidance documents, and HUD's responses to the comments.

The final guidance and public comment summary may be downloaded at HUD's asset management Web page: *www.hud.gov/offices/pih/programs/ph/am/.*

Dated: March 29, 2007.

**Paula O. Blunt,**

*General Deputy Assistant Secretary for Public and Indian Housing.*

[FR Doc. E7–7218 Filed 4–16–07; 8:45 am]

BILLING CODE 4210–67–P

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Notice of Availability of a Draft Environmental Assessment for the Sheldon National Wildlife Refuge Horse and Burro Management Program and Announcement of a Public Meeting

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability and announcement of a public meeting.

**SUMMARY:** The Fish and Wildlife Service (Service) announces that a draft environmental assessment (EA) for an interim Sheldon National Wildlife Refuge (Refuge) Horse and Burro Management Program (Program) is available for review and comment. The EA provides a consolidated and updated National Environmental Policy Act (NEPA) evaluation of the Sheldon Refuge Program. The EA analyzes the environmental effects of various alternatives for managing the Refuge's horses and burros until a Comprehensive Conservation Plan (CCP) for the Refuge is completed.

**DATES:** Comments must be received by May 17, 2007 (see addresses). A public meeting will be held on May 8, 2007 in Lakeview, Oregon (details of the meeting will be posted on Internet).

**ADDRESSES:** Address comments on the draft EA by e-mail to *Sheldon-Hart@fws.gov* or in writing to: Sheldon National Wildlife Refuge, P.O. Box 111, Lakeview, OR 97630. The EA will be available on the Internet at *http://www.fws.gov/pacific/news/2006/Sheldon_Horse_EA_draft.pdf.*

**FOR FURTHER INFORMATION CONTACT:** Paul Steblein, Project Leader, Sheldon National Wildlife Refuge, at e-mail *Sheldon-Hart@fws.gov,* fax (541) 947–4414, or phone (541) 947–3315.

**SUPPLEMENTARY INFORMATION:**

## Background

The Sheldon Refuge encompasses approximately 572,900 acres of semiarid desert in the northwestern corner of Nevada, and approximately 630 acres across the State line, in Oregon.

The Sheldon Refuge was established in the 1930's for the conservation of antelope (American pronghorn), migratory birds, and other species of wildlife. By law, the Service must manage its refuges to achieve the purpose(s) of the refuge and accomplish the mission of the National Wildlife Refuge System, which focuses on the conservation, management, and, where appropriate, restoration of native fish, wildlife, plants, and their habitats. The terrain of Sheldon Refuge is characterized by flat, open expanses of sagebrush lands, narrow canyons that empty into rolling valleys, and broad rimrock tables that end abruptly in vertical cliffs. Surface water supplies are severely limited. Annual precipitation averages less than 13 inches in the western portions of the Refuge, and decreases to 6 inches in the easterly parts. With elevations averaging approximately 6,000 feet, the area has been appropriately labeled high-desert country.

## Alternatives

The draft EA for Sheldon Refuge's Horse and Burro Management Program identifies and describes four

alternatives. Program objectives for all of the alternatives are based on the Sheldon National Wildlife Refuge Renewable Natural Resources Management Plan (Management Plan) and associated NEPA document published in 1980, and include: (1) Maintaining a manageable feral horse and burro population (75 to 125 horses, 30 to 60 burros) in balance with other wildlife species for the enjoyment of Refuge visitors; (2) stopping range deterioration and improving wildlife habitat and watershed conditions, and reducing impacts on existing water resources; (3) ensuring that the Refuge range provides ample forage for all wildlife populations endemic to the area; and (4) reducing the spread of feral horses and burros into key wildlife areas. Alternative B, the Status Quo Alternative, is the Service's preferred alternative. The alternatives are briefly discussed below.

*Alternative A, No Agency Action on Horse and Burro Management.* Under Alternative A, the Refuge would discontinue the ongoing program of horse and burro population management. Program objectives from the 1980 Management Plan would not be met. Program elements such as gathering, providing interim care for and adoptions of the Refuge's horses and burros would no longer be conducted. Without any control, horse and burro populations on the Refuge could double approximately every four years, severely impacting Refuge lands, water sources, wildlife habitats and associated fish, wildlife and plant populations, and posing a safety risk along major public roads. Implementation of this alternative would likely prevent the Refuge from being managed to achieve the purposes for which it was established. The environmental effects of this alternative contrast with those of the three action-based alternatives; B, C, and D.

*Alternative B, Status Quo.* Under Alternative B, the Refuge's current horse and burro management program would continue until a CCP has been completed for the Refuge. Implementing this alternative would include minor improvements to the program through an adaptive management process. This alternative would place horses and burros up for adoption through several private adoption agents. Agents are screened and certified based on adequate facilities, appropriate knowledge on horse care and handling, successful record of prior horse adoptions, and interviews with character witnesses and a veterinarian. The adoption agents would screen potential homes for the horses and burros, care for them in the intervening time, and coordinate transportation. The horses and burros would be shipped to the agents from the Refuge and then transported to their adopted homes. Refuge staff would use three methods to gather horses and burros: (1) Corrals set with bait (such as hay) to draw in burros; (2) horseback riders to herd horses into corrals; and (3) helicopters to herd horses into corrals. Management of horses and burros consumes staff time and funding, detracting from the Refuge's ability to conduct other programs necessary to achieve Refuge purposes as well as Refuge management objectives associated with native wildlife species and wildlife dependant public use. However, implementation of Alternative B would best accomplish current management objectives for horse and burro management and would be the most cost effective program.

*Alternative C, Adoption of Horses and Burros through Individuals.* Under Alternative C, Refuge staff would: screen individuals and organizations for suitability for potential adoption of gathered horses and burros; care for them until they are picked up by the adopter; coordinate brand inspections; secure health certificates; and facilitate transportation. Other aspects of the program would be the same as under Alternative B. Refuge staff would use three methods to gather horses and burros: (1) Corrals set with bait to draw in burros; (2) horseback riders to herd horses into corrals; and (3) helicopters to herd horses into corrals. Implementing this Alternative would require allocation of more staff time and resources which would detract from other Refuge programs, such as facility maintenance, working and meeting with the public, wildlife monitoring and studies, range and fire management, and law enforcement.

*Alternative D, Conduct Horse and Burro Gathering by Bait and Horseback Techniques Only.* Under Alternative D, using wranglers on horseback only to gather horses and burros is proposed, rather than using both helicopters and horseback. In addition, burros would be drawn into corrals with bait. An adoption agent would screen and select the adopters to ensure good homes, and care for the horses and burros in the intervening time. This Alternative, using bait and horseback gathering only, would be less efficient and less effective than using both helicopters and horseback riders. This approach would delay completion of the gather and achievement of other Refuge conservation objectives. Selection of this alternative would allow impacts from horse and burro populations to continue for longer periods, and reduce funds available for other Refuge management and operations.

**Public Comments**

Public comments are requested on the draft Environmental Assessment for the Sheldon National Wildlife Refuge Horse and Burro Management Program and its evaluation of the environmental effects of the four alternatives. Comments on the draft EA will be analyzed and addressed in final documents. All comments received from individuals become part of the official public record available for public review. Requests for copies of comments will be handled in accordance with the Administrative Procedure Act, Freedom of Information Act, NEPA regulations, and Service and Department of the Interior policies and procedures.

Dated: April 11, 2007.

**Don Weathers,**

*Acting Regional Director, Region 1, Portland, Oregon.*

[FR Doc. E7–7243 Filed 4–16–07; 8:45 am]

BILLING CODE 4310–55–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[OR 038–1220–AL–24–1A; HAG07–0036]**

### Call for Nominations for National Historic Oregon Trail Interpretive Center Advisory Board

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Solicitation of applications.

**SUMMARY:** This notice is to request nominations for the National Historic Oregon Trail Interpretive Center Advisory Board. The seven member terms on the Board expired December 29, 2006. The Board provides advice and recommendations to the Bureau of Land Management (BLM) on resource management issues associated with the Oregon Trail Interpretive Center.

**DATES:** Submit completed nomination forms and nomination letters to the address listed below no later than May 17, 2007.

**ADDRESSES:** Applications are available from, and candidates should send nominations to: Pam Robbins, OR–912, Bureau of Land Management, (*pam_robbins@blm.gov*), P.O. Box 2965, Portland, Oregon 97208, (503) 808–6306.

**FOR FURTHER INFORMATION CONTACT:** Pam Robbins, (503) 808–6306.

**SUPPLEMENTARY INFORMATION:** Individuals and organizations may

nominate themselves or one or more other persons to serve on the Interpretive Center Advisory Board. Council members serve two year terms. Meetings are usually held quarterly, or as needed to accomplish Board business. Nomination forms can be obtained from the BLM, (see address above). Nominations must include a completed nomination form, letter(s) of reference from the interests or organizations the nominee intends to represent, and other material showing the nominee's qualifications. The letter of nomination and the nomination form should identify the category the nominee would like to represent. Membership on the Board will be balanced among the following interest categories:

(1) Federal, county and local governments;

(2) The local business community;

(3) Trail advocacy groups; and

(4) The public-at-large.

The National Historic Oregon Trail Interpretive Center Advisory Board advises the BLM on the management of the Center. Each member will be a person who, as a result of training and experience, has knowledge or special expertise that qualifies them to provide advice from among the categories of interest listed above. Members serve without monetary compensation, but will be reimbursed for travel and per diem expenses at current rates for government employees.

**Kathy Eaton,**

*Associate State Director, Oregon/Washington BLM.*

[FR Doc. E7–7264 Filed 4–16–07; 8:45 am]

**BILLING CODE 4310–PK–P**

## DEPARTMENT OF THE INTERIOR

### Minerals Management Service

### Coastal Impact Assistance Program Allocations, Fiscal Years 2007–2008

**AGENCY:** Minerals Management Service, Interior.

**ACTION:** Notice of availability of recipient allocation amounts for fiscal years 2007 and 2008.

**SUMMARY:** The Minerals Management Service (MMS) is issuing this notice to advise the public of the availability of the individual allocation amounts available to each of the 73 eligible recipients of the Coastal Impact Assistance Program (CIAP). The amounts are an important piece of information to be used by the States and Coastal Political Subdivisions in the completion of CIAP grant applications.

**FOR FURTHER INFORMATION CONTACT:** Ms. Colleen Benner, Minerals Management Service, 381 Elden Street, Mail Stop 4040, Herndon, Virginia 20170. You may also contact Ms. Benner by telephone at (703) 787–1710.

**SUPPLEMENTARY INFORMATION:** The Energy Policy Act of 2005 (Act) has created CIAP by amending Section 31 of the Outer Continental Shelf Lands Act (43 U.S.C. 1356(a)). Under the provisions of the Act, the authority and responsibility for the management of CIAP is vested in the Secretary of the Interior (Secretary). The Secretary has delegated this authority and responsibility to MMS. In the February 16, 2007, continuing resolution, Congress approved a 3 percent appropriation of the CIAP funds to be used by MMS to administer the program. Under Section 384 of the Act, MMS shall disburse $250 million for each fiscal year 2007 through 2010 to eligible producing States (State) and coastal political subdivisions (CPS). The funds allocated to each State are based on the proportion of qualified Outer Continental Shelf (OCS) revenues offshore the individual State to total qualified OCS revenues from all States. In order to receive CIAP funds, States are required to submit a coastal impact assistance plan (Plan) that MMS must approve prior to disbursing any funds. All funds shall be disbursed through a grant process. The guidance has been developed by MMS to provide the information necessary for States to develop a Plan and submit it to MMS. The allotment amounts and guidelines may be found on the MMS Web site at *http://www.mms.gov/offshore/CIAPmain.htm.*

Dated: March 28, 2007.

**R. M. "Johnnie" Burton,**

*Director, Minerals Management Service.*

[FR Doc. E7–7221 Filed 4–16–07; 8:45 am]

**BILLING CODE 4310–MR–P**

## DEPARTMENT OF THE INTERIOR

### Minerals Management Service

### Notice on Outer Continental Shelf Oil and Gas Lease Sales

**AGENCY:** Minerals Management Service, Interior.

**ACTION:** List of restricted joint bidders.

**SUMMARY:** Pursuant to the authority vested in the Director of the Minerals Management Service by the joint bidding provisions of 30 CFR 256.41, each entity within one of the following groups shall be restricted from bidding with any entity in any other of the following groups at Outer Continental Shelf oil and gas lease sales to be held during the bidding period May 1, 2007 through October 31, 2007. The List of Restricted Joint Bidders published in the **Federal Register** December 5, 2006 covered the period November 1, 2006 through April 30, 2007.

**Group I**

Exxon Mobil Corporation
ExxonMobil Exploration Company

**Group II**

Shell Oil Company
Shell Offshore Inc.
SWEPI LP
Shell Frontier Oil & Gas Inc.
Shell Consolidated Energy Resources Inc.
Shell Land & Energy Company
Shell Onshore Ventures Inc.
Shell Offshore Properties and Capital II, Inc.
Shell Rocky Mountain Production LLC
Shell Gulf of Mexico Inc.

**Group III**

BP America Production Company
BP Exploration & Production Inc.
BP Exploration (Alaska) Inc.

**Group IV**

TOTAL E&P USA, Inc.

**Group V**

Chevron Corporation
Chevron U.S.A. Inc.
Chevron Midcontinent, L.P.
Unocal Corporation
Union Oil Company of California
Pure Partners, L.P.

**Group VI**

ConocoPhillips Company
ConocoPhillips Alaska, Inc
ConocoPhillips Petroleum Company
Phillips Pt. Arguello Production Company
Burlington Resources Oil & Gas Company LP
Burlington Resources Offshore Inc.
The Louisiana Land and Exploration Company
Inexeco Oil Company

**Group VII**

Eni Petroleum Co. Inc.
Eni Petroleum U.S. LLC
Eni Oil U.S. LLC
Eni Marketing Inc.
Eni BB Petroleum Inc.
Eni U.S. Operating Co. Inc.
Eni BB Pipeline LLC

**Group VIII**

Petrobras America Inc.

Dated: March 28, 2007.

**R. M. "Johnnie" Burton,**

*Director, Minerals Management Service.*

[FR Doc. E7–7220 Filed 4–16–07; 8:45 am]

BILLING CODE 4310–MR–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Reclamation

### Account for Central Valley Project (CVP) Water Transfers Under Mid-Pacific Region Business Practice Guidelines (Guidelines)

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice of availability and request for comments.

**SUMMARY:** The Mid-Pacific Regional Office of the Bureau of Reclamation is proposing guidelines to provide Mid-Pacific Region field, area, and Regional Office employees with the information necessary to consistently and accurately account for water transfers between all contractors who receive CVP water under water service, repayment, settlement, or exchange contracts. Comments on the guidelines are being requested.

**DATES:** Submit written comments on these guidelines by May 17, 2007 to the address below.

**ADDRESSES:** Written comments should be either addressed to: Bureau of Reclamation, Attention: Lawrence Bauman, MP–3400, 2800 Cottage Way, Sacramento, CA 95825 or e-mailed to Mr. Bauman at *lbauman@mp.usbr.gov.* The guidelines are located at *www.usbr.gov/mp/cvpwaterrates.* To request a copy of these guidelines, contact Mr. Bauman at either of the above addresses or call 916–978–5364.

**FOR FURTHER INFORMATION CONTACT:** For additional information, please contact Katherine Thompson at 916–978–5550 or e-mail: *kathompson@mp.usbr.gov.*

**SUPPLEMENTARY INFORMATION:** Reclamation is proposing the guidelines and requesting public comments. The guidelines are available at *http://www.usbr.gov/mp/cvpwaterrates* and are the culmination of over one year of meetings and discussions involving Reclamation staff and the CVP Water Association's Financial Affairs Committee. They provide a long-term framework and will be updated only on an as-needed basis.

Revenue application will be included as a separate section of these guidelines. A **Federal Register** notice with a separate comment period will be provided upon completion.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, please be aware that your entire comment (including your personal identifying information) may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: March 30, 2007.

**Susan M. Fry,**

*Regional Environmental Officer, Mid-Pacific Region.*

[FR Doc. E7–7239 Filed 4–16–07; 8:45 am]

BILLING CODE 4310–MN–P

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

### Notice of Proposed Information Collection for 1029–0030 and 1029–0049

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing its intention to request approval for the collections of information for 30 CFR 764–State processes for designating areas unsuitable for surface coal mining operations, and 30 CFR Part 822–Special permanent program performance standards-operations in alluvial valley floors.

**DATES:** Comments on the proposed information collection must be received by June 18, 2007, to be assured on consideration.

**ADDRESSES:** Comments may be mailed to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave, NW., Room 202–SIB, Washington, DC 20240. Comments may also be submitted electronically to *jtrelease@osmre.gov.*

**FOR FURTHER INFORMATION CONTACT:** To receive a copy of the information collection requests contact John A. Trelease, at (202) 208–2783 or by e-mail at *jtrelease@osmre.gov.*

**SUPPLEMENTARY INFORMATION:** The Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8 (d)]. This notice identifies information collections that OSM will be submitting to OMB for extension. These collections are contained in 30 CFR Part 764 and 30 CFR Part 822.

OSM has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on reestimates of burden or respondents. OSM will request a 3-year term of approval for these information collection activities.

*Comments are invited on:* (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collections; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will accompany OSM's submissions of the information collection requests to OMB.

This notice provides the public with 60 days in which to comment on the following information collection activities:

*Title:* 30 CFR 764—State processes for designating areas unsuitable for surface coal mining operations.

*OMB Control Number:* 1029–0030.

*Summary:* This part implements the requirement of section 522 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. 95–87, which provides authority for citizens to petition States to designate lands unsuitable for surface coal mining operations, or to terminate such designation. The regulatory authority uses the information to identify, locate, compare and evaluate the area requested to be designated as unsuitable, or terminate the designation, for surface coal mining operations.

*Bureau Form Number:* None.

*Frequency of Collection:* Once.

*Description of Respondents:* Individuals, groups or businesses that petition the States, and the State regulatory authorities that must process the petitions.

*Total Annual Respondents:* 3.

*Total Annual Burden Hours:* 4,920.

*Total Annual Non-wage Costs:* $150.

*Title:* 30 CFR 822—Special permanent program performance standards—operations in alluvial valley floors.

*OMB Control Number:* 1029–0049.

*Summary:* Sections 510(b)(5) and 515(b)(10)(F) of the Surface Coal Mining and Reclamation Act of 1977 (the Act)

protect alluvial valley floors from the adverse effects of surface coal mining operations west of the 100th meridian. Part 822 requires the permittee to install, maintain, and operate a monitoring system in order to provide specific protection for alluvial valley floors. This information is necessary to determine whether the unique hydrologic conditions of alluvial valley floors are protected according to the Act.

*Bureau Form Number:* None.

*Frequency of Collection:* Annually.

*Description of Respondents:* 21 coal mining operators who operate on alluvial valley floors and the State regulator authorities.

*Total Annual Burden Hours:* 2,300.

Dated: April 10, 2007.

**John R. Craynon,**

*Chief, Division of Regulatory Support.*

[FR Doc. 07–1881 Filed 4–16–07; 8:45 am]

**BILLING CODE 4310–05–M**

## DEPARTMENT OF JUSTICE

### Office of Justice Programs

**[OMB Number 1121–NEW]**

### Agency Information Collection Activities: Proposed Collection; Comments Requested

**ACTION:** 60-Day Emergency Notice of Information Collection Under Review: Mandatory Case Reporting Form for the Internet Crimes Against Children Task Forces.

The Department of Justice, Office of Justice Programs will be submitting the following emergency information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with emergency review procedures of the Paperwork Reduction Act of 1995. OMB approval has been requested by April 23, 2007. The proposed information collection is published to obtain comments from the public and affected agencies. Comments should be directed to OMB, Office of Information and Regulation Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20503. Comments are encouraged and will be accepted for 60 days until June 18, 2007.

During the first 60 days of this same review period, a regular review of this information collection is also being undertaken. All comments and suggestions, or questions regarding additional information, to include obtaining a copy of the proposed information collection instrument with instructions, should be directed to Currie Gunn, Office of the Associate Attorney General, Department of Justice, 950 Pennsylvania Ave, NW., Washington, DC 20530, or facsimile (202) 514–0238.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies' estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information:

(1) *Type of information collection:* New collection.

(2) *The title of the form/collection:* Case Reporting Form for the Internet Crimes Against Children Task Forces.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection: Form Number:* none. Office of the Associate Attorney General, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Internet Crimes Against Children Task Forces receiving over $20,000 in federal grants. Other: none. The grants to ICACs were authorized to make funds available to help State and local law enforcement agencies enhance their investigative response to offenders who use the Internet, online communication systems, or other computer technology to sexually exploit children.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that 45 respondents will complete the application in approximately 180 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated total annual public burden associated with this application is 540 hours.

*If additional information is required contact:* Lynn Bryant, 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: April 12, 2007.

**Lynn Bryant,**

*Department Clearance Officer, PRA, U.S. Department of Justice.*

[FR Doc. E7–7234 Filed 4–16–07; 8:45 am]

**BILLING CODE 4410–18–P**

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[Notice: (07–031)]**

### Notice of Centennial Challenges Lunar Lander Challenge

**AGENCY:** National Aeronautics and Space Administration (NASA).

**ACTION:** Notice.

**SUMMARY:** This notice is issued in accordance with 42 U.S.C. 2451 (314) (d).

The Lunar Lander Challenge is now scheduled and teams that wish to compete may now register. The NASA Centennial Challenges Program is a program of prize contests to stimulate innovation and competition in space exploration and ongoing NASA mission areas. The Lunar Lander Challenge is a prize contest designed to accelerate technology developments supporting the commercial creation of a vehicle capable of ferrying cargo or humans back and forth between lunar orbit and the lunar surface.

The Lunar Lander Challenge is being administered for NASA by the X PRIZE Foundation. Their Web site is: *http://www.xprize.org*. The Centennial Challenges Web site is *http://www.centennialchallenges.nasa.gov*.

**DATES:** The Lunar Lander Challenge was first held at the X PRIZE Cup events starting in October 2006 and will be continued on an annual basis until all the purse money has been awarded, or until October 2010, whichever comes first. The first Lunar Lander Challenge competition was held on October 20–21, 2006.

**ADDRESSES:** The Lunar Lander Challenge will be held at the X PRIZE Cup at the Holloman Air Force Base, Alamogordo, NM 88330, on October 26–28, 2007. Questions and comments

regarding the NASA Centennial Challenges Program should be addressed to Kenneth Davidian, Program Manager, Suite 2S24, Centennial Challenges Program, Innovative Partnerships Program Office, NASA, 20546–0001.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information regarding the NASA Centennial Challenges Program should be directed to Kenneth Davidian, Program Manager, Suite 2S24, Centennial Challenges Program, Innovative Partnerships Program Office, NASA, 20546–0001, (202) 358–1160, *kdavidian@nasa.gov*.

To register for and get additional information regarding the Lunar Lander Challenge, contact the X PRIZE Foundation, William Pomerantz, (301) 395–5283, *Will@xprize.org*.

**SUPPLEMENTARY INFORMATION:**

## I. Summary

The purpose of the Lunar Lander Challenge is to accelerate technology developments supporting the commercial creation of a vehicle capable of ferrying cargo or humans back and forth between lunar orbit and the lunar surface. Such a vehicle would have direct application to NASA's space exploration goals as well as the personal spaceflight industry. Additionally, the prize will help industry build new vehicles and develop the operational capacity to operate quick turnaround vertical take-off, vertical landing vehicles, which will be of significant use to many facets of the commercial launch procurement market.

## II. Challenge Basis and Prize Amount

To win the $2,000,000 purse, a rocket-propelled vehicle with an assigned payload must take-off vertically, climb to a defined altitude, fly for a pre-determined amount of time, then land vertically on a target that is a fixed distance from the take-off point. After remaining at this location for a period of time, the vehicle must take-off, fly for the same amount of time, and land again on its original launch pad.

## III. Eligibility

The Centennial Challenges Program has established the following language, including definitions, governing eligibility. CHALLENGE is the Lunar Lander Challenge. TEAM is defined as an individual, organization or corporation, or a group of individuals, organizations or corporations that register to participate in the CHALLENGE. TEAM is comprised of a TEAM LEADER and TEAM MEMBERs. For the sake of clarity, PARTICIPANT is a TEAM.

TEAM LEADER is defined as a single individual, organization, or corporation, which is the sole agent representing a TEAM regarding its participation in the CHALLENGE. TEAM LEADERs who are individuals must be U.S. citizens. TEAM LEADERs that are organizations or corporations must be incorporated in the U.S. and majority-owned and controlled by U.S. citizens. Corporate or other organizational TEAM LEADERs must appoint an individual who is an officer of the corporation or organization to represent the TEAM LEADER.

TEAM MEMBERs are defined as the participants on a TEAM that are not the TEAM LEADER. If a TEAM consists of a single individual, then in this case the TEAM MEMBER is also the TEAM LEADER. Individuals and corporate entities that are other than U.S. citizens or entities may be TEAM MEMBERs, subject to written request to and approval by XPF, and provided that the TEAM and all TEAM MEMBERs comply with all applicable laws, rules and regulations, including, without limitation, the International Traffic in Arms Regulations and the Export Administration Act.

PARTICIPANTs are defined as TEAM, TEAM LEADER, and/or TEAM MEMBERs. Each TEAM MEMBER will apply to register for the CHALLENGE through TEAM LEADER and must receive written notification of official acceptance by XPF to be considered eligible.

PARTICIPANT's TEAM LEADER and each of its TEAM MEMBERs must execute an ''Adoption of Agreement'', in the form attached hereto as Exhibit B, committing to all terms of this AGREEMENT and a ''Liability Waiver'', in the form attached hereto as Exhibit C. By signing below, TEAM LEADER of PARTICIPANT represents that all of PARTICIPANT's TEAM MEMBERs have executed the Adoption of Agreement; no one may become a TEAM MEMBER or otherwise participate in the CHALLENGE until such time as they have signed an Adoption of Agreement. XPF may disqualify any TEAM that has any person acting as a TEAM MEMBER, or otherwise participating in the CHALLENGE, who has not signed an Adoption of Agreement. PARTICIPANT's TEAM LEADER will provide XPF with a copy of the ''Adoption of Agreement'' signed by each of PARTICIPANT's TEAM MEMBERs.

To be eligible to win a prize, in the case of a private entity, shall be incorporated in and maintain a primary place of business in the United States, and in the case of an individual, whether participating singly or in a group, shall be a citizen or permanent resident of the United States.

Any U.S. government organization or organization principally or substantially funded by the Federal Government, including Federally Funded Research and Development Centers, government-owned, contractor operated (GOCO) facilities, and University Affiliated Research Centers, are ineligible to be TEAM LEADERs or TEAM MEMBERs.

U.S. government employees, and employees of Federally Funded Research and Development Centers, government-owned, contractor operated facilities, and University Affiliated Research Centers, may not participate in the CHALLENGE.

## IV. Rules

The rules for the Lunar Lander Challenge can be found at: *http://www.xprize.org*.

Dated: April 9, 2007.

**Douglas A. Comstock,**

*Director, Innovative Partnerships Program Office.*

[FR Doc. E7–7214 Filed 4–16–07; 8:45 am]

BILLING CODE 7510–13–P

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# NUCLEAR REGULATORY COMMISSION

**[Docket No. 052–00009]**

## Notice of Issuance of Early Site Permit (ESP) for Grand Gulf ESP Site Located 25 Miles South of the City of Vicksburg, MS

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of issuance of Early Site Permit.

**FOR FURTHER INFORMATION CONTACT:** George F. Wunder, Senior Project Manager, ABWR/ESBWR Projects Branch 1, Division of New Reactor Licensing, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Telephone: (301) 415–1494; Fax number: (301) 415–2102; e-mail: *gfw@nrc.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. Introduction

Pursuant to 10 CFR 2.106, the Nuclear Regulatory Commission (NRC) is providing notice of the issuance of Early Site Permit (ESP) ESP–002 to System Energy Resources Inc. (SERI, or the permit holder), for approval of a site located near Port Gibson, Mississippi, approximately 25 miles south of the city of Vicksburg, Mississippi, for one or more nuclear power reactors; this action

is separate from the filing of an application for a construction permit or combined license for such a facility. The NRC has found that the application for an ESP filed by SERI complies with the applicable requirements of the Atomic Energy Act of 1954, as amended, and the applicable rules and regulations of the Commission, and all required notifications to other agencies or bodies have been duly made. Based on consideration of the site criteria contained in 10 CFR Part 100, a reactor, or reactors, having design characteristics that fall within the site characteristics and controlling parameters of the Grand Gulf ESP Site can be constructed and operated without undue risk to the health and safety of the public. There is reasonable assurance that the permit holder will comply with the regulations in 10 CFR Chapter I, and the health and safety of the public will not be endangered. Issuance of an ESP to the permit holder will not be inimical to the common defense and security or the health and safety of the public.

There is no significant impediment to the development of emergency plans, as referenced in 10 CFR 52.17(b)(1) and 10 CFR 52.18. The descriptions of contacts and arrangements made with Federal, State, and local governmental agencies with emergency planning responsibilities, as referenced in 10 CFR 52.17(b)(3), are acceptable. Major features A, B, C, D, E, F, G, I, J, K, L, O, and P of the emergency plan are acceptable to the extent specified in NUREG–1840, ''Safety Evaluation Report for an Early Site Permit (ESP) at the Grand Gulf Site.'' The issuance of this ESP is in accordance with the National Environmental Policy Act of 1969, as amended, and with applicable sections of 10 CFR Part 51 as referenced by Subpart A of 10 CFR Part 52, and all applicable requirements therein have been satisfied. The permit holder's request for the proposed permit was previously noticed in the **Federal Register** on January 16, 2004, (69 FR 2636), with a notice of hearing and opportunity to petition for leave to intervene.

This ESP complies with the standards and requirements of the Atomic Energy Act of 1954, as amended, and NRC's rules and regulations as set forth in 10 CFR Chapter I and the National Environmental Policy Act (NEPA) of 1969. Accordingly, this ESP was issued on April 5, 2007, and is effective immediately.

## II. Further Information

The NRC has prepared a Safety Evaluation Report (SER) and Environmental Impact Statement (FEIS), that document the information that was reviewed and NRC's conclusions. In accordance with 10 CFR 2.390 of the NRC's ''Rules of Practice,'' details with respect to this action, including the SER, FEIS, and accompanying documentation included in the ESP package, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this site, members of the public 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:

| | |
|---|---|
| ML070780457 | Issuance of Early Site Permit for System Energy Resources, Inc.—Grand Gulf Site (ESP–002). |
| ML061070443 | NUREG–1840—''Safety Evaluation Report for an Early Site Permit (ESP) at Grand Gulf Site''. |
| ML060900037 | NUREG–1817—''Environmental Impact Statement for an Early Site Permit (ESP) at the Grand Gulf ESP Site'' Final Report. |
| ML032960291 | Grand Gulf Early Site Permit Application, Part 1, Cover and Table of Contents. |

Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should 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 Public Document Room (PDR), O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Rockville, Maryland, this 9th day of April, 2007.

For the Nuclear Regulatory Commission.

**Mohammed Shuaibi,**

*Chief, ESBWR/ABWR Projects Branch 1, Division of New Reactor Licensing, Office of New Reactors.*

[FR Doc. E7–7261 Filed 4–16–07; 8:45 am]

BILLING CODE 7590–01–P

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## NUCLEAR REGULATORY COMMISSION

### Request To Amend a License To Export Radioactive Waste

Pursuant to 10 CFR 110.70(c) ''Public notice of receipt of an application,'' please take notice that the Nuclear Regulatory Commission has received the following request to amend an export license. Copies of the request are available electronically through ADAMS and can be accessed through the Public Electronic Reading Room (PERR) link *http://www.nrc.gov/reading-rm.html* at the NRC Homepage.

A request for a hearing or petition for leave to intervene may be filed within 30 days after publication of this notice in the **Federal Register**. Any request for hearing or petition for leave to intervene shall be served by the requestor or petitioner upon the applicant, the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555; and the Executive Secretary, U.S. Department of State, Washington, DC 20520.

The information concerning this import license application follows.

NRC EXPORT LICENSE APPLICATION

| Name of applicant<br>Date of application<br>Date received<br>application No.<br>docket No. | Material type | Total quantity | End use | Recipient country |
|---|---|---|---|---|
| **Description of Material** | | | | |
| Diversified Scientific Services, Inc. (DSSI).<br>February 21, 2007<br>February 26, 2007<br>XW008/02<br>11005323 | Class A radioactive mixed waste in the form of baghouse salts and ash; and, if necessary, return of any non-conforming Class A radioactive mixed waste. | License to be amended to extend expiration date to March 31, 2009. | Return of non-conforming waste back to the Atomic Energy of Canada, Limited (AECL). | Canada. |

For the Nuclear Regulatory Commission.

Dated this 5th day of April 2007 at Rockville, Maryland.

**Janice Dunn Lee,**

*Director Office of International Programs.*

[FR Doc. E7–7270 Filed 4–16–07; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

### Advisory Committee on Reactor Safeguards; Subcommittee Meeting on Safety Research Program; Notice of Meeting

The ACRS Subcommittee on Safety Research Program will hold a meeting on May 2, 2007, Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

*Wednesday, May 2, 2007—10:30 a.m. until the conclusion of business.*

The Subcommittee will discuss the status of staff's efforts associated with the development of an integrated, long-term regulatory research plan. The purpose of this meeting is to gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official, Dr. Hossein P. Nourbakhsh (Telephone: 301–415–5622) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Electronic recordings will be permitted.

Further information regarding this meeting can be obtained by contacting the Designated Federal Official between 7:30 a.m. and 4:15 p.m. (ET). Persons planning to attend this meeting are urged to contact the above-named individual at least two working days prior to the meeting to be advised of any potential changes to the agenda.

Dated: April 11, 2007.

**Cayetano Santos,**

*Acting Branch Chief, ACRS.*

[FR Doc. E7–7268 Filed 4–16–07; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

### Advisory Committee on Reactor Safeguards; Subcommittee Meeting on Planning and Procedures; Notice of Meeting

The ACRS Subcommittee on Planning and Procedures will hold a meeting on May 2, 2007, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance, with the exception of a portion that may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to the internal personnel rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.

The agenda for the subject meeting shall be as follows:

*Wednesday, May 2, 2007, 8:30 a.m.–10 a.m.*

The Subcommittee will discuss proposed ACRS activities and related matters. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official, Mr. Sam Duraiswamy (telephone: 301–415–7364) between 7:30 a.m. and 4 p.m. (ET) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Electronic recordings will be permitted only during those portions of the meeting that are open to the public.

Further information regarding this meeting can be obtained by contacting the Designated Federal Official between 7:30 a.m. and 4 p.m. (ET). Persons planning to attend this meeting are urged to contact the above named individual at least two working days prior to the meeting to be advised of any potential changes in the agenda.

Dated: April 11, 2007.

**Cayetano Santos,**

*Acting Branch Chief, ACRS.*

[FR Doc. E7–7269 Filed 4–16–07; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

### Sunshine Act Federal Register Notice

**AGENCY HOLDING THE MEETINGS:** Nuclear Regulatory Commission.

**DATES:** Weeks of April 16, 23, 30, May 7, 14, 21, 2007.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Public and Closed.

**MATTERS TO BE CONSIDERED:**

*Week of April 16, 2007*

Monday, April 16, 2007

1:30 p.m. Discussion of Security Issues (Closed—Ex. 1, 2, & 3).

Tuesday, April 17, 2007

9 a.m. Briefing on New Reactor Issues—Environmental Issues (Public Meeting) (Contact: James Lyons, 301–415–3050).

This meeting will be webcast live at the Web address—*www.nrc.gov*.

12:55 p.m. Affirmation Session (Public Meeting) (Tentative).

a. Final Rulemaking—10 CFR part 26—Fitness-for-Duty Programs (Tentative).

b. Final Rulemaking on Limited Work

Authorizations (Tentative).

c. Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), Docket No. 52–011–ESP, Certified Questions (Tentative).

1 p.m. Briefing on Office of Nuclear Regulatory Research (RES) Programs, Performance, and Plans (Public Meeting) (Contact: Ann Ramey-Smith, 301–415–6877).

This meeting will be webcast live at the Web address—*www.nrc.gov*.

*Week of April 23, 2007—Tentative*

There are no meetings scheduled for the Week of April 23, 2007.

*Week of April 30, 2007—Tentative*

There are no meetings scheduled for the Week of April 30, 2007.

*Week of May 7, 2007—Tentative.*

Monday, May 7, 2007

1:30 p.m. Briefing on Office of Federal and State Materials and Environmental Management Programs (FSME) Programs, Performance, and Plans (Public Meeting) (Contact: George Deegan, 301–415–7834).

This meeting will be webcast live at the Web address—*www.nrc.gov*.

*Week of May 14, 2007—Tentative*

There are no meetings scheduled for the Week of May 14, 2007.

*Week of May 21, 2007—Tentative*

There are no meetings scheduled for the Week of May 21, 2007.

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The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: Michelle Schroll, (301) 415–1662.

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*Additional Information*

By a vote of 4–1 on April 12, 2007, the Commission determined pursuant to U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that Affirmation of ''Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), Docket No. 52–011–ESP, Certified Questions'' be held April 17, 2007, and on less than one week's notice to the public.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *www.nrc.gov/about-nrc/policy-making/schedule.html*.

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The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify the NRC's Disability Program Coordinator, Deborah Chan, at 301–415–7041, TDD: 301–415–2100, or by e-mail at *DLC@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: April 12, 2007.

**R. Michelle Schroll,**

*Office of the Secretary.*

[FR Doc. 07–1915 Filed 4–13–07; 12:54 pm]

**BILLING CODE 7590–01–P**

## OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

### Determination of Eligibility for Retroactive Duty Treatment Under the Dominican Republic—Central America—United States Free Trade Agreement

**AGENCY:** Office of the United States Trade Representative.

**ACTION:** Notice.

**SUMMARY:** Pursuant to Section 205(b) of the Dominican Republic—Central America—United States Free Trade Agreement Implementation Act (the Act), the United States Trade Representative (USTR) is providing notice of her determination that the Dominican Republic is an eligible country for purposes of retroactive duty treatment as provided in Section 205 of the Act.

**DATES:** *Effective Date:* April 17, 2007.

**ADDRESSES:** Inquiries may be mailed, delivered, or faxed to Robert A. Carrigg, Director of Textile Trade Policy, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508, fax number, (202) 395–5639.

**FOR FURTHER INFORMATION CONTACT:** Robert A. Carrigg, Office of the United States Trade Representative, 202–395–3026.

**SUPPLEMENTARY INFORMATION:** Section 205(a) of the Act (Pub. L. 109–53; 119 Stat. 462, 483; 19 U.S.C. 4034) provides that certain entries of textile or apparel goods of designated eligible countries that are parties to the Dominican Republic—Central America—United States Free Trade Agreement (CAFTA–DR) made on or after January 1, 2004 may be liquidated or reliquidated at the applicable rate of duty for those goods established in the Schedule of the United States to Annex 3.3 of the CAFTA–DR. Section 205(b) of the Act requires the USTR to determine, in accordance with Article 3.20 of the CAFTA–DR, which CAFTA–DR countries are eligible countries for purposes of Section 205(a). Article 3.20 provides that importers may claim retroactive duty treatment for imports of certain textile or apparel goods entered on or after January 1, 2004 and before the entry into force of CAFTA–DR from those CAFTA–DR countries that will provide reciprocal retroactive duty treatment or a benefit for textile or apparel goods that is equivalent to retroactive duty treatment.

Pursuant to Section 205(b) of the Act, I have determined that the Dominican Republic will provide an equivalent benefit for textile or apparel goods of the United States within the meaning of Article 3.20 of the CAFTA–DR. I therefore determine that the Dominican Republic is an eligible country for purposes of Section 205 of the Act.

**Susan C. Schwab,**

*U.S. Trade Representative.*

[FR Doc. E7–7263 Filed 4–16–07; 8:45 am]

**BILLING CODE 3190–W7–P**

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meeting during the week of April 16, 2007:

A Closed Meeting will be held on Thursday, April 19, 2007 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), (9)(B), and

(10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Nazareth, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the Closed Meeting scheduled for Thursday, April 19, 2007 will be:

Formal orders of investigations;
Institution and settlement of injunctive actions;
Institution and settlement of administrative proceedings of an enforcement nature;
Litigation matters; and
Other matters related to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: April 12, 2007.

**Nancy M. Morris,**

*Secretary.*

[FR Doc. E7–7282 Filed 4–16–07; 8:45 am]

BILLING CODE 8010–01–P

## SECURITIES AND EXCHANGE COMMISSION

**[File No. 500.1]**

### In the Matter of Certain Companies Quoted on the Pink Sheets: Amerossi EC, Inc., Irwin Resources, Inc., Peopleline Telecom, Inc.; Order of Suspension of Trading

April 13, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of the issuers listed below. As set forth below for each issuer, questions have arisen regarding the adequacy and accuracy of publicly disseminated information concerning, among other things: (1) The companies' assets, (2) the companies' business operations, (3) the companies' current financial condition, and/or (4) financing arrangements involving the issuance of the companies' shares.

1. Amerossi EC, Inc. is a Wyoming company with offices in Bangkok, Thailand. Questions have arisen regarding the adequacy and accuracy of press releases concerning the company's operations.

2. Irwin Resources, Inc., is a Delaware company with offices in Vancouver, British Columbia, Canada. Questions have arisen regarding the adequacy and accuracy of press releases concerning the company's current financial condition, management, operations, and transactions involving the issuance of the company's shares.

3. Peopleline Telecom, Inc. is a Nevada company based in Los Angeles, California. Questions have arisen regarding the adequacy and accuracy of press releases concerning the company's operations and concerning stock promoting activity.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the companies listed above.

*Therefore, it is ordered*, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the companies listed above is suspended for the period from 9:30 a.m. EDT, April 13, 2007, through 11:59 p.m. EDT, on April 26, 2007.

By the Commission.

**J. Lynn Taylor,**

*Assistant Secretary.*

[FR Doc. 07–1913 Filed 4–13–07; 12:56 pm]

BILLING CODE 8010–01–P

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–55606; File No. SR–BSE–2006–11]**

### Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendments No. 1 and 2 Relating to the Boston Options Exchange's Minor Rule Violation Plan

April 10, 2007.

On March 6, 2006, the Boston Stock Exchange, Inc. (''BSE'' or ''Exchange'') 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 Chapter X of the Boston Options Exchange (''BOX'') Rules, BOX's minor rule violation plan (''BOX MRVP''). The Exchange filed Amendments No. 1 and 2 to the proposed rule change on June 28, 2006, and July 14, 2006, respectively. The proposed rule change, as amended, was published for comment in the **Federal Register** on March 7, 2007.[3] The Commission received no comments regarding the proposal. This order approves the proposed rule change, as modified by Amendments No. 1 and 2.

The Exchange proposed to make the following actions subject to the BOX MRVP:

- contrary exercise advice infractions (in violation of BOX Rule Chapter VII, Section 1(c), (d), (f), and (g));
- locked and crossed market infringements (in violation of BOX Rule Chapter XII, Section 4);
- Market Maker assigned activity violations (in violation of BOX Rule Chapter VI, Section 4(e));
- Market Maker's failure to respond to a request for a quote within the designated time limit (in violation of BOX Rule Chapter VI, Section 6(b)(ii)–(iii)); and
- trade-through violations (in violation of BOX Rule Chapter XII, Section 3(a)).

The sanctions imposed would include the application of a fine for each violation and an increased fine amount for repeat violations. In the instance of a trade-through violation, the rule proposal would also allow BOX Regulation to require the Options Participant [4] to disgorge any gains from transactions in violation of the trade-through rules.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[5] In particular, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Act,[6] which requires that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission further believes that the proposal is consistent with Sections 6(b)(1) and 6(b)(6) of the Act,[7] which require that the rules of an exchange enforce compliance with, and provide appropriate discipline for, violations of Commission and Exchange rules. In addition, because BSE Rule Chapter

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 55373 (February 28, 2007), 72 FR 10276.

[4] *See* BOX Rule Chapter I, Section 1(a)(40) for definition of ''Options Participants.''

[5] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78f(b)(1) and 78f(b)(6).

XVIII provides procedural rights to contest the fine imposed pursuant to the BOX MRVP and permits disciplinary proceedings on the matter, the Commission believes that BOX Rule Chapter X, as amended by this proposal, provides a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d)(1) of the Act.[8]

Finally, the Commission finds that the proposal is consistent with the public interest, the protection of investors, or otherwise in furtherance of the purposes of the Act, as required by Rule 19d–1(c)(2) under the Act[9] which governs minor rule violation plans. The Commission believes that the proposed rule change would strengthen the Exchange's ability to carry out its oversight and enforcement responsibilities as a self-regulatory organization in cases where full disciplinary proceedings are unsuitable in view of the minor nature of the particular violation.

In approving this proposed rule change the Commission in no way minimizes the importance of compliance with BOX rules and all other rules subject to the imposition of fines under the BOX MRVP. The Commission believes that the violation of any self-regulatory organization's rules, as well as Commission rules, is a serious matter. However, the BOX MRVP provides a reasonable means of addressing rule violations that do not rise to the level of requiring formal disciplinary proceedings, while providing greater flexibility in handling certain violations. The Commission expects that BSE would continue to conduct surveillance with due diligence and make a determination based on its findings, on a case-by-case basis, whether a fine of more or less than the recommended amount is appropriate for a violation under the BOX MRVP or whether a violation requires formal disciplinary action under BSE Rule Chapter XXX.

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act[10] and Rule 19d–1(c)(2) under the Act,[11] that the proposed rule change (SR–BSE–2006–11), as modified by Amendments No. 1 and 2, be, and hereby is, approved and declared effective.

[8] 15 U.S.C. 78f(b)(7) and 78f(d)(1).

[9] 17 CFR 240.19d–1(c)(2).

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 240.19d–1(c)(2).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E7–7225 Filed 4–16–07; 8:45 am]

**BILLING CODE 8010–01–P**

[12] 17 CFR 200.30–3(a)(12); 17 CFR 200.30–3(a)(44).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–55613; File No. SR–CHX–2007–11]**

## Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Relating to Participant Fees and Credits

April 10, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 22, 2007, the Chicago Stock Exchange, Inc. (''CHX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the CHX. On April 10, 2007, the CHX filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CHX proposes to amend its Schedule of Participant Fees and Credits (the ''Fee Schedule'') to remove provisions that are no longer in effect due to the roll-out of the Exchange's new trading model. The text of this proposed rule change is available at the CHX, on the Exchange's Web site at *http://www.chx.com/rules/proposed_rules.htm,* and in 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 CHX 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 CHX has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

On January 26, 2007, the CHX completed the transition to its new trading model.[3] The Exchange now proposes to amend its Fee Schedule to delete several provisions that are no longer in effect as a result of that transition. The provisions of the Fee Schedule that would be deleted through this filing include: (1) Section E(8) (Transaction and Order Processing Fees Associated with Securities Not Yet Traded in the Matching System); (2) Parts of Section F(2) (Institutional Broker Credits); (3) Section F(4) (Two-Sided Quote Providers); (4) Section L (Space Charges); and (5) Section M (Equipment, Information Services and Technology Charges). Each of these provisions currently contains an introductory note confirming that it is only in effect until the transition to the new trading model or contains an effective date that has been exceeded.[4] Because of the transition to the new trading model, these fees are no longer in effect for the Exchange's participants.[5]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 54550 (September 29, 2006); 71 FR 59563 (October 10, 2006) (SR–CHX–2006–05) (approving rules for the new trading model).

[4] *See, e.g.*, Section E(8) of the Fee Schedule (confirming that ''these fees will continue to be charged as the Exchange transitions to its new trading model, but will be eliminated as each issue transitions to the new trading model''); *see also* Section F(4) of the Fee Schedule (noting that it is in effect through October 31, 2006).

[5] For example, an additional network/connectivity fee credit was available to institutional brokers until the completion of the new trading model rollout. *See* Section F(2) of the Fee Schedule. Similarly, with the transition to the new trading model, the CHX no longer operates a physical trading floor; as a result, the space and equipment charges are no longer charged to participants pursuant to the Fee Schedule, but are instead part of separate agreements between the Exchange and any firms that sublease space on the Exchange's former trading floor. *See* Sections L and M of the Fee Schedule.

2. Statutory Basis

*The proposed rule change is consistent with Section 6(b)(4) of the Act*[6] *in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members.*

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition.

*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**

Because the foregoing proposed rule change establishes or changes a member due, fee or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and subparagraph (f)(2) of Rule 19b–4 thereunder.[8] 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.[9]

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR-CHX–2007–11 on the subject line.

*Paper comments*

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CHX–2007–11. 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 CHX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CHX–2007–11 and should be submitted on or before May 8, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E7–7223 Filed 4–16–07; 8:45 am]

BILLING CODE 8010–01–P

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(2).

[9] For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on April 10, 2007, the date on which the CHX filed Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

[10] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–55617; File No. SR–NASD–2007–022]**

## Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Make Technical Amendments to the Code of Mediation Procedure

April 11, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 16, 2007, the National Association of Securities Dealers, Inc. (''NASD''), through its wholly owned subsidiary, NASD Dispute Resolution, Inc. (''NASD Dispute Resolution'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD Dispute Resolution. NASD has designated the proposed rule change as concerned solely with the administration of the self-regulatory organization under Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(3) 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**

NASD Dispute Resolution is proposing to amend the Code of Mediation Procedure to re-number Rules 10401 through 10410 and update cross references within the re-numbered rules. The text of the proposed rule change is available on NASD's Web site (*http://www.nasd.com*), at NASD'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, NASD 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. NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

In 1998, the SEC launched an initiative to encourage issuers and self-regulatory organizations to use ''plain English'' in disclosure documents and other materials used by investors. In response, NASD undertook to rewrite the NASD Code of Arbitration Procedure (''old Code'') in ''plain

[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)(3).

English.'' This undertaking became the Code Revision Project (''Project'').

NASD began to implement the Project in 2003 when it filed with the SEC a proposed rule change to the old Code to reorganize the rules, simplify the language, codify current practices, and implement several substantive changes.[5] The proposal reorganized NASD's old dispute resolution rules (Rules 10000 *et seq.*) into three separate procedural codes: the NASD Code of Arbitration Procedure for Customer Disputes (''Customer Code''); the NASD Code of Arbitration Procedure for Industry Disputes (''Industry Code''); and the NASD Code of Mediation Procedure (''Mediation Code'').[6] The three new Codes would replace the old Code in its entirety.

On October 31, 2005, the SEC approved the Mediation Code.[7] It became effective on January 30, 2006.[8] On January 24, 2007, the SEC approved the Customer Code and Industry Code.[9] The Customer and Industry Codes will become effective on April 16, 2007.[10]

Because the Mediation Code became effective before the Customer and Industry Codes were approved, NASD implemented the Mediation Code by replacing the old rules governing mediation (Rules 10400 *et seq.*) in the old Code with the rules of the Mediation Code. To minimize confusion and to assist the users of the dispute resolution forum, NASD re-numbered the rules of the Mediation Code so that they would be consistent with the numbering in the old Code, which was still in effect at the time the Mediation Code became effective. In replacing the old rules with those of the Mediation Code, NASD changed cross-references to proposed rules of the Customer and Industry Codes to applicable rules of the old Code, and removed rule language that was based on the proposed codes.

Under this proposed rule change, NASD is proposing to remove Rules 10401 through 10410 of the Mediation Code from the old Code and re-number them so that the Mediation Code becomes a separate procedural code, as proposed and approved by the SEC.[11] NASD also is proposing to change cross-references to applicable rules of the Customer and Industry Codes, and re-insert definitions of ''NASD Customer Code'' and ''NASD Industry Code'' in Rules 14100(g) and Rules 14100(h) respectively, which had been reserved until the new Codes were approved.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[12] which requires, among other things, that NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change is consistent with the provision of the Act noted above because it will provide useful guidance to parties, mediators and staff, and will help standardize the administration of NASD mediations.

*(B) Self-Regulatory Organization's Statement on Burden on Competition*

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were neither solicited nor received by NASD.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act and Rule 19b–4(f)(3) thereunder because it is concerned solely with the administration of the self-regulatory organization.[13] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASD–2007–022 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASD–2007–022. 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

[5] *See* Exchange Act Release No. 51856 (June 15, 2005), 70 FR 36442 (June 23, 2005) (File No. SR–NASD–2003–158) (Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 Thereto to Amend NASD Arbitration Rules for Customer Disputes).

[6] In 2004, NASD filed separately with the SEC the Industry and Mediation Codes. *See* Exchange Act Release No. 51857 (June 15, 2005), 70 FR 36430 (June 23, 2005) (File No. SR–NASD–2004–011) (Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 Thereto to Amend NASD Arbitration Rules for Industry Disputes); and Exchange Act Release No. 51855 (June 15, 2005), 70 FR 36440 (June 23, 2005) (File No. SR–NASD–2004–013) (Notice of Filing of Proposed Rule Change and Amendments No. 1 and 2 Thereto to Amend NASD Arbitration Rules for Mediation Proceedings).

[7] *See* Exchange Act Release No. 52705 (Oct. 31, 2005), 70 FR 67525 (Nov. 7, 2005) (File No. SR–NASD–2004–013) (Order Granting Approval to Proposed Rule Change and Amendments Nos. 1 and 2 Thereto, and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 3, to Amend NASD Rules for Mediation Proceedings).

[8] The changes were announced in Notice to Members 05–85 (Dec. 2005).

[9] *See* Exchange Act Release No. 55158 (Jan. 24, 2007), 72 FR 4574 (Jan. 31, 2007) (File Nos. SR–NASD–2003–158 and SR–NASD–2004–011) (Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules for Customer Disputes and Notice of Filing and Order Granting Accelerated Approval of Amendments 5, 6, and 7 Thereto; Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules for Industry Disputes and Notice of Filing and Order Granting Accelerated Approval of Amendments 5, 6, and 7 Thereto).

[10] The changes were announced in Notice to Members 07–07 (Feb. 2007).

[11] *See Id.* at nn. 7 & 9. The Customer Code will use the Rule 12000 series, the Industry Code will use the Rule 13000 series, and the Mediation Code will use the Rule 14000 series, all of which are currently unused under the NASD numbering system. *Id.*

[12] 15 U.S.C. 78o–3(b)(6).

[13] 17 CFR 240.19b–4(f)(3).

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 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–2007–022 and should be submitted on or before May 8, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E7–7222 Filed 4–16–07; 8:45 am]

BILLING CODE 8010–01–P

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–55615; File No. SR–NYSE–2007–34]**

## Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Amend NYSE Rule 80A.40(b) To Update the Definition of ''Program Trading,'' To Substitute Simplified Audit Trail Requirements, and To Make Conforming Amendments to NYSE Rule 410B

April 11, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 22, 2007, the New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared substantially by NYSE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NYSE proposes to amend NYSE Rule 80A.40(b) to update the definition of ''program trading'' by eliminating the pre-determined minimum dollar value requirement for trading strategies that involve the related purchase or sale of a ''basket'' or group of 15 or more stocks, to substitute simplified audit trail requirements, and to make conforming amendments to Rule 410B. The text of the proposed rule change is available at NYSE, *http://www.nyse.com*, and the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NYSE included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NYSE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

In order to improve the reporting and monitoring of program trading by the Exchange, NYSE proposes to clarify what constitutes program trading and to streamline the process for entering and identifying program trades. To accomplish this, the Exchange is proposes (i) to amend NYSE Rule 80A.40 to eliminate the minimum dollar value from the definition of program trading, and (ii) to substitute simplified audit trail requirements in place of the more cumbersome reporting requirements that currently apply to program trading. The proposed amendments also include certain conforming amendments to NYSE Rule 410B. In connection with these changes, the Exchange also intends to issue guidance regarding the definition of a ''coordinated strategy,'' as that term is used in Rule 80A.40.

*Background.* The Exchange adopted Rule 80A in the wake of the 1987 market break to address various coordinated professional trading strategies, in particular, program trading that was using the cash market to take advantage of trading in the derivatives market. To ensure that the rule would encompass the various permutations that such trading strategies might take, the Exchange defined program trading as either index arbitrage or ''any trading strategy involving the related purchase or sale of a 'basket' or group of 15 or more stocks having a total market value of $1 million or more.'' The monetary value was believed at the time to capture program trading strategies that would be significant in the context of the market. Despite a significant increase in the size and value of trading in the market since 1987, however, this monetary component of the definition has not been updated since it was adopted.

*Proposed Redefinition of Program Trading.* Given the technical and automated nature of the trading environment that exists today, the Exchange believes that the current definition of ''program trading'' is no longer workable, since, among other things, it captures certain computer-driven or algorithmic trading strategies that are not intended to be program trades. At the same time, certain strategies that could fairly be classified as programs—that is, strategies involving 15 or more stocks that are intended to be coordinated, but which do not meet the monetary threshold—are not being captured.

In contrast to 1987, most firms today employ algorithmic trading to manage and carry out both plain-vanilla execution strategies that are not intended to be programs, including public-customer driven parameter-based trading (that is, trading in which the customer specifies certain desired execution conditions such as timing, pricing, quantity, or marketplace selection, and the algorithm evaluates market information and generates orders that best match the specified conditions without further human intervention), and more complex trading strategies that are intended to be programs. The Exchange therefore recognizes that not all computer-driven trading strategies constitute Program Trading. For example, if they otherwise lack the other definitional characteristics of program trading, algorithmic trading, volume-weighted average price (''VWAP'') trading, statistical arbitrage, and similar computer-driven trading strategies may not need to be classified or reported as a program simply because the strategy is executed through a computer model or ''black box.''

This has led to regulatory confusion; indeed, member firms have informed the Exchange that in order to ensure full compliance with the rule, they feel compelled to report computer-driven trading strategies that meet the technical definition of a program even though they are not, in fact, intended as program trading.

To address the issue of the overbroad definition of program trading and to improve the precision of program trade reporting, the Exchange proposes to amend the definition of program trading under NYSE Rule 80A.40 to eliminate

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

the requirement that program trades must have a combined value of $1 million or more. The Exchange believes that the minimum dollar value currently contained in Rule 80A.40 establishes an arbitrary and artificial bar for determining whether a coordinated strategy constitutes program trading. In the absence of the dollar threshold, the Exchange proposes assessing whether a trading program constitutes a coordinated strategy examining its attributes rather than relying on such an arbitrary limitation.

To assist firms in determining whether a particular set of trades constitutes a ''program,'' the Exchange intends to issue guidance to member organizations regarding factors to consider in determining whether a trading strategy is ''coordinated.'' This guidance will focus on how the primary investment objective of the trading, as well as the linkage or dependency between and among simultaneous (or substantially simultaneous) trades in different securities, relate to the investment objective. As described more fully below, under the revised rule, the Exchange would consider any execution of 15 or more stocks that is entered as part of a single investment strategy (including liquidation, rebalancing, or realignment of a basket/portfolio) with the intention to execute all or most of the stocks to be a ''coordinated strategy.''

''Coordinated strategies'' would include any purchase or sale of 15 or more stocks that is (i) coordinated pursuant to a broader investment strategy such as economic, financial, or fundamental characteristics (such as a particular industry, sector, or industry) or market activity, and (ii) where the execution of the securities within the portfolio is linked, as opposed to being merely coincidental single stock definitions. A coordinated strategy would include a portfolio or basket strategy of 15 or more stocks wherein each stock execution is dependent upon the execution of all or most of the securities within the portfolio or basket. And, as before, program trading would also include all index arbitrage trading. Accordingly, any strategy that attempts to capture identified mispricings between an S&P 500 component security and its related future as the filters for buying or selling such stock, regardless of the number of stocks involved, is a program.

As noted above, not all computer-driven trading strategies would be defined as program trading. For example, portfolio VWAP transactions that attempt to provide a customer with an average price for the purchase or sale of stocks would not necessarily be a program. For VWAP trading to constitute a program, the trading would have to involve a portfolio or basket of 15 or more stocks as part of a coordinated strategy.

In addition, pairs trading, in which stocks are put into pairs by fundamental or market-based similarities and traded versus each other, would not necessarily be program trading. For pairs trading to fall within the program trading definition, the engine or algorithm used for execution of the selected pairs would have to consist of a group of related stocks that would be defined as a program, *e.g.*, an automative ''pairs'' algorithm that typically trades more than 15 different automotive stocks.

*Streamlining Reporting of Program Trades.* The Exchange is also proposing to streamline the reporting process that member organizations must follow when reporting program trading. Since 1988, the Exchange has required that member firms report program trading activities by the close of business on the second business day following the trade date on a Daily Program Trading Report (''DPTR''). Member firms currently file their DPTRs via an electronic filing platform operated by the Exchange.

Because the DPTR is created after the trades have been executed, rather than in connection with the entry of orders at issue, the DPTR is potentially less accurate than determining program trading information based on audit trail information, which captures trading information at the time of execution. Moreover, because all information reported on the DPTR is already available to the Exchange via audit trail information, the DPTR has become redundant. Accordingly, to streamline the reporting process, the Exchange is proposing to eliminate the DPTR requirement, and to rely instead on audit trail information to determine whether firms are engaging in program trading. To assist in identifying program trading, the Exchange is redefining two of the eight existing program trading related audit trail account types so that member firms can mark the specific program trading strategy at the time of order entry and execution, rather than waiting to report via the DPTR.

The Exchange does not believe that the proposed changes to Rules 80A and 410B would in any way compromise its existing surveillances, or impair the ability to conduct additional surveillances, as necessary. To the contrary, the Exchange believes that the proposed changes to the definition of program trading and the revised audit trail information will lead to more focused surveillances for assessing whether member organizations engage in program trading.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5) [3] that an Exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has neither solicited nor received written comments on the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File No. SR–NYSE–2007–34 on the subject line.

[3] 15 U.S.C. 78f(b)(5).

*Paper Comments*

• Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2007–34. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of NYSE.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2007–34 and should be submitted on or before May 8, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E7–7224 Filed 4–16–07; 8:45 am]

BILLING CODE 8010–01–P

## DEPARTMENT OF STATE

**[Public Notice 5777]**

### Determination and Waiver of Section 517(a) of the Foreign Operations, Export Financing, and Related Programs Appropriations Act (2006) (Pub. L. 109–102), as Carried Forward Under the Revised Continuing Appropriations Resolution, 2007 (Pub. L. 110–5), Relating to Assistance for the Independent States of the Former Soviet Union

Pursuant to the authority vested in me as Deputy Secretary of State, including by Section 517(a) of the Foreign Operations, Export Financing, and Related Programs Appropriations Act (2006) (Pub. L. 109–102), as Carried Forward Under the Revised Continuing Appropriations Resolution, 2007 (Pub. L. 110–5), Executive Order 13118 of March 31, 1999, and State Department Delegation of Authority No. 245 of April 23, 2001, I hereby determine that it is in the national security interest of the United States to make available funds appropriated under the heading ''Assistance for the Independent States of the Former Soviet Union'' in Title II of the FOAA, as carried forward under the CR, without regard to the restriction in that section.

This determination shall be reported to the Congress promptly and published in the **Federal Register**.

Dated: April 4, 2007.

**John D. Negroponte,**

*Deputy Secretary of State, Department of State.*

[FR Doc. E7–7273 Filed 4–16–07; 8:45 am]

BILLING CODE 4710–23–P

## DEPARTMENT OF STATE

**[Public Notice 5758]**

### Defense Trade Advisory Group; Notice of Open Meeting

**AGENCY:** Department of State.

**ACTION:** Notice.

**SUMMARY:** The Defense Trade Advisory Group (DTAG) will meet in open session from 9 a.m. to 12 noon on Thursday, September 20, 2007, in the East Auditorium at the U.S. Department of State, Harry S. Truman Building, Washington, DC. Entry and registration will begin at 8:15 a.m. Please use the building entrance located at 21st Street, NW., Washington, DC between C&D Streets. The membership of this advisory committee consists of private sector defense trade specialists, appointed by the Assistant Secretary of State for Political-Military Affairs, who advise the Department on policies, regulations, and technical issues affecting defense trade. The purpose of the meeting will be to discuss current defense trade issues and topics for further study.

Members of the public may attend this open session and will be permitted to participate in the discussion in accordance with the Chairman's instructions. They may also, if they wish, submit a brief statement to the committee in writing.

As access to the Department of State facilities is controlled, persons wishing to attend the meeting must notify the DTAG Executive Secretariat by COB Thursday, September 13, 2007. If notified after this date, the DTAG Secretariat cannot guarantee that State's Bureau of Diplomatic Security can complete the necessary processing required to attend the September 20th plenary.

Each non-member observer or DTAG member that wishes to attend this plenary session should provide: His/her name; company or organizational affiliation; phone number; date of birth; and identifying data such as driver's license number, U.S. Government ID, or U.S. Military ID, to the DTAG Secretariat contact person, Nicholas Memos, via e-mail at *MemosNI@state.gov.* A RSVP list will be provided to Diplomatic Security. One of the following forms of valid photo identification will be required for admission: U.S. driver's license, passport, U.S. Government ID, or other valid photo ID.

**FOR FURTHER INFORMATION CONTACT:** For additional information, contact Nicholas Memos, PM/DDTC, SA–1, 12th Floor, Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, U.S. Department of State, Washington, DC 20522–0112; telephone (202) 663–2804; fax (202) 663–261–8199; or e-mail *MemosNI@state.gov.*

Dated: April 10, 2007.

**Robert W. Maggi,**

*Executive Secretary, Defense Trade Advisory Group, Department of State.*

[FR Doc. E7–7274 Filed 4–16–07; 8:45 am]

BILLING CODE 4710–25–P

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

### Aviation Proceedings, Agreements Filed the Week Ending April 6, 2007

The following Agreements were filed with the Department of Transportation under the Sections 412 and 414 of the Federal Aviation Act, as amended (49 U.S.C. 1383 and 1384) and procedures governing proceedings to enforce these provisions. Answers may be filed within 21 days after the filing of the application.

*Docket Number:* OST–2007–27825.

*Date Filed:* April 5, 2007.

*Parties:* Members of the International Air Transport Association.

*Subject:* Mail Vote 532—Resolution 010n, TC3 Special Passenger Amending Resolution Between Japan and China (excluding Hong SAR and Macao SAR) (Memo 1076).

[4] 17 CFR 200.30–3(a)(12).

*Intended effective date:* 15 April 2007.

**Barbara J. Hairston,**

*Supervisory Docket Officer, Docket Operations, Alternate Federal Register Liaison.*

[FR Doc. E7–7246 Filed 4–16–07; 8:45 am]

**BILLING CODE 4910–9X–P**

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

### Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending April 6, 2007

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

*Docket Number:* OST–2007–27815.

*Date Filed:* April 4, 2007.

*Due Date for Answers, Conforming Applications, or Motion to Modify Scope:* April 25, 2007.

*Description:* Application of Exec Air Inc. of Naples Dba. ExecAir requesting authority to conduct scheduled passenger operations as a commuter air carrier.

**Barbara J. Hairston,**

*Supervisory Docket Officer, Docket Operations, Altenate Federal Register Liaison.*

[FR Doc. E7–7248 Filed 4–16–07; 8:45 am]

**BILLING CODE 4910–9X–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Notice of Final Federal Agency Actions on Proposed Highway in Indiana

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of Limitation on Claims for Judicial Review of Actions by FHWA and United States Fish and Wildlife Service (USFWS), DOI.

**SUMMARY:** This notice announces actions taken by the FHWA and the USFWS that are final within the meaning of 23 U.S.C. § 139(*l*)(1). The actions relate to a proposed highway project, I–69, Evansville to Indianapolis, Indiana, in the Counties of Vanderburgh, Warrick, Gibson, Pike, Daviess, Greene, Monroe, Morgan, Johnson and Marion, State of Indiana. The Federal actions, taken as a result of a tiered environmental review process under the National Environmental Policy Act, 42 U.S.C. 4321–4351 (NEPA), and implementing regulations on tiering, 40 CFR 1502.20, 40 CFR 1508.28, and 23 CFR Part 771, determined certain issues relating to the proposed project. Those decisions will be used by Federal agencies in subsequent proceedings, including decisions whether to grant licenses, permits, and approvals for the highway project. The decisions also may be relied upon by State and local agencies in proceedings on the proposed project.

**DATES:** By this notice, the FHWA is advising the public that the FHWA and the USFWS have made decisions that are subject to 23 U.S.C. 139(*l*)(1) and are final within the meaning of that law. A claim seeking judicial review of those Federal agency decisions on the proposed highway project will be barred unless the claim is filed on or before October 15, 2007. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then the shorter time period applies.

**FOR FURTHER INFORMATION CONTACT:** For the FHWA: Mr. Anthony DeSimone, P.E., Federal Highway Administration, Indiana Division, 575 North Pennsylvania Street, Room 254, Indianapolis, IN 46204–1576; telephone: (317) 226–5307; e-mail: *Anthony.DeSimone@fhwa.dot.gov.* The FHWA Indiana Division Office's normal business hours are 7:30 a.m. to 4 p.m., e.t. For the USFWS: Mr. Scott Pruitt, Field Supervisor, Bloomington Field Office, USFWS, 620 South Walker Street, Bloomington, IN 47403–2121; telephone: 812–334–4261; e-mail: *Scott_Pruitt@fws.gov.* Normal business hours for the USFWS Bloomington Field Office are: 8 a.m. to 4:30 p.m., e.t. You may also contact Mr. Thomas Seeman, Project Manager, Indiana Department of Transportation (INDOT), 100 North Senate Avenue, Indianapolis, IN 46204; telephone: (317) 232–5336; e-mail: *TSeeman@indot.IN.gov.* Normal business hours for the Indiana Department of Transportation are: 8 a.m. to 4:30 p.m., e.t.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that the FHWA has approved a Tier 1 Final Environmental Impact Statement (FEIS) and issued a Record of Decision (ROD) in connection with a proposed highway project in the State of Indiana: I–69 from Evansville to Indianapolis, in Vanderburgh, Warrick, Gibson, Pike, Daviess, Greene, Monroe, Morgan, Johnson and Marion Counties. The project will be an approximately 142 mile long Interstate highway. It will begin at the I–64/I–164 interchange just north of Evansville, Indiana and end at I–465 in Indianapolis, to the west of the I–465/SR 37 interchange. The proposed freeway will be on both new and existing alignment.

Decisions in the FHWA Tier 1 ROD that have final approval include, but are not limited to, the following:

1. Purpose and need for the project (see section 3.1).
2. Range of alternatives for analysis (see sections 3.3 and 3.4).
3. Selection of the Interstate highway build alternative and highway corridor for the project. The selected alternative, referred to in the FEIS as Alternative 3C, involves completing I–69 as an Interstate highway from Evansville to Indianapolis via Oakland City, Washington, Crane Naval Surface Warfare Center, Bloomington, and Martinsville (see section 2.1). This alternative includes the use of parts of the existing alignment of SR 37 to reach I–465 and the route variation known as WE2 in the area of Washington, Indiana. The ultimate alignment of the highway within the corridor, and the location and number of interchanges and rest areas will be evaluated in the Tier 2 National Environmental Policy Act (NEPA) proceedings.
4. Elimination of other alternatives from consideration in Tier 2 NEPA proceedings. The alternatives that will not be considered any further include, but are not limited to, those identified in the Tier 1 FEIS as the ''no build'' alternative, and alternatives 1, 2A, 2B, 2C, 3A, 3B, 4A, 4B, 5A, and 5B. Also eliminated were a number of hybrids and variations on these alternatives, including the ''Mann Road Variation'' for reaching I–465 and variations WW1, WW2, and WE1 in the area of Washington, Indiana. Detailed information about the alternatives considered in Tier 1, and about the Federal decisions that eliminate alternatives other than Alternative 3C from further consideration, is available in section 3 of the Tier 1 ROD and the Tier 1 FEIS sections cited therein.
5. Process for completing the Tier 2 alternatives analysis and studies for the project, including the designation of six Tier 2 sections and a decision to prepare a separate environmental impact statement for each Tier 2 section (see section 2.3).

Interested parties may consult the Tier 1 ROD and Tier 1 FEIS for details about each of the decisions described above and for information on other issues decided. The documents are available as described below.

Following the completion of the Tier 1 ROD, interested parties submitted comments suggesting that new information existed that might affect the Tier 1 FEIS analyses and the Federal decisions based on those analyses. In response, the FHWA reevaluated the project and decided that the changes that occurred following the ROD did not individually or collectively require supplementation of the Tier 1 FEIS.

The Tier 1 FEIS (issued on December 5, 2003), the Tier 1 ROD (issued on March 24, 2004), the FHWA decision that supplementation of the Tier 1 FEIS is not required (issued on February 12, 2007), and other documents in the project records are available by contacting the FHWA or the INDOT at the addresses provided above. Interested parties also may view or download the FHWA Tier 1 FEIS, Tier 1 ROD, the decision not to prepare a Tier 1 supplemental EIS, the related reevaluation report, and INDOT responses to comments on the reevaluation report at the project Web site, *http://deis.i69indyevn.org/,* or by contacting FHWA or INDOT at the addresses listed above.

Actions taken by the USFWS, pursuant to the Endangered Species Act, 16 U.S.C. 1531–1544, include its concurrence with the FHWA's determination that the I–69 project is not likely to adversely affect the eastern fanshell mussel (*Cyprogenia stegaria*) and that the project is still likely to adversely affect, but not jeopardize, the bald eagle. The USFWS concluded that the project is not likely to jeopardize the continued existence of the Indiana bat and is not likely to adversely modify the bat's designated Critical Habitat. The USFWS decisions are described in the Programmatic Biological Opinion issued on December 3, 2003, the Revised Programmatic Biological Opinion issued on August 24, 2006, and other documents in the project records. These opinions, and other project records relating to the USFWS actions, are available by contacting the FHWA, INDOT, or USFWS at the addresses provided above. The Programmatic Biological Opinion can be viewed in the Appendices Section and downloaded from the project Web site at *http://deis.i69indyevn.org/FEIS/index.html* and the Revised Programmatic Biological Opinion can be viewed and downloaded from the project Web site at *http://i69indyevn.org/Corridor_Reports/corridor_reports.html.*

This notice applies to all Federal agency decisions that are final within the meaning of 23 U.S.C. 139(*1*)(1) as of the issuance date of this notice, and to all laws under which such actions were taken. The laws include, but are not limited to:

1. National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351].
2. Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128].
3. Endangered Species Act [16 U.S.C. 1531–1544].
4. National Historic Preservation Act of 1966, as amended [16 U.S.C. 470 *et seq.*].
5. Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303 and 23 U.S.C. 138].
6. Clean Air Act [42 U.S.C. 7401–7671(q)].

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

**Authority:** 23 U.S.C. 139(*l*)(1).

**Robert F. Tally Jr.,**

*Division Administrator, Indianapolis, Indiana.*

[FR Doc. E7–7231 Filed 4–16–07; 8:45 am]

BILLING CODE 4910–RY–P

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## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Docket No. AB–534 (Sub-No. 3X)]**

### Lake State Railway Company—Abandonment Exemption—Rail Line in Otsego County, MI

On March 28, 2007, the Lake State Railway Company (Lake State) filed with the Surface Transportation Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to permit the abandonment of 4.15 miles of rail line in Otsego County, MI. The line includes the northernmost portion of the carrier's main line Mackinaw Subdivision extending from milepost MP 116.8 (where the line crosses East McCoy Road) to the end of the line at milepost MP 120.95 The line traverses U.S. Postal Service Zip Code 49735.

The line does not contain Federally granted rights-of-way. Any documentation in Lake State's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by July 16, 2007.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each OFA must be accompanied by a $1,300 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than May 7, 2007. Each trail use request must be accompanied by a $200 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to STB Docket No. AB–534 (Sub-No. 3X), and must be sent to: (1) Surface Transportation Board, 395 E. Street, SW., Washington, DC 20423–0001; and (2) Andrew B. Kolestar, 1224 Seventeenth Street, NW., Washington, DC 20036. Replies to the petition are due on or before May 7, 2007.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Services at (202) 245–0230 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis (SEA) at (202) 245–0305. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by SEA will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact SEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: April 6, 2007.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. E7–6934 Filed 4–16–07; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

### Proposed Agency Information Collection Activities; Comment Request—Interagency Guidance on Asset Securitization Activities

**AGENCY:** Office of Thrift Supervision (OTS), Treasury.

**ACTION:** Notice and request for comment.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

**DATES:** Submit written comments on or before June 18, 2007.

**ADDRESSES:** Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov*. OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov*. In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov*, or send a facsimile transmission to (202) 906–7755.

**FOR FURTHER INFORMATION CONTACT:** You can request additional information about this proposed information collection from William J. Magrini, Senior Project Manager, Examinations and Supervision Policy, (202) 906–5744, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:** OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

*Title of Proposal:* Interagency Guidance on Asset Securitization Activities.

*OMB Number:* 1550–0104.

*Form Number:* N/A.

*Description:* The collection applies to institutions engaged in asset securitization and consists of a written asset securitization policy, the documentation of fair value of retained interests, and a management information system to monitor securitization activities. Institutions use the collection as the basis for the safe and sound operation of their asset securitization activities. The agencies use the information to evaluate the quality of an institution's risk management practices.

*Type of Review:* Renewal.

*Affected Public:* Businesses or other for-profit; individuals.

*Estimated Number of Respondents:* 19.

*Estimated Number of Responses:* 19.

*Estimated Frequency of Response:* On occasion.

*Estimated Total Burden:* 190 hours.

*Clearance Officer:* Marilyn K. Burton, (202) 906–6467, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Dated: April 12, 2007.

**Deborah Dakin,**

*Senior Deputy Chief Counsel, Regulations and Legislation Division.*

[FR Doc. E7–7259 Filed 4–16–07; 8:45 am]

**BILLING CODE 6720–01–P**

## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

### Proposed Agency Information Collection Activities; Comment Request—Consumer Protections for Depository Sales of Insurance

**AGENCY:** Office of Thrift Supervision (OTS), Treasury.

**ACTION:** Notice and request for comment.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

**DATES:** Submit written comments on or before June 18, 2007.

**ADDRESSES:** Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov*. OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov*. In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov*, or send a facsimile transmission to (202) 906–7755.

**FOR FURTHER INFORMATION CONTACT:** You can request additional information about this proposed information collection from Judi McCormick, Director, Consumer Protection & Specialty Programs, (202) 906–5636,

Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:** OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

*Title of Proposal:* Consumer Protections for Depository Sales of Insurance.

*OMB Number:* 1550–0106.

*Form Number:* N/A.

*Regulation requirement:* 12 CFR part 536.

*Description:* This submission covers an extension of OTS's currently approved information collection in its regulation found at 12 CFR part 536. This submission involves no change to the regulations or to the information collections embodied in the regulations.

The information collections contained in the regulations are as follows:

*12 CFR 536.40(a).* Savings associations must make insurance disclosures in connection with the initial purchase of an insurance product. The disclosure must be made orally and in writing to the consumer that: (1) The insurance product or annuity is not a deposit or other obligation of, or guaranteed by, a savings association or an affiliate of a savings association; (2) the insurance product or annuity is not insured by the FDIC or any other agency of the United States, a savings association, or (if applicable) an affiliate of a savings association; and (3) in the case of an insurance product or annuity that involves an investment risk, there is investment risk associated with the product, including the possible loss of value.

*12 CFR 536.40(b).* Savings associations must make a disclosure at the time a consumer applies for an extension of credit in connection with which an insurance product or annuity is solicited, offered, or sold. The disclosure must be made orally and in writing that a savings association may not condition an extension of credit on either: (1) the consumer's purchase of an insurance product or annuity from a savings association or any of its affiliates; or (2) the consumer's agreement not to obtain, or a prohibition on the consumer from obtaining, an insurance product or annuity from an unaffiliated entity.

*Type of Review:* Renewal.

*Affected Public:* Businesses or other for-profit; individuals.

*Estimated Number of Respondents:* 845.

*Estimated Number of Responses:* 841,826.

*Estimated Frequency of Response:* On occasion.

*Estimated Total Burden:* 21,046 hours.

*Clearance Officer:* Marilyn K. Burton, (202) 906–6467, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Dated: April 12, 2007.

**Deborah Dakin,**

*Senior Deputy Chief Counsel, Regulations and Legislation Division.*

[FR Doc. E7–7260 Filed 4–16–07; 8:45 am]

BILLING CODE 6720–01–P

## DEPARTMENT OF VETERANS AFFAIRS

### Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board, Notice of Meetings

The Department of Veterans Affairs gives notice under the Public Law 92–463 (Federal Advisory Committee Act) that the subcommittees of the Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board will meet from 8 a.m. to 5 p.m. as indicated below:

| Subcommittee for | Date(s) | Location |
|---|---|---|
| Mental Hlth & Behav Sciences–A | May 7, 2007 | St. Gregory Hotel. |
| Infectious Diseases–A | May 10, 2007 | Radisson Hotel. |
| Endocrinology–B | May 14, 2007 | Beacon Hotel. |
| Nephrology | May 14, 2007 | Wyndham Washington, DC. |
| Immunology–A | May 17, 2007 | L'Enfant Plaza Hotel. |
| Hematology | May 18, 2007 | *VA Central Office. |
| Cardiovascular Studies | May 21, 2007 | Woodfin Suites. |
| Endocrinology–A | May 21–22, 2007 | Radisson Hotel. |
| Epidemiology | May 23, 2007 | *VA Central Office. |
| Cellular & Molecular Medicine | May 24, 2007 | Radisson Hotel. |
| Infectious Diseases–B | May 31, 2007 | Double Tree Hotel. |
| Oncology–A | May 31, 2007 | L'Enfant Plaza Hotel. |
| Mental Hlth & Bahav Sciences–B | May 31, 2007 | L'Enfant Plaza Hotel. |
| Respiration | June 1, 2007 | Double Tree Hotel. |
| Neurobiology–E | June 4, 2007 | Beacon Hotel. |
| Surgery | June 4, 2007 | St. Gregory Hotel. |
| Immunology–B | June 5, 2007 | Radisson Hotel. |
| Clinical Research Program | June 6, 2007 | *VA Central Office. |
| Neurobiology–A | June 11, 2007 | St. Gregory Hotel. |
| Neurobiology–D | June 11, 2007 | Beacon Hotel. |
| Oncology–B | June 14, 2007 | L'Enfant Plaza Hotel. |
| Neurobiology–C | June 14–15, 2007 | Radisson Hotel. |

| Subcommittee for | Date(s) | Location |
|---|---|---|
| Gastroenterology | June 15, 2007 | L'Enfant Plaza Hotel. |

The addresses of the hotels and VA Central Office are: Beacon Hotel & Corporate Quarters, 1615 Rhode Island Avenue, NW., Washington, DC; Double Tree Hotel, 1515 Rhode Island Avenue, NW., Washington, DC; L'Enfant Plaza Hotel, 480 L'Enfant Plaza, SW., Washington, DC; Radisson Hotel Reagan National Airport, 2020 Jefferson Davis Highway, Arlington, VA; St. Gregory Hotel, 2033 M Street, NW., Washington, DC; VA Central Office, 1722 Eye Street, NW., Washington, DC; Woodfin Suites Hotel Rockville, 1380 Piccard Drive, Rockville, MD; Wyndham Hotel, 1400 M Street, Washington, DC.

*Teleconference.

The purpose of the Merit Review Board is to provide advice on the scientific quality, budget, safety and mission relevance of investigator-initiated research proposals submitted for VA merit review consideration. Proposals submitted for review by the Board involve a wide range of medical specialities within the general areas of biomedical, behavioral and clinical science research.

The subcommittee meetings will be open to the public for approximately one hour at the start of each meeting to discuss the general status of the program. The remaining portion of each subcommittee meeting will be closed to the public for the review, discussion, and evaluation of initial and renewal projects.

The closed portion of each meeting involves discussion, examination, reference to staff and consultant critiques of research protocols. During this portion of each subcommittee meeting, discussion and recommendations will deal with qualifications of personnel conducting the studies, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, as well as research information, the premature disclosure of which could significantly frustrate implementation of proposed agency action regarding such research projects.

As provided by subsection 10(d) of Public Law 92–463, as amended, closing portions of these subcommittee meetings is in accordance with 5 U.S.C. 552b(c)(6) and (9)(B). Those who plan to attend or would like to obtain a copy of minutes of the subcommittee meetings and rosters of the members of the subcommittees should contact LeRoy G. Frey, PhD, Chief, Program Review (121F), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Dr. Frey can be contacted by phone at (202) 254–0288.

Dated: April 6, 2007.

By direction of the Secretary.

**E. Philip Riggin,**

*Committee Management Officer.*

[FR Doc. 07–1877 Filed 4–16–07; 8:45 am]

**BILLING CODE 8320–01–M**

## DEPARTMENT OF VETERANS AFFAIRS

### Special Medical Advisory Group; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Special Medical Advisory Group will meet on May 14, 2007. The meeting will be held in Room 830 at VA Central Office, 810 Vermont Avenue, NW., Washington, DC. The meeting is open to the public.

The purpose of the Group is to advise the Secretary of Veterans Affairs and the Under Secretary for Health on the care and treatment of disabled veterans, and other matters pertinent to the Department's Veterans Health Administration (VHA).

The agenda for the meeting will include discussion of environment of care, polytrauma/medical evaluations, an update on information technology, and women veterans health.

Any member of the public wishing to attend should contact Juanita Leslie, Office of Administrative Operations (10B2), Veterans Health Administration, Department of Veterans Affairs at (202) 273–5882. No time will be set aside at this meeting for receiving oral presentations from the public. Statements, in written form, may be submitted to Juanita Leslie before the meeting or within 10 days after the meeting.

Dated: April 10, 2007.

By direction of the Secretary.

**E. Philip Riggin,**

*Committee Management Officer.*

[FR Doc. 07–1878 Filed 4–16–07; 8:45 am]

**BILLING CODE 8320–01–M**

Federal Register

Tuesday,
April 17, 2007

# Part II

# Department of the Treasury

## Internal Revenue Service

## 26 CFR Part 1

## Application of Section 409A to Nonqualified Deferred Compensation Plans; Final Rule

**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**26 CFR Part 1**

**[TD 9321]**

**RIN 1545–BE79**

## Application of Section 409A to Nonqualified Deferred Compensation Plans

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations regarding the application of section 409A to nonqualified deferred compensation plans. The final regulations are necessary to clarify and explain the rules governing 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.

**FOR FURTHER INFORMATION CONTACT:** Stephen Tackney, (202) 927–9639 (not a toll-free number).

**DATES:** *Effective Date:* These regulations are effective April 17, 2007.

*Applicability Dates:* For dates of applicability, see § 1.409A–6(b).

**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 a nonqualified deferred compensation plan, 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 (published as modified on January 6, 2005, in 2005–1 CB 274), setting forth initial guidance with respect to the application of section 409A, and supplying transition guidance pursuant to a statutory directive. A notice of proposed rulemaking (REG–158080–04, 2005–2 CB 786 [70 FR 57930]) was published in the **Federal Register** on October 4, 2005. See § 601.601(a)(3). A public hearing was conducted on January 25, 2006. In addition, the IRS received written and electronic comments responding to the notice of proposed rulemaking. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision. The amendments are discussed in this preamble.

The Treasury Department and the IRS have also issued six additional notices providing transition guidance with respect to section 409A: (1) Notice 2005–94, 2005–2 CB 1208 (transition guidance with respect to 2005 reporting and withholding obligations); (2) Notice 2006–4, 2006–3 IRB 307 (transition guidance with respect to certain outstanding stock rights); (3) Notice 2006–33, 2006–15 IRB 754 (transition guidance with respect to the application of section 409A(b)); (4) Notice 2006–64, 2006–29 IRB 88 (interim guidance regarding payments necessary to meet Federal conflict of interest requirements); (5) Notice 2006–79, 2006–43 IRB 763 (additional transition relief); and (6) Notice 2006–100, 2006–51 IRB 1109 (transition guidance with respect to 2005 and 2006 reporting and withholding obligations). See § 601.601(d)(2). For a discussion of the continued applicability of these notices, see the Effect on Other Documents section of this preamble.

### Explanation of Provisions and Summary of Comments

*I. Structure and Format of Regulations*

The final regulations generally adopt the structure and format of the proposed regulations. A table of contents has been included in the final regulations, as well as several additional sets of examples addressing various topics.

*II. Definition of Nonqualified Deferred Compensation Plan*

A. Excluded Plans

The final regulations exclude the types of plans described in section 409A(d)(1) from the definition of a nonqualified deferred compensation plan, as well as certain other arrangements that were also set forth in the proposed regulations. Accordingly, the final regulations generally provide that a nonqualified deferred compensation plan for purposes of section 409A does not include a qualified plan, a bona fide sick leave or vacation plan, a disability plan, a death benefit plan, or certain medical expense reimbursement arrangements.

The final regulations clarify that the exemption from coverage under section 409A for certain welfare plans does not apply to medical expense reimbursements that constitute taxable income to the service provider. The coverage exemption applies only to arrangements that provide benefits that are excludable from gross income under section 105 or section 106.

Several commentators requested clarification of when a leave program will be treated as a bona fide sick leave or vacation leave plan for purposes of section 409A. Another commentator requested a clarification of the definition of a compensatory time plan. Because the definitions of these terms may raise issues and require coordination with the provisions of section 451, section 125, and, with respect to certain taxpayers, section 457, the final regulations do not address these issues.

Notice 2005–1, Q&A–6 provides that, until further guidance, taxpayers whose participation in a nonqualified deferred compensation plan would be subject to section 457(f) may rely on the definitions of bona fide vacation leave, sick leave, compensatory time, disability pay, or death benefit plan applicable for purposes of section 457(f) as also being applicable for purposes of section 409A. Until further guidance, such taxpayers may continue to rely on such definitions for purposes of section 409A.

One commentator requested that a qualified employer plan for purposes of the exclusion from section 409A include certain plans covered by section 402(d) (certain plans with a foreign-situs trust treated as qualified plans with respect to the taxation of the participants and beneficiaries) and retirement plans described in section 1022(i)(2) of the Employee Retirement Income Security Act of 1974, as amended (certain Puerto Rican retirement plans). The final regulations adopt this suggestion.

B. Section 457 Plans

The final regulations provide that section 409A is not applicable to an eligible deferred compensation plan under section 457(b), but may be applicable to a deferred compensation plan that is subject to section 457(f). Commentators requested clarification of the application of the exception in the proposed regulations from the definition of deferred compensation referred to as the short-term deferral rule (described in section III.C.1 of this preamble) to a section 457(f) plan. As discussed below, a right to deferred compensation

generally refers to a legally binding right in one taxable year to compensation that is or may be payable in a subsequent taxable year. For purposes of determining the time of payment, the term ''payment'' generally refers to an actual or constructive payment of cash or property. However, the final regulations provide that for purposes of the short-term deferral rule, an amount is treated as paid when it is included in income under section 457(f) whether or not an actual or constructive payment occurs. Accordingly, where the income inclusion under section 457(f) stems from the lapse of a substantial risk of forfeiture that is also treated as a substantial risk of forfeiture for purposes of section 409A, the amount included in income will be considered a short-term deferral for purposes of section 409A. However, the right to earnings on amounts that have previously been included under section 457(f) will be deferred compensation for purposes of section 409A unless the right to the earnings independently satisfies the requirements for an exclusion.

C. Arrangements With Independent Contractors

The final regulations provide that section 409A generally does not apply to an amount deferred under an arrangement between a service provider and an unrelated service recipient if during the service provider's taxable year in which the service provider obtains a legally binding right to the deferred amount 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), and 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.

The final regulations retain the safe harbor in the proposed regulations, under which a service provider is deemed to be providing significant services to two or more such service recipients for this purpose 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 revenues generated by the service provider from the trade or business of providing such services. Commentators expressed concern that the safe harbor did not permit independent contractors to know in advance whether the arrangements under which an independent contractor deferred compensation during a taxable year would be subject to section 409A. Commentators requested certain look-back periods, including the ability to use averaging over the previous three to five years, or to satisfy the 70 percent threshold over a certain portion of the previous three to five years. The Treasury Department and the IRS are concerned that the suggested rules would allow service providers to engage in strategic behavior to ensure that activity in certain years would be exempt from section 409A. Accordingly, the final regulations adopt an additional safe harbor that provides that a service provider that has actually met the 70 percent threshold in the three immediately previous years is deemed to meet the 70 percent threshold for the current year, but only if at the time the amount is deferred the service provider does not know or have reason to anticipate that the service provider will fail to meet the threshold in the current year.

In response to comments, the final regulations provide that if an independent contractor qualifies for the safe harbor for exclusion from coverage under section 409A with respect to arrangements with unrelated service recipients, an arrangement between the independent contractor and a service recipient related to the independent contractor will not be subject to section 409A if the arrangement, and the practices under the arrangement, are bona fide, arise in the ordinary course of business, and are substantially the same as the arrangements and practices (such as billing and collection practices) applicable to one or more unrelated service recipients to whom the independent contractor provides substantial services and that produce a majority of the total revenue that the independent contractor earns from the trade or business of providing such services during the year.

The final regulations further clarify that if at the time the legally binding right to the payment arose, the arrangement was not subject to section 409A because the service provider was an independent contractor that was eligible for this exclusion from coverage under section 409A, the amount deferred under the arrangement during that taxable year (and earnings credited to the deferred amount) will not become subject to section 409A in a later year if the service provider becomes an employee, independent contractor, or other type of service provider subject to the rules of section 409A.

Commentators also requested that a service recipient be permitted to rely upon a representation of an independent contractor that the independent contractor meets the exclusion requirements, so that a service recipient will know whether it is subject to the reporting requirements with respect to amounts deferred subject to section 409A. The Treasury Department and the IRS are continuing to study this issue.

D. Anti-Abuse Rule

If a principal purpose of a plan is to achieve a result with respect to a deferral of compensation that is inconsistent with the purposes of section 409A, the Commissioner may treat the plan as a nonqualified deferred compensation plan for purposes of section 409A.

*III. Definition of Nonqualified Deferred Compensation Plan*

A. In General

The final regulations provide that a nonqualified deferred compensation plan is a plan that provides for the deferral of compensation. The final regulations further provide that a plan generally provides for the deferral of compensation if, under its terms and the relevant facts and circumstances, a service provider has a legally binding right during a taxable year to compensation that, pursuant to its terms, is or may be payable to (or on behalf of) the service provider in a later year. For this purpose, an amount generally is payable at the time the service provider has a right to currently receive a transfer of cash or property, including a transfer of property includible in income under section 83, the economic benefit doctrine or section 402(b). Accordingly, a taxable transfer of an annuity contract is treated as a payment for purposes of section 409A.

The definition of deferral of compensation in the final regulations excludes the condition that the amount not be actually or constructively received and included in income during the taxable year, because that language might cause confusion with respect to the applicable rules governing deferral elections and the prohibition on the acceleration of payments. For example, if a service provider has made an irrevocable election to defer an amount of his or her salary to a future year, that amount is treated as deferred compensation regardless of whether the service recipient actually pays such amount to the service provider during the year in which the services are performed. Any early payment of the deferred compensation (or any right to receive such an early payment) generally would constitute an impermissible acceleration of the payment of the deferred amount.

For this purpose, a plan will be treated as providing for a payment to be made in a subsequent year whether the plan explicitly so provides (including through a service provider election) or the deferral condition is inherent in the terms of the contract. Where the parties have agreed that a payment will be made upon an event that could occur after the year in which the legally binding right to the payment arises, the plan generally will provide for a deferral of compensation (unless otherwise excluded under a specific exception, such as the short-term deferral rule).

For example, if a plan provides a service provider a right to a payment upon separation from service, the plan generally will result in a deferral of compensation regardless of whether the service provider separates from service and receives the payment in the same year as the grant, because under the plan the payment is conditioned upon an event that may occur after the year in which the legally binding right to the payment arises. Similarly, if an arrangement such as a stock option or stock appreciation right not otherwise excluded from coverage under section 409A provides a right to a payment for a term of years where the payment could be received during the short-term deferral period or a subsequent period but is not otherwise includible in income until paid, the arrangement will provide for deferred compensation even though the service provider could receive the payment during the short-term deferral period (for example, by exercising the stock option or stock appreciation right). However, where a plan does not specify a payment date, payment event or term of years (or specifies a date or event certain to occur during the year in which the services are performed), the plan generally will not provide for the deferral of compensation if the service provider actually or constructively receives the payment within the short-term deferral period.

The proposed regulations provided that earnings on deferred amounts are generally treated as deferred compensation for purposes of section 409A. Under the final regulations, whether a deferred amount constitutes earnings on an amount deferred, or actual or notional income attributable to an amount deferred, is determined under the principles defining income attributable to the amount taken into account under § 31.3121(v)(2)–1(d)(2).

A commentator requested clarification of whether a payment for a noncompetition agreement could be subject to section 409A. Because such a payment would occur in connection with the performance or nonperformance of services, and a covenant not to compete does not create a substantial risk of forfeiture for purposes of section 409A, a legally binding right obtained in one year to a payment in a subsequent year in connection with a noncompetition agreement generally would constitute deferred compensation.

B. Legally Binding Right

The regulations define deferral of compensation in the context of a legally binding right to a payment of compensation in a future taxable year. Commentators requested clarification of the standard that would be used to determine whether a service provider has a legally binding right. A legally binding right includes a contractual right that is enforceable under the applicable law or laws governing the contract. A legally binding right also includes an enforceable right created under other applicable law, such as a statute.

One commentator suggested that no legally binding right exists where the payment is made only upon the realization of gain from a particular investment. For example, the commentator argued that a bonus payable based upon the amount that a service provider obtains in selling property should not be treated as granting the service provider a legally binding right to the payment until the property is sold. In such a situation, however, the requirement that the property be sold is a condition to the right to the payment, but the right to the payment is still a legally binding right. The service recipient could not simply revoke the promise, sell the property, and not pay the bonus. However, the condition that the property be sold before the service provider becomes entitled to payment may constitute a substantial risk of forfeiture, depending on the specific facts and circumstances.

C. Short-Term Deferrals

1. In General

Subject to the modifications described in this section III.C of the preamble, the final regulations generally adopt the short-term deferral rule that was contained in the proposed regulations. Under the short-term deferral rule, a deferral of compensation does not occur for purposes of section 409A if the arrangement under which a payment is made does not provide for a deferred payment and the payment is made no later than the 15th day of the third month following the later of the end of the service provider's taxable year or the end of the service recipient's taxable year in which occurs the later of the time the legally binding right to the payment arises or the time such right first ceases to be subject to a substantial risk of forfeiture (subject to certain extensions for unforeseeable events). For this purpose, an arrangement provides for a deferred payment if it provides for a payment that will be made or completed after a date or an event that will or may occur later than the end of the 2½ month period described in the preceding sentence, either because of an affirmative election on the part of the service provider or service recipient or a deferral condition inherent in the terms of the contract (for example, that the amount will be paid upon the service provider's separation from service, which may occur in a future year).

Several commentators requested that additional flexibility be provided to allow payments to be short-term deferrals. By analogy to the rules in the proposed regulations concerning when payments of deferred compensation amounts are considered timely for purposes of the payment date rules, the commentators suggested that payments should qualify as short-term deferrals if made by the end of the year after the year in which a substantial risk of forfeiture lapses, rather than by the 15th day of the third month of that year. The final regulations do not adopt this suggestion. The short-term deferral rule is based on the historical treatment of certain payments paid within a short period following the end of a taxable year as not constituting deferred compensation. See § 1.404(b)–1T, Q&A–2(b). That short period has been defined as ending on the 15th day of the third month following the end of the year, subject to certain extensions for unforeseeable events. Extending the payment date by which a short-term deferral could be paid would be inconsistent with this approach and the legislative history of section 409A (H.R. Conf. Rep. No. 108–755, at 735 (2004)), and accordingly is not adopted in the final regulations. However, the final regulations liberalize the standard under which a payment can be a short-term deferral even if it is delayed due to unforeseeable events. The proposed regulations provided generally that payment could be delayed if the payment would jeopardize the service recipient's solvency and such insolvency was unforeseeable at the time the service provider obtained the right to the payment. By contrast, the final regulations provide generally that payment may be delayed where the

payment would jeopardize the ability of the service recipient to continue as a going concern.

Commentators asked how the short-term deferral rule applies to a series of payments scheduled to commence following the lapse of a substantial risk of forfeiture. The final regulations provide that the short-term deferral rule applies separately to each payment, applying the technical definition of ''payment'' set out in the regulations, provided that the entire payment is made during the short-term deferral period. Accordingly, where a payment has been designated as a separate payment, it may qualify as a short-term deferral (and thus not deferred compensation) even where the service provider has a right to subsequent payments under the same arrangement. In contrast, where a payment has not been designated as a separate payment (such as, for example, a life annuity payment or a series of installment payments treated as a single payment), any initial payments in the series will not be treated as a short-term deferral even if paid within the short-term deferral period. For a discussion of the definition of payment, see § 1.409A–3.

Commentators suggested that a right to a reimbursement be treated as potentially subject to the short-term deferral rule, arguing that the right to the reimbursement payment is subject to a substantial risk of forfeiture that the service provider will not incur the expense. Commentators argued that the short-term deferral rule then could apply if the reimbursement payment were made within a short period following the occurrence of the expense. Generally, the risk that a service provider will fail to incur a reimbursable expense will not qualify as a substantial risk of forfeiture, so the short-term deferral rule will not be applicable. However, the final regulations provide considerable additional flexibility with regard to structuring reimbursement arrangements to meet the requirements of section 409A. For a discussion of these provisions, see section VII.B.2 of this preamble.

2. Application to Event-Based Payments

Some commentators asked whether any payments based on a legally binding right arising in the year of a separation from service are excluded from coverage under section 409A, if paid by the end of the relevant short-term deferral period. For example, where an employee had accrued benefits under a defined benefit supplemental executive retirement plan (SERP) during his career that was payable immediately upon a separation from service, including an amount accrued in the year of separation from service, commentators asked whether the payment of the portion of the benefits accrued in that final year is excluded from coverage under section 409A if paid by March 15 of the year following the separation from service, because the amount is paid within a short period following the year the service provider obtains a vested legally binding right to the additional benefit accrual. (This generally would be of most concern to specified employees subject to the requirement of a six-month delay in payment following a separation from service.)

The analysis that applies in this situation is similar to that applied to the general definition of deferral of compensation, discussed in section III.A of this preamble. The short-term deferral rule does not provide an exclusion from the requirements of section 409A for such current-year benefit accruals because the rule does not apply to amounts of compensation subject to a deferral election. For this purpose, an election to defer includes either an affirmative election on the part of the service provider or a deferral condition inherent in the terms of the contract. Where the parties have agreed that a payment will be made upon an event that does not necessarily coincide with the lapsing of the substantial risk of forfeiture, and could occur at a time beyond the short-term deferral period, the arrangement provides for a deferral election such that the short-term deferral rule does not apply. Accordingly, in this example, because the benefits accrued in the final year of the SERP could have been paid upon an event occurring after the short-term deferral period (if, for example, the individual had not separated from service until a later year), the payment of the benefit accrued in the final year is subject to section 409A and is not a short-term deferral, even if paid by March 15 of the year following the separation from service.

Also, for example, if a plan that is not subject to section 457(f) provides that an amount is subject to a substantial risk of forfeiture until the completion of three years of service, and is payable upon a separation of service following the three years of service, the right to the amount is not a short-term deferral even if the service provider separates from service immediately after vesting in the right, because under the plan the payment is based upon an event other than the lapsing of the substantial risk of forfeiture and such event may occur in a year subsequent to the year in which the risk of forfeiture lapses.

Conversely, where a plan specifies no payment date or payment event, or specifies only the date at which the substantial risk of forfeiture lapses, the plan may qualify for the short-term deferral rule if the payment is made within the applicable short-term deferral period. However, such a plan generally would violate section 409A if the payment were made after the short-term deferral period.

As discussed in this preamble with respect to the general definition of deferred compensation, to implement the statutory scheme, including the applicable reporting and form requirements, taxpayers generally must be able to determine whether an arrangement provides for a deferral of compensation at the time the service provider obtains a legally binding right to the compensation. Although a plan need not specify a payment date to be a short-term deferral that is excluded from coverage under section 409A, the short-term deferral exclusion does not apply if the payment event or date is specified and will or may occur after the end of the short-term deferral period.

The preamble to the proposed regulations explained that where a plan requires that a payment be made on a date within the short-term deferral period, but the payment is made after the specified date and after the end of the short-term deferral period, the arrangement will be treated as a nonqualified deferred compensation plan, but the payment date will be treated as a specified date. Thus, under such an arrangement, if the service provider receives the payment after the specified date, but not later than the end of the year in which the specified date occurs, the payment generally will comply with section 409A. However, taxpayers should note that a provision requiring only that a payment be made on or before the end of the short-term deferral period may not qualify as a permissible specified date for this purpose, if under the facts and circumstances the payment could have been made in more than one taxable year. For a discussion of the application of the definition of a specified payment date to this type of plan, see section VII.B of this preamble.

For a discussion of when rights to compensation upon a separation from service for good reason may be treated as rights to compensation upon an involuntary termination, and the potential application of the short-term deferral exception to these arrangements, see section III.J.3 of this preamble.

D. Stock Options and Stock Appreciation Rights

1. In General

Subject to the modifications described in this preamble, the final regulations adopt the provisions of the proposed regulations excluding from coverage under section 409A statutory stock options and certain other stock rights. Generally under the regulations, nondiscounted stock options and nondiscounted stock appreciation rights issued on service recipient stock that do not include any additional deferral feature are excluded from section 409A.

2. Statutory Stock Options

The final regulations adopt the exclusion from coverage under section 409A for statutory stock options, including incentive stock options described in section 422 of the Code and options granted under an employee stock purchase plan described in section 423 of the Code. This exclusion applies regardless of whether the statutory stock option would be excluded if the same option were not treated as a statutory stock option. For example, an employee stock purchase plan described in section 423 offering a discounted purchase price is not a deferred compensation plan for purposes of section 409A.

Commentators requested clarification, however, of the treatment of a statutory stock option that is modified, or otherwise becomes ineligible to be treated as a statutory stock option. The final regulations adopt the rule set forth in the proposed regulations, and provide that at the time of such modification or event, the modification or other event is treated as the grant of a new option, or causes the option to be treated as having had a deferral feature from the date of grant, as applicable, for purposes of section 409A only if such modification or other event would have been so treated had the option been a nonstatutory stock option immediately before such modification or other event. For example, where an incentive stock option is modified through an extension of the option's term, the extended option will be treated as having had an additional deferral feature from the date of grant for section 409A purposes only if the same extension of a nonstatutory stock option would have resulted in such treatment.

Commentators also requested that the exclusion from coverage under section 409A for certain stock rights issued under plans meeting the requirements of section 423 (employee stock purchase plans) be extended to employee stock purchase plans offered by foreign employers that do not meet such requirements, where the shares are made available for purchase at a discount and substantially all of the participants are nonresident aliens. The legislative history does not provide a basis for extending the exception applicable to options meeting the requirements of section 423 to grants of discounted stock options not meeting the requirements of section 423. Accordingly, this suggestion is not adopted in the final regulations.

3. Definition of Service Recipient Stock

The final regulations adopt the requirement in the proposed regulations that for the exclusion for certain stock rights to apply, the stock right must relate to service recipient stock. Commentators criticized the definition of service recipient stock contained in the proposed regulations as too restrictive. Generally such criticisms centered on two different aspects of the definition of service recipient stock in the proposed regulations—the classes of stock that may qualify as service recipient stock, and the issuer or issuers whose stock may constitute service recipient stock, where the service recipient is comprised of more than one entity.

a. Classes of Stock That May Qualify as Service Recipient Stock

Commentators requested clarification and expansion of the classes of stock of a corporation that may constitute service recipient stock. Commentators generally focused on two issues. First, with respect to stock of a particular service recipient corporation, commentators requested that the stock right be permitted to relate to any class of common stock, regardless of whether another class of common stock of that corporation was publicly traded, and regardless of whether that class of common stock had the greatest aggregate value of all classes of common stock issued by that corporate entity. Subject to the restrictions governing certain preferences as to distributions, the final regulations generally provide that any class of common stock may be used, regardless of whether another class of common stock that could qualify as service recipient stock is publicly traded or has a higher aggregate value outstanding, and regardless of whether the class of stock is subject to transferability restrictions or buyback rights (provided such buyback rights reflect the fair market value of the stock at the time of purchase).

Second, commentators suggested narrowing the types of preferences on a class of common stock that would prohibit that class from being treated as service recipient stock. One commentator requested that the classes of stock permitted as service recipient stock include any class of stock that is widely held by non-service recipients. While it may be unlikely that a widely-held class of stock was created to facilitate an abusive avoidance of section 409A, it does not follow that service recipient stock rights issued on such stock necessarily would be consistent with the intended application of section 409A if, for example, holders of such class enjoyed preferences that would make such stock rights a suitable substitute for nonqualified deferred compensation.

To be treated as service recipient stock under the final regulations, a class of stock must qualify as common stock under section 305 of the Code. Accordingly, the final regulations provide that stock that is not common stock under section 305 is not service recipient stock for purposes of section 409A. However, the mere classification of a class of stock as common stock under section 305 is not sufficient for such stock to be treated as service recipient stock for purposes of section 409A. The Treasury Department and the IRS are concerned that classes of stock that are common stock under section 305 may provide preferences that could permit stock rights with respect to such stock to resemble traditional nonqualified deferred compensation, such that exclusion of such stock rights would permit the avoidance of section 409A.

Commentators suggested that a preference with respect to liquidation rights, without any other preferences such as a preferential right to dividends, should be permitted under the definition of service recipient stock. A holder of this class of stock would not be guaranteed any return, but rather would simply be guaranteed preferred distribution rights upon a complete liquidation of the service recipient. The final regulations generally adopt this suggestion.

With respect to other preferential rights, commentators were unable to provide a workable standard under which permissible preferences could be distinguished from impermissible preferences. Accordingly, the final regulations do not treat any stock including such preferences as service recipient stock. However, the Treasury Department and the IRS continue to study this area, and the final regulations authorize the publication of other additional guidance, should a workable standard be developed.

b. Entities the Stock of Which May Qualify as Service Recipient Stock

Commentators also requested an expansion of the class of entities the stock of which can qualify as service recipient stock where the service recipient is comprised of multiple entities. The Treasury Department and the IRS believe that the stock right exception under section 409A was intended to cover stock rights directly reflecting the enterprise value of the entity for which the service provider is providing services. Consistent with this approach, the final regulations provide that service recipient stock may include the stock of the corporation for which the service provider was providing services at the date of grant. In addition, the final regulations provide that service recipient stock may include stock of any corporation in a chain of organizations all of which have a controlling interest in another organization, beginning with the parent organization and ending with the organization for which the service provider was providing services at the date of grant of the stock right. Similarly to the proposed regulations, the final regulations provide that the term ''controlling interest'' has the same meaning as provided in § 1.414(c)–2(b)(2)(i), except that where that regulation requires at least an 80 percent interest, the final regulations generally require only a 50 percent interest. 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 final regulations generally require only a 20 percent interest. For purposes of determining ownership of an interest in an organization, the attribution rules of § 1.414(c)–4 apply, and the exclusion rules of § 1.414(c)–3 also apply. For example, under the final regulations, with respect to an employee of a subsidiary corporation, the common stock of the ultimate parent corporation, or of a subsidiary corporation anywhere in the chain of corporate ownership between the subsidiary that employed the employee and the ultimate parent corporation (a higher tier subsidiary), could qualify as service recipient stock for purposes of determining whether a stock right issued to such employee with respect to such stock was excluded from coverage under section 409A, provided that the 50 percent or 20 percent ownership standard, as applicable, was satisfied by each corporation in the chain.

The proposed regulations contained many requirements for using an ownership level of less than 50 percent. Commentators requested several simplifications of these requirements. In response, the final regulations no longer require a formal election by any corporation. Rather, each individual grant of a stock right is analyzed to determine whether the stock qualifies as service recipient stock with respect to a service provider at the time the stock right is granted. If a corporation owns at least 50 percent of the stock of one corporation and owns less than 50 percent of the stock of another corporation, and it intends to treat its stock as service recipient stock with respect to employees of both corporations, there is no requirement that a legitimate business criteria exist with respect to the issuance of stock rights on the parent corporation stock to service providers of the first such corporation. The legitimate business criteria standard applies only to stock rights issued to service providers of subsidiaries that are not majority-owned, because the test of legitimate business criteria relates to the actual issuance of a stock right to a particular service provider. Accordingly, a subsidiary may have more than one shareholder corporation the stock of which qualifies as service recipient stock with respect to a subsidiary employee such as, for example, where three entities each own a one-third interest in the subsidiary. However, with respect to each grant of a stock right on stock of a particular non-majority shareholder corporation to a service provider of a particular subsidiary, there must exist legitimate business criteria for issuing such a stock right. Even if legitimate business criteria exist with respect to the issuance of a stock right on stock of a particular shareholder corporation to a particular service provider, legitimate business criteria may or may not exist with respect to the issuance of a stock right to the same service provider on stock of another shareholder corporation.

The legitimate business criteria requirement is a facts and circumstances test, focusing generally on whether there is sufficient nexus between a particular service provider and the entity, the stock of which underlies the stock right granted to the service provider, for the grant to serve a legitimate non-tax business purpose. As provided in the preamble to the proposed regulations, if a corporation issued a stock right on its stock to a current employee of a joint venture in which the corporation was a venturer, and the employee was a former employee of the corporate venturer, generally the issuance would be based on legitimate business criteria. Similarly, if the corporate venturer issued such a right to an employee of the joint venture who it reasonably expected would become an employee of the corporate venturer in the future, generally the legitimate business criteria requirement would be met. By contrast, where an employee has no real nexus with a corporate venturer, such as generally happens when the corporate venturer is a passive investor in the service recipient, the use of the investor corporation stock as the stock underlying a stock right grant to that employee generally would not be based upon legitimate business criteria. Similarly, where a corporation holds only a minority interest in an entity that in turn holds a minority interest in the entity for which the employee performs services, such that the corporation holds only an insubstantial indirect interest in the entity receiving the services, legitimate business criteria generally would not exist for issuing a stock right on the corporation's stock to the employee.

The Treasury Department and the IRS remain concerned that the manipulation of the structure of a related group of corporations may be used to allow stock options or stock appreciation rights to mimic the characteristics of nonqualified deferred compensation, by compensating holders based on predictable amounts and investment returns unrelated to the enterprise value of an operating entity. Accordingly, the exception contained in the proposed regulations under which the stock of a corporation serving as investment vehicle is not considered service recipient stock has been retained. In addition, an anti-abuse rule has been added to address corporate structures, transactions, or stock right grants, a principal purpose of which is the avoidance of the application of section 409A to an arrangement otherwise providing deferred compensation. These corporate structures, transactions, and stock right grants generally will occur where the structure, transaction, or grant is intended to provide enhanced security for the value of the stock right as a means of providing deferred compensation, rather than as compensation related to an increase in the true enterprise value of the service recipient. The regulations provide that if an entity becomes a member of a group of corporations or other entities treated as a single service recipient, and the primary source of income or value of such entity arises from the provision of management services to other members of the service recipient group, if any stock rights are issued with respect to such entity it is presumed that such

structure was established for purposes of avoiding the application of section 409A.

c. Equity Interests in Certain Non-Corporate Entities

The final regulations permit certain equity interests in a non-stock mutual company to be treated analogously to equity interests in a corporation. Commentators requested that the definition of service recipient stock be expanded to cover interests in cooperatives and interests in the value of an Indian tribal enterprise. The regulations do not include such interests in the definition of service recipient stock, but provide the IRS authority to provide guidance expanding the definition of service recipient stock. For a discussion of the application of the exclusion for certain stock rights to rights issued on equity interests in entities taxed as partnerships, see section III.G of this preamble.

4. Valuation

a. In General

The final regulations provide that for the exclusion for stock rights to apply, the stock right must specify an exercise price of the stock right that may never be less than the fair market value of the underlying stock on the date the stock right is granted. For purposes of this discussion and the final regulations, the exercise price of a stock appreciation right refers to the base stock value from which the appreciation is measured for purposes of determining the compensation payable under the stock appreciation right (for example, a stock appreciation right providing for a payment of the excess of the fair market value of 100 shares over $100 would have a $1 per share exercise price).

Several commentators expressed concerns regarding the determination of the fair market value of the underlying stock. Some commentators requested that the valuation rules applicable to incentive stock options be applied for purposes of the exclusion from section 409A. Under those rules, if the stock option would otherwise fail to be an incentive stock option solely because the exercise price was less than the fair market value of the underlying stock as of the date of grant, generally the option is treated as an incentive stock option if the issuer attempted in good faith to set the exercise price at fair market value. See section 422(c)(1). The Treasury Department and the IRS believe that this is not the appropriate standard for determining whether stock rights are subject to section 409A. Incentive stock options are subject to strict limitations on the amount of such options that may be granted to a particular employee. See section 422(d). In contrast, there are no such limits applicable to nonstatutory stock options, and grants of nonstatutory stock options often far exceed the limitation applicable to incentive stock options. In addition, section 422(c)(1) explicitly provides for the good faith standard with respect to incentive stock options, while no such provisions exist within section 409A or its legislative history.

Commentators requested clarification of the consistency standard with respect to the use of a valuation method. Specifically, commentators asked whether one valuation method could be used for purposes of establishing the exercise price while another method could be used for purposes of determining the fair market value of the stock at the time of the payment (for example, to determine the amount of payment in the case of a stock appreciation right or a stock option where the stock is subject to repurchase by the service recipient). The final regulations clarify that consistency is not required, provided that each valuation method used otherwise meets the requirements of the final regulations. Accordingly, a service recipient may use one valuation method for purposes of establishing an exercise price, but another valuation method for purposes of establishing the payment amount (in the case of a stock appreciation right) or the buyback amount (in the case of a stock option where the underlying stock is subject to a buyback arrangement). However, once an exercise price has been established, the exercise price may not be changed through the retroactive use of another valuation method. In addition, where after the date of grant, but before the date of exercise, of the stock right, the service recipient stock to which the stock right relates becomes readily tradable on an established securities market, the service recipient must use a valuation method for stock readily tradable on an established securities market for purposes of determining the payment amount (in the case of a stock appreciation right) or the buyback amount (in the case of a stock option where the underlying stock is subject to a buyback arrangement).

b. Valuation—Stock Readily Tradable on an Established Securities Market

The final regulations adopt the rules under the proposed regulations governing valuation of stock readily tradable on an established securities market, generally requiring that the valuation of such stock be based upon the contemporaneous prices established in the securities market, subject to the modifications discussed in this preamble. Some commentators requested additional guidance with respect to when a stock will be treated as readily tradable. The final regulations adopt the same standard as that set forth in § 1.280G–1, Q&A–6(e), that stock is treated as readily tradable if it is regularly quoted by brokers or dealers making a market in such stock.

With respect to the rules governing the valuation of stock that is readily tradable on an established securities market, commentators generally focused on the provision of the proposed regulations permitting the use of an average selling price during a specified period that is within 30 days before or 30 days after the date of grant. Specifically, comments concentrated on the requirement that the commitment to grant the stock right with an exercise price set using such an average selling price be irrevocable before the beginning of the specified period. Commentators questioned both the purpose of the requirement of the commitment to the valuation method, as well as the actions required to satisfy the rule if averaging were being used.

The rule was intended to prohibit the use of an average price, set on a look-back basis, to ensure a discounted exercise price. For example, if a corporation decided to grant a stock option on July 1, and it could set the exercise price using an average selling price for any period falling within the prior 30 days without having had a prior commitment to a specific averaging period, the corporation could simply look for the lowest price that occurred during the prior June. Furthermore, if the corporation were not committed to grant the stock option on July 1, the corporation could wait until its stock price began to rise and then grant an option using the selling price on a given day during the previous 30 days to provide a particular discount. Accordingly, the final regulations require that the commitment to grant the stock right with an exercise price set using such an average selling price be irrevocable before the beginning of the specified period. To satisfy this requirement, the service recipient must designate the recipient of the stock option, the number of shares the stock option will permit the holder of the stock option to purchase, and the method for determining the exercise price including the period over which the averaging will occur, before the beginning of the specified averaging period.

One commentator stated that the requirement of an irrevocable commitment to the averaging period could not be met under French law, because French law requires that the stock option exercise price be set based on the average trading price over the preceding 20 days and the commitment to the grant before the beginning of the period may be viewed as violating that requirement. The final regulations provide that where applicable foreign law requires that the compensatory stock right granted by the issuer must be priced based upon a specific price averaging method and period, a stock right granted in accordance with such applicable foreign law will be treated as meeting the requirement, provided that the averaging period may not exceed 30 days.

c. Valuation—Stock Not Readily Tradable on an Established Securities Market

i. In General

The final regulations adopt the provisions in the proposed regulations relating to the valuation of stock not readily tradable on an established securities market, subject to the modifications discussed in this section III.C.4.c. Accordingly, a valuation of stock based upon a reasonable application of a reasonable valuation method is treated as reflecting the fair market value of the stock. To meet this standard, it is not necessary that a taxpayer demonstrate that the value was determined by an independent appraiser. Where the taxpayer can otherwise demonstrate that the valuation was determined by the reasonable application of a reasonable valuation method, the standard will be met.

One commentator requested that the factors to be considered in determining the fair market value of the stock should be modified to include consideration of any recent equity sales made by the corporation in arm's-length transactions. The final regulations adopt this suggestion.

The final regulations continue to require that in the case of a stock right issued with respect to stock that was not publicly traded at the time the right was issued, but becomes publicly traded before the right is exercised, the stock value for purposes of calculating the payment amount (in the case of a stock appreciation right) or the buyback amount (in the case of a stock option where the underlying stock is subject to a buyback agreement) must be based upon the rules governing stock that is publicly traded. This does not mean that the initial exercise price determined under the rules governing stock that is not publicly traded must be reset. Rather, this means only that the value at the time of exercise used to determine the payment amount or the buyback amount must be determined under the rules governing stock that is publicly traded. For example, if a service provider holds an excluded stock appreciation right with an exercise price of $1 that was fixed based on a valuation of the closely-held corporate stock at the time of grant, and before exercise the stock becomes readily tradable on an established securities market, the amount payable upon exercise must be the excess of the value of the stock based on its trading price over the $1 exercise price.

ii. Safe Harbor Presumptions

The final regulations adopt a presumption in specified circumstances that, for purposes of section 409A, a valuation of stock reflects the fair market value of the stock, rebuttable only by a showing that the valuation is grossly unreasonable. The presumption applies where the valuation is based upon an independent appraisal, a generally applicable repurchase formula (applicable for both compensatory and noncompensatory purposes) that would be treated as fair market value under section 83, or, in the case of illiquid stock of a start-up corporation, a valuation by a qualified individual or individuals applied at a time that the corporation did not otherwise anticipate a change in control event or public offering of the stock.

Many of the comments with respect to these presumptions related to the presumption applicable to illiquid stock of start-up corporations. As set forth in the proposed regulations, the start-up corporation presumption would not apply if the service recipient or service provider could reasonably anticipate, as of the time the valuation is applied, that the service recipient would undergo a change in control event or make a public offering of securities within the 12 months following the event to which the valuation is applied. Commentators suggested that a 12-month period is too long, because changes occur so rapidly in the business world that it often is difficult or impossible to predict so far in advance whether such an event will occur. Commentators suggested that the service provider should retain the benefit of the presumption unless the issuing corporation entered into a definitive agreement or filed its registration statement with the Securities and Exchange Commission within a period of 15 or 30 days after issuing the stock right.

The Treasury Department and the IRS believe that a 15-day or a 30-day period is too short. Although there is always a risk that a public offering will fail or that a corporate transaction will not occur, the Treasury Department and the IRS also believe that a person should reasonably be able to anticipate whether such a transaction will occur during a reasonable period before the transaction.

Accordingly, the final regulations provide that the start-up corporation presumption will not apply if at the time the valuation is made, the service recipient or service provider may reasonably anticipate that the service recipient will undergo a change in control event in the next 90 days or an initial public offering within the next 180 days. As under the proposed regulations, the rule in the final regulations is concerned with what the parties may reasonably anticipate at the time the stock right is issued.

Other comments requested examples of persons with sufficient knowledge, experience, and skill in valuing illiquid stock of a start-up corporation. Because knowledge, skill, and training may be obtained in different ways, the final regulations do not provide specific examples. However, the regulations clarify that the standard to be applied is whether a reasonable individual, upon being apprised of such person's relevant knowledge, experience, education, and training, would reasonably rely on the advice of such person with respect to valuation in deciding whether to accept an offer to purchase or sell the stock being valued. The final regulations also clarify that significant experience generally means at least five years of relevant experience in business valuation or appraisal, financial accounting, investment banking, private equity, secured lending, or other comparable experience in the line of business or industry in which the service recipient operates.

With respect to the presumption based upon a generally applicable buyback formula, some commentators requested that the presumption apply where the formula is applicable to all compensatory stock transactions, but not also applicable to all noncompensatory stock transactions. The final regulations do not adopt this suggestion. However, the final regulations clarify that to meet the requirements of the presumption, the buyback formula is required to be applicable to compensatory and noncompensatory transactions with the issuer or a person owning 10 percent or more of the stock of the issuer, but is not

required to be applicable to transactions with other persons or transactions that are part of an arm's length transaction constituting the sale of all or substantially all of the stock of the issuer to an unrelated purchaser.

5. Modification of a Stock Right

The final regulations continue to apply certain rules addressing modifications, extensions and renewals of stock rights. Although these rules in many respects resemble the rules applicable to statutory stock options, the rules are not intended to incorporate the rules applicable to statutory stock options except where explicitly provided.

The final regulations generally retain the rules in the proposed regulations that generally treat extensions of the exercise period of a stock right as an additional deferral feature as of the date of grant of the right, with an exception for certain limited extensions following a separation from service. Commentators characterized these rules as unnecessarily restrictive. Specifically, commentators argued that the extension of a stock option upon the occurrence of a separation from service (often in connection with a program of layoffs) or a corporate transaction is a common practice, and that often these extensions cover periods longer than the limited period provided in the proposed regulations. In addition, commentators argued that the same substantive results could be obtained by specifying a longer term for the stock right and providing the service recipient the discretion to shorten the term, rather than providing discretion to extend a shorter term, and that the former approach would be permissible under the proposed regulations. In response, the final regulations provide that the extension of an option exercise period generally is not treated as an additional deferral feature or a modification of the stock option for section 409A purposes if the exercise period is not extended beyond the earlier of the original maximum term of the option or 10 years from the original date of grant of the stock right.

Many commentators also requested that the extension of the exercise period of a stock right not be treated as an additional deferral feature for purposes of section 409A, where at the time of the extension the fair market value of the underlying stock does not exceed the exercise price (an ''underwater'' option). Because the issuance of an otherwise identical option with an exercise period ending after the end of the exercise period of the underwater option would be excluded from coverage under section 409A, the final regulations provide that such an extension does not constitute an additional deferral feature.

The final regulations adopt the provisions in the proposed regulations regarding substitution or assumption of stock rights due to a corporate transaction, which are generally in accordance with the corresponding provisions governing incentive stock options. The final regulations clarify that the applicable corporate transactions for this purpose include only those transactions described in § 1.424–1(a)(3). One commentator requested that the provision permitting substitutions of stock options be modified to reflect that a holder of a nonstatutory stock option is not required to be employed by the successor entity. The final regulations adopt this suggestion, so that a substituted nonstatutory stock option may be treated as a continuation of the initial option even where the holder of the option is not employed or otherwise providing services to the successor entity, provided the substitution otherwise meets the rules provided in the regulations.

6. Other Stock Right Issues

The final regulations adopt certain definitions from the regulations governing statutory stock options, modified as appropriate for purposes of applying the rules under section 409A. These include the time and date of grant of an option (§ 1.421–1(c)), and the definitions of option (§ 1.421–1(a)), stock (§ 1.421–1(d)), exercise price (§ 1.424–1(e)), exercise (§ 1.421–1(f)), and transfer (§ 1.421–1(g)). These definitions apply by analogy to stock appreciation rights.

The final regulations adopt the rule that a right to a payment of accumulated dividend equivalents at the time of the exercise of a stock right generally will be treated as a reduction in the exercise price of the stock right, causing the stock right to be deferred compensation subject to the requirements of section 409A. The final regulations provide that an arrangement to accumulate and pay dividend equivalents the payment of which is not contingent upon the exercise of a stock right may be treated as a separate arrangement for purposes of section 409A. Such an arrangement generally will be required to comply with section 409A (unless it independently qualifies for an exception from coverage under section 409A), but will not affect whether the related stock right qualifies for the exclusion from coverage under section 409A. The right to the dividend equivalents may be set forth within the stock right plan or the individual stock right grant, or in a separate document, as long as the payment of the dividend equivalents is not contingent upon the exercise of the stock right.

Commentators also asked whether the exclusion of stock rights from coverage under section 409A would apply to tandem rights, meaning a stock right that combines a stock option right and a stock appreciation right, exercisable on an alternative basis. Similarly, commentators asked whether the substitution of a stock option for a stock appreciation right, or vice versa, where all the terms except the mode of payment upon exercise are similar, would be treated as a modification of a stock right. The application of section 409A generally is not affected by the medium of a taxable payment (for example, cash or stock). Accordingly, whether a stock right is expressed as a tandem arrangement under which the exercise of one right terminates the other right, or there is a substitution of a stock appreciation right for a stock option identical in all respects except for the medium of payment, generally does not impact whether the arrangement is excluded from coverage under section 409A.

Commentators requested further clarification of the application of section 409A to stock option gain deferrals. The ability to defer gain upon the exercise or exchange (including a purported forfeiture) of a stock right is incompatible with the exclusion of certain stock rights from the requirements of section 409A because such exclusion is predicated on the option not having any additional deferral feature. Accordingly, if an arrangement provides for a potential to defer the payment of cash or property upon the exercise or exchange of a stock right beyond the year the right is exercised or beyond the original term of the stock right, the arrangement provides for a deferral feature and must comply with the requirements of section 409A from the time the legally binding right granted by the award arises.

Because a stock option with a deferral feature is subject to section 409A regardless of whether the deferral feature is actually utilized, an option that includes a provision permitting deferral of option gain generally will not satisfy the time and form of payment rules under section 409A if the service provider can exercise the option in more than one taxable year. If a deferral feature is added to a preexisting option, the option will be treated as having included a deferral feature as of the original date of grant, generally resulting in a violation of section 409A.

However, the final regulations provide that a stock right will not be treated as having a deferral feature where the service recipient delays a payment because the making of the payment would violate applicable Federal, state, local, or foreign law or jeopardize the ability of the service recipient to continue as a going concern. Although these provisions permit the delay for purposes of section 409A, no inference should be drawn as to the Federal tax consequences of such a delay under any other section of the Code or Federal tax doctrine such as section 83, section 451, the constructive receipt doctrine, or the economic benefit doctrine.

Commentators requested that the definition of service recipient stock be expanded to include the stock of a corporation for which a service recipient provides substantial services, at least with respect to a service provider of the service recipient that is providing services to the corporation. The legislative history does not support such a broad interpretation of service recipient stock, and the final regulations do not adopt this suggestion.

E. Restricted Property

The final regulations provide, as did the proposed regulations, that a grant of restricted property generally will not constitute a deferral of compensation for purposes of section 409A. Commentators requested that the regulations clarify that a vested right to receive nonvested property in a future year does not constitute deferred compensation. Commentators argued that a right to receive nonvested property is not truly vested. For example, commentators argued that a right to receive restricted stock that will be subject to a substantial risk of forfeiture until the service provider completes three years of future services cannot be a vested right. The final regulations adopt this suggestion, so long as the risk of forfeiture to which the stock is subject constitutes a substantial risk of forfeiture for purposes of section 409A.

Commentators specifically requested clarification of the circumstances under which a service provider may elect to be paid a bonus or other payment in the form of restricted stock, rather than cash. Generally an election between compensation alternatives, none of which provides for a deferral of compensation within the meaning of section 409A, will not cause the election to be subject to the section 409A timing restrictions. Thus, a choice between an award of restricted stock or stock options that are not subject to section 409A will not be governed by the section 409A election timing rules. However, where any of the alternatives involves a deferral of compensation subject to section 409A, the election must comply with the provisions of section 409A. In addition, no inference should be drawn as to the Federal tax consequences of such an election provision under any other section of the Code or Federal tax doctrine such as section 83, section 451, the constructive receipt doctrine, or the economic benefit doctrine.

F. Section 402(b) Trusts

The final regulations continue to except from coverage under section 409A transfers of a beneficial interest in a trust, or a transfer to or from a trust, to the extent such a transfer is subject to section 402(b). The final regulations further clarify that a right to compensation required to be included in income under section 402(b)(4)(A) (alternative taxation of highly compensated employees of a section 402(b) trust that fails to meet the requirements of section 401(a)(26) or section 410(b)) also is not a deferral of compensation. However, a right to receive a benefit formulated as a right to a future contribution to a section 402(b) trust is similar to a right to receive property in a future taxable year, and generally would constitute deferred compensation.

G. Arrangements Between Partnerships and Partners

The proposed regulations did not address the application of section 409A to arrangements between partnerships and partners, and these final regulations also do not address such arrangements. The statute and the legislative history of 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. Commentators raised 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 are continuing to analyze the issues raised in this area. 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 and section II.E. of the preamble to the proposed regulations.

Notice 2005–1, Q&A–7 provided that until further guidance is issued for purposes of section 409A, taxpayers may treat the issuance of a partnership interest (including a profits interest) or an option to purchase a partnership interest, granted in connection with the performance of services under the same principles that govern the issuance of stock. For this purpose, taxpayers may apply the principles applicable to stock options or stock appreciation rights under these final regulations, as effective and applicable, to equivalent rights with respect to partnership interests.

Taxpayers also may continue to rely upon the explanation in the preamble to the proposed regulations regarding the application of section 409A to guaranteed payments for services described in section 707(c). As stated in that preamble, 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.

Commentators raised issues concerning the application of the provision in Notice 2005–1, Q&A–7 stating that until further guidance is issued, taxpayers may treat arrangements providing for payments subject to section 736 (payments to a retiring partner or a deceased partner's successor in interest) as not being subject to section 409A, except that an arrangement providing for payments that qualify as payments to a partner under section 1402(a)(10) is subject to section 409A. Section 1402(a)(10) provides for an exception from the Self-Employment Contributions Act (SECA) tax for payments to a retired partner, provided that certain conditions are met. Specifically, the payments must be made pursuant to a written plan of the partnership, must be on account of the partner's retirement and must continue at least until the partner's death. In addition, to qualify for the exception, the partner must not have rendered services during the partnership's taxable year ending within or with the partner's taxable year in which the amounts were received, as of the close of the partnership's taxable year no obligation

must exist from the other partners to such retired partner except with respect to retirement payments under such plan, and before the end of the partnership's taxable year such retired partner's share, if any, of the capital of the partnership must have been paid to him in full.

Commentators questioned the appropriateness of the inclusion of such arrangements under section 409A, because neither the statute nor the legislative history refers to section 1402(a)(10). However, the Treasury Department and the IRS believe it is appropriate for such arrangements to be subject to section 409A because such arrangements are purposefully created to provide deferred compensation, and do not raise issues regarding the coordination of the provisions of section 409A with the provisions of section 736, specifically the rules governing the classification of payments to a retired partner under section 736(a) (payments considered as distributive share or guaranteed payments) and section 736(b) (payments for interest in partnership).

However, further clarification and relief is provided concerning the application of the deferral election timing rules to these payments. Until further guidance is issued, for purposes of section 409A, taxpayers may treat the legally binding right to the payments excludible from SECA tax under section 1402(a)(10) as arising on the last day of the partner's taxable year before the partner's first taxable year in which such payments are excludible from SECA tax under section 1402(a)(10), and the services for which the payments are compensation as performed in the partner's first taxable year in which such payments are excludible from SECA tax under section 1402(a)(10). Accordingly, for purposes of section 409A, the time and form of payment of such amounts generally may be established, including through an election to defer by the partner, on or before the final day of the partner's taxable year immediately preceding the partner's first taxable year in which such payments are excludible from SECA tax under section 1402(a)(10). However, this interim relief does not apply a second time where an amount paid under an arrangement in one year has been excluded from SECA tax under section 1402(a)(10), and an amount paid in a subsequent year has not been excluded from SECA tax under section 1402(a)(10) because, for example, the partner performed services in that subsequent year.

H. Foreign Plans

1. Plans Covered by an Applicable Treaty

The proposed regulations provided an exclusion from the definition of a nonqualified deferred compensation plan for any scheme, trust, or arrangement maintained with respect to an individual where contributions made by or on behalf of such individual to such scheme, trust or arrangement are excludable for Federal income tax purposes under an applicable income tax treaty. The final regulations retain that exclusion and clarify that the exclusion applies to the extent contributions made by or on behalf of such individual to such scheme, trust, arrangement or plan, or credited allocations, accrued benefits, or earnings or other amounts constituting income, of such individual under such scheme, trust, arrangement or plan, 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.

2. Exclusion for Benefits Earned Under a Broad-Based Foreign Retirement Plan

The proposed regulations contained an exclusion from coverage under section 409A for amounts deferred under a broad-based foreign retirement plan, subject to certain conditions, including that the service provider not be eligible to participate in a qualified employer plan, and that if the person is a U.S. citizen or lawful permanent resident, the exception only applies to nonelective deferrals of foreign earned income (as defined in section 911(b)(1)) that do not exceed the limits under section 415(b) and (c) that would be applicable if the plan were a qualified plan. Deferrals by participants that are nonresident aliens are not subject to the limitation based on section 415. The final regulations adopt this provision, subject to certain modifications.

Many of the commentators requested expansion of the exclusion for broad-based foreign retirement plans. One commentator requested that the exclusion apply to U.S. citizens working in the United States for a foreign employer. The Treasury Department and the IRS do not believe such an exception is justified. However, the exception for U.S. citizens or lawful permanent residents has been expanded to cover nonelective deferrals of foreign earned income as defined in section 911(b)(1) without regard to section 911(b)(1)(B)(iv) and without regard to the requirement that the income be attributable to services performed during the period described in section 911(d)(1)(A) or (B). Accordingly, the exception may now cover certain participation by a U.S. citizen or lawful permanent resident who works overseas during only part of a year, and therefore is not a bona fide resident of a foreign country for an uninterrupted period that includes an entire taxable year, or is not present in the foreign country at least 330 full days during a period of 12 consecutive months.

The regulations have also been modified to address nonqualified deferred compensation plans covering bona fide residents of a U.S. possession. Under the regulations a bona fide resident of a possession who participates in a broad-based foreign retirement plan is not subject to section 409A with respect to participation in such plan. In addition, a plan substantially all of the participants in which are bona fide residents of a possession is eligible to be treated as a broad-based foreign retirement plan, so that U.S. citizens and resident aliens (other than bona fide residents of a possession) who participate in such a plan may be eligible for the more limited exclusion for participation in a broad-based foreign retirement plan.

Another commentator requested that the exclusion apply to a plan that otherwise meets the requirements for the exclusion, regardless of whether the plan is sponsored by a foreign or U.S. employer. This suggestion has been adopted in the final regulations.

Other commentators requested further clarification and revision of certain of the requirements to qualify for the exclusion. One commentator requested a safe harbor treating any plan granted favorable tax treatment under the laws of a foreign jurisdiction as qualifying for the exclusion. The Treasury Department and the IRS believe this standard is both too broad and not administrable, and this suggestion has not been adopted in the final regulations.

Another commentator requested that the regulations provide a safe harbor percentage for determining whether substantially all of a foreign plan's participants are nonresident aliens. The final regulations do not adopt such a provision. However, the final regulations clarify that in determining whether substantially all of a foreign plan's participants are nonresident aliens or bona fide residents of a possession, only active participants are considered. For this purpose, active participants include individuals who, under the terms of the plan and without further amendment or action by the plan sponsor, are eligible to make or receive contributions or accrue benefits under

the plan (even if the individual has elected not to participate in the plan).

A similar standard applies to the requirement that the individual not be eligible to participate in a qualified employer plan. The final regulations provide that a service provider will be treated as eligible to participate in a qualified employer plan if, under the plan's terms and without further amendment or action by the plan sponsor, the service provider is eligible to make or receive contributions or accrue benefits under the plan (even if the service provider has elected not to participate in the plan).

The final regulations also clarify that the exclusion for United States citizens and lawful permanent residents applies to nonelective deferrals even if elective deferrals are permitted under the same plan, provided that the amounts deferred through nonelective deferrals and earnings on such amounts are distinguishable from amounts deferred through elective deferrals and earnings on such amounts, such as through the use of separate accounts.

3. Tax Equalization Payments

The proposed regulations excluded from coverage under section 409A certain arrangements, referred to as tax equalization arrangements, that provide for payments intended to compensate the service provider for the excess of taxes actually imposed by a foreign jurisdiction on the compensation paid over the taxes that would be imposed if the compensation were subject solely to United States Federal income tax, subject to certain requirements. The final regulations adopt these provisions, subject to modifications. Based upon the comments received, the final regulations generally expand the exclusion in two respects. First, the final regulations extend the tax equalization payments exception to cover reimbursements of U.S. taxes that exceed foreign taxes. Second, the final regulations provide that the payment must be made by the end of the second taxable year of the service provider following the latest of the deadline for filing a U.S. Federal tax return or the deadline for filing foreign tax returns (or if a foreign return is not required to be filed, the due date for foreign tax payments) reflecting the compensation for which the tax equalization payment is provided.

Commentators also asked how such reimbursement agreements could address the potential for an audit or other tax controversy, both in the U.S. and abroad. The same issue arises with respect to tax gross-up payments in general. For a discussion of the treatment of the right to such payments, see section VII.B.4 of this preamble.

4. Certain Limited Deferrals by Nonresident Aliens

The proposed regulations provided an exception for amounts deferred by a nonresident alien under a foreign plan maintained by a foreign service recipient, to the extent the amounts deferred during the year did not exceed $10,000. The final regulations adopt this provision, subject to the modifications described in this preamble. In response to comments, the final regulations clarify that the exception applies to amounts deferred in that taxable year up to the specified limit, regardless of whether additional amounts are deferred. In making this modification, the exclusion provision has been moved from the section providing a definition of nonqualified deferred compensation plan (§ 1.409A–1(a)) to the section providing a definition of an amount deferred (§ 1.409A–1(b)). In addition, the final regulations clarify that this exception applies to earnings on amounts deferred that were subject to the exception, provided that the taxpayer can identify both the deferred amounts excepted and the applicable earnings. Finally, in response to comments requesting that the limit be increased and indexed, the final regulations increase the limit for the small deferral exception to the limit provided for elective deferrals under section 402(g).

The small deferral exception is intended to provide relief to service providers that are not U.S. citizens or lawful permanent residents, are participating in a foreign plan, and perform services in the U.S. for which they are compensated. In such cases, the nonresident alien may inadvertently defer a relatively small amount of compensation that would otherwise be subject to U.S. Federal income tax. This may occur where the service provider defers the compensation that the service provider would otherwise have been paid for a brief period of service in the United States, or where the service provider receives service or compensation credit for a brief period of service in the United States under a benefit formula of a nonqualified deferred compensation plan.

Some commentators requested that the exemption be extended to cover all amounts deferred by nonresident aliens under foreign plans to the extent the nonresident alien provides only temporary services in the U.S. Where the compensation earned by such a nonresident alien would be subject to U.S. income tax if paid when earned, the Treasury Department and the IRS do not believe that such a broad exception is warranted.

5. Other Foreign Plans

The final regulations adopt the exclusion in the proposed regulations for deferrals of amounts that would be excluded as foreign earned income under section 911 if the amounts had been paid out when earned. The final regulations clarify that the amount is limited to an amount equal to or less than the difference between the maximum section 911 exclusion for the year and the amount actually excluded for the year. Commentators requested that the exception for the deferral of amounts that would be excluded under section 911 be relaxed, so that U.S. expatriates who return for periods longer than 30 days or who earn compensation for services performed in the U.S. that is not excluded as foreign earned income, may also take advantage of the exception. This exception was not intended to address such plans. Rather, the provision was intended to provide relief from the section 409A requirements for U.S. expatriates who intend to work full-time outside the U.S. for compensation that is less than the exclusion amount under section 911, because it would severely disadvantage such workers to expect them to request that their potential foreign employers modify standard plans to accommodate them, or to expect such workers to otherwise be able to determine how to avoid or comply with section 409A.

Commentators pointed out, however, that earnings on deferred amounts, including increases in amounts deferred under a nonaccount balance plan solely due to the passage of time, may not be treated as earned income under section 911 and argued that, nonetheless, such amounts should not lower the amount otherwise available to be deferred under the exception. The final regulations generally provide that rights to earnings credited on amounts that qualify for this exception are also excepted from coverage under section 409A, provided that the earnings satisfy the definition of earnings in § 1.409A–1(o).

I. Indemnification Arrangements

The final regulations generally provide that the right to the payment of contingent amounts pursuant to a service recipient's indemnification for expenses incurred as a result of a legal claim for damages related to the service provider's performance as a service provider, to the extent permissible under applicable law, will not be treated as the right to deferred compensation. Similarly, a right to liability insurance

coverage providing for such payments in the event of such a suit also will not be treated as providing for a deferral of compensation.

J. Separation Pay Plans

1. In General

The final regulations generally adopt the provisions addressing separation pay plans set forth in the proposed regulations, subject to certain modifications. The final regulations clarify that separation pay refers only to compensation to which the service provider's right is conditioned upon a separation from service (including a separation from service due to death or disability) and not to compensation the service provider could receive without separating from service (such as an amount also payable upon a change in control, as a result of an unforeseeable emergency, or on a date certain). For example, the right to a gross-up payment for taxes payable due to the application of section 280G will constitute separation pay if a separation from service is required to obtain the payment. The final regulations also clarify that a separation pay plan for purposes of section 409A, including for purposes of the plan aggregation rules, refers only to plans providing for payments of amounts of deferred compensation (disregarding the exceptions from the definition of deferred compensation for certain types of separation pay) where one of the conditions to the right to the payment is a separation from service. A right to a payment upon a separation from service that is not deferred compensation does not become subject to section 409A under the plan aggregation rule. For example, the accelerated vesting due to a separation from service of stock options excluded from coverage under section 409A would not constitute a separation pay plan or otherwise become subject to section 409A under the plan aggregation rules.

The final regulations generally retain and supplement the various exceptions from the definition of deferred compensation for certain types of separation pay, providing exceptions for (1) certain bona fide collectively bargained arrangements, (2) certain arrangements providing separation pay due solely to an involuntary separation from service or participation in a window program in limited amounts and for a limited period of time, (3) certain foreign separation pay arrangements, (4) certain reimbursement arrangements providing for expense reimbursements or in-kind benefits for a limited period of time following a separation from service, and (5) certain rights to limited amounts of separation pay. These exceptions from coverage under section 409A for specified separation pay plans may be used in combination. For example, the rights of an employee to the maximum amount available under the exception for separation payments made solely due to involuntary separation from service or participation in a window program, to reimbursements for reasonable moving expenses and outplacement expenses that meet the requirement for exclusion from coverage under section 409A, and to rights to payments that do not exceed the limit on elective deferrals under section 402(g) and accordingly qualify for the limited payment exception, may all be excluded from coverage under section 409A due to application of the various exceptions.

The final regulations continue to provide that any amount, or entitlement to any amount, that acts as a substitute for, or replacement of, amounts deferred under a separate nonqualified deferred compensation plan constitutes a payment of deferred compensation or deferral of compensation under the separate nonqualified deferred compensation plan. Commentators asked how this would apply where the service provider would otherwise forfeit a payment upon separation from service but a payment is made anyway, in whole or in part.

The regulations provide that if a separation from service is voluntary, it is presumed that the payment results from an acceleration of vesting followed by a payment of the deferred compensation that is subject to section 409A. Accordingly, any change in the payment schedule to accelerate or defer the payments would be subject to the rules of section 409A. The presumption that a right to a payment is not a new right, but is instead a right substituted for an existing nonvested right, may be rebutted by demonstrating that the service provider's right to the payment after the separation from service would have existed regardless of the forfeiture of the nonvested right. Factors indicating that a right would have existed regardless of the forfeiture include that the amount to which the service provider obtains a right is materially less than the present value of the forfeited amount multiplied by a fraction, the numerator of which is the period of service the service provider actually completed, and the denominator of which is the full period of service the service provider would have been required to complete to receive the full amount of the payment. Another factor is that the payment consists of a type of payment customarily made to service providers who separate from service with that service recipient and do not forfeit nonvested rights to deferred compensation (for example, a payment of accrued but unused leave or a payment for a release of potential claims).

2. Separation Pay Due Solely to Involuntary Separation From Service or Participation in a Window Program

The final regulations generally continue the exception from coverage under section 409A in the proposed regulations for rights to payments available only upon an involuntary separation from service or participation in a window program, payable no later than the end of the second taxable year of the service provider following the year of the separation from service, and limited to an amount that is generally the lesser of two times the service provider's annual compensation or two times the limit on compensation set forth in section 401(a)(17). This exception only applies where the payment is available solely due to an involuntary separation from service of the service provider, or the service provider's participation in a window program, and not to a plan providing for a payment upon a voluntary separation from service or other event. For a discussion of when a separation from service for good reason may be treated as an involuntary separation from service, see section III.J.3 of this preamble.

Commentators requested that the exclusion continue to apply to payments up to the limit, even where the entire amount of the separation payments exceeds the limit. The final regulations adopt this rule. Accordingly, where a service provider is entitled to a payment that qualifies for the exception except that it exceeds the limit, only the excess over the limit will be subject to section 409A. The right to the payment up to the applicable limit will not be subject to section 409A, including the requirement that the payment be delayed for six months in the case of a specified employee, provided that such limited payment is otherwise required to be made, and is made, no later than the end of the second taxable year following the service provider's taxable year in which the separation from service occurs.

The final regulations clarify that for purposes of applying the section 401(a)(17) limit, the statutory limit applicable for the year of the separation from service occurs applies. The final

regulations also clarify that for purposes of determining the service provider's annual rate of pay for the taxable year preceding the taxable year in which the separation from service occurs, an annual rate of pay based upon the service provider's taxable year immediately preceding the service provider's taxable year in which the separation from service occurs is used, adjusted for any increase during the year that was expected to continue indefinitely if the service provider had not separated from service. One commentator requested that the limit be set at twice the amount of compensation set forth under section 401(a)(17), regardless of the service provider's actual income. This suggestion has not been adopted in the final regulations.

3. Definition of Involuntary Separation From Service

The proposed regulations provided an exclusion from coverage under section 409A that applied only to certain amounts paid solely because of an actual involuntary separation from service or participation in a window program. Many comments asked how to determine whether a separation from service is involuntary for this purpose. The final regulations contain a definition of involuntary separation from service and also apply this definition for purposes of the definition of a substantial risk of forfeiture, pursuant to which a payment that will not be made unless the service provider experiences an involuntary separation from service is subject to a substantial risk of forfeiture for purposes of section 409A. (See section V of this preamble.)

The final regulations provide that whether a separation from service is involuntary is determined based on all the facts and circumstances. For this purpose, any characterization of the separation from service as voluntary or involuntary by the service provider and the service recipient in the documentation relating to the separation from service is rebuttably presumed to properly characterize the nature of the separation from service. For example, if a separation from service is characterized as voluntary, the presumption may be rebutted by demonstrating that absent the voluntary separation from service the service recipient would have terminated the service provider's services, and that the service provider had knowledge that the service provider would be so terminated.

Commentators requested that a separation from service for good reason be treated as an involuntary separation from service. The final regulations provide that where the right to a payment is contingent upon a voluntary separation from service following an occurrence that constitutes good reason for the service provider to terminate his or her services, the right may be treated as payable only upon an involuntary separation from service where the good reason condition is such that the service provider's separation from service effectively is an involuntary separation for purposes of section 409A. To be treated as an involuntary separation for purposes of section 409A, the avoidance of the requirements of section 409A must not be a purpose of the inclusion of any good reason condition in the plan or of the actions by the service recipient in connection with the satisfaction of a condition. In addition, such good reason condition must require actions taken by the service recipient resulting in a material negative change in the employment relationship, such as a material negative change in the duties to be performed, the conditions under which such duties are to be performed, or the compensation to be received. Additional factors that may be relevant to whether a purported separation from service for good reason is the result of a bona fide good reason condition not having as a principal purpose the avoidance of section 409A include the extent to which the payments upon a separation from service for good reason are in the same amount and are made at the same time and in the same form as payments available upon an actual involuntary separation from service, and whether the service provider is required to give the service recipient notice of the existence of the good reason condition and a reasonable opportunity to remedy the condition. Where a good reason condition is sufficient to be treated for purposes of section 409A as a condition requiring an involuntary separation from service, an amount payable on account of a separation from service for good reason will be treated the same as an amount payable on account of an actual involuntary separation from service.

The final regulations also provide a safe harbor under which a provision for a payment upon a voluntary separation from service for good reason will be treated for purposes of section 409A as providing for a payment upon an actual involuntary separation from service. Those conditions include that the amount be payable only if the service provider separates from service within a limited period of time not to exceed one year following the initial existence of the good reason condition, and that the amount, time and form of payment upon a voluntary separation from service for good reason be identical to the amount, time and form of payment upon an involuntary separation from service. In addition, the service provider must be required to provide notice of the existence of the good reason condition within a period not to exceed 90 days of its initial existence, and the service recipient must be provided a period of at least 30 days during which it may remedy the good reason condition. For these purposes, a good reason condition may consist of one or more of the following conditions arising without the consent of the service provider: (1) A material diminution in the service provider's base compensation; (2) a material diminution in the service provider's authority, duties, or responsibilities; (3) a material diminution in the authority, duties, or responsibilities of the supervisor to whom the service provider is required to report, including a requirement that a service provider report to a corporate officer or employee instead of reporting directly to the board of directors of a corporation (or similar entity with respect to an entity other than a corporation); (4) a material diminution in the budget over which the service provider retains authority; (5) a material change in geographic location at which the service provider must perform the services; or (6) any other action or inaction that constitutes a material breach of the terms of an applicable employment agreement.

4. Collectively Bargained Plans

Commentators requested an exception from coverage under section 409A to address certain plans providing for payments upon a voluntary separation from service, in the context of a collective bargaining agreement covering services performed for multiple employers. The Treasury Department and the IRS believe these issues are better addressed in the definition of separation from service. See section VII.C.2.b of this preamble.

5. Treatment as a Separate Plan

For purposes of the plan aggregation rules, the final regulations provide for separate treatment of plans providing for separation pay solely due to an involuntary separation from service or participation in a window program. This exception is intended to apply only where the amounts are payable solely due to an involuntary separation from service or participation in a window program, and not where the amounts may also become payable for some other reason, even where such payments actually are made due to an involuntary

separation from service or participation in a window program. Accordingly, any amount that would be paid as a result of a voluntary separation from service will not be included in this category. An arrangement that does not provide for deferred compensation will not be aggregated with a deferred compensation plan under this rule, merely because the arrangement not providing for deferred compensation accelerates vesting or payment upon an involuntary separation from service (for example, the acceleration of the vesting of a stock option or stock appreciation right that is excluded from coverage under section 409A).

6. Reimbursement and Fringe Benefit Plans

a. In General

The proposed regulations provided that certain plans under which a service recipient reimburses certain types of expenses (for example, reasonable moving expenses or reasonable outplacement expenses directly related to a termination of the service provider's services) actually incurred by a service provider (including certain in-kind benefits provided to the service provider) following a separation from service are not nonqualified deferred compensation plans for purposes of section 409A, if such reimbursements are available only for expenses incurred, and the reimbursements are made during a limited period (generally not after the second taxable year of the service provider following the separation from service).

In response to questions from commentators, the final regulations clarify that a right to a benefit that is excludible from income will not be treated as a deferral of compensation for purposes of section 409A. Accordingly, for example, an arrangement to provide health coverage excludible from income under section 105 generally would not be subject to section 409A.

Many commentators requested increased flexibility to provide for reimbursement arrangements upon a separation from service, including certain requests to exempt broad categories of such arrangements, such as the continuation of any plan in which the service provider participated while performing services. The Treasury Department and the IRS believe that an exemption from coverage under section 409A is not appropriate in such circumstances, because such plans may provide for rights to significant amounts of deferred compensation over lengthy periods of time. However, the final regulations extend the limited period during which taxable reimbursements of medical expenses may be provided, to cover the period during which the service provider would be entitled (or would, but for such arrangement, be entitled) to continuation coverage under a group health plan of the service recipient under section 4980B (COBRA) if the service provider elected such coverage and paid the applicable premiums. In addition, the final regulations contain several provisions governing reimbursement plans (including plans providing in-kind benefits) that constitute nonqualified deferred compensation plans for purposes of section 409A, so that taxpayers will be able to design such arrangements to comply with the payment timing requirements of section 409A. For a discussion of these provisions, see section VII.B.2 of this preamble.

b. Specific Exceptions for Post-Separation Reimbursement Plans

The final regulations continue to exclude from coverage under section 409A the reimbursement of certain expenses such as reasonable outplacement expenses and reasonable moving expenses for a limited period of time due to a separation from service, whether the separation from service is voluntary or involuntary. The final regulations, like the proposed regulations, require that the eligible expense must be incurred by the service provider no later than the end of the second year following the year in which the separation from service occurs. In response to questions from commentators, the final regulations clarify that the exception applies to the qualifying reimbursements available during the limited period of time, even if the plan extends beyond the limited period of time.

Several commentators requested that the limited period of time refer solely to the time the expense is incurred, and not the time the expense is reimbursed, to reflect the need for time to process the reimbursement request. Although the final regulations do not adopt this suggestion, the final regulations extend the period during which a service provider can receive a reimbursement payment by providing that such payments must be made not later than the end of the third year following the separation from service. This extension applies only to reimbursements of expenses incurred by the service provider. Where the service recipient provides in-kind benefits (as defined in the regulations), or the service recipient pays a third party to provide in-kind benefits, such benefits must be provided by the end of the second year following the separation from service.

Commentators also requested that the final regulations clarify the treatment of rights to a reimbursement of any loss incurred due to a sale of a residence. The regulations clarify that for this purpose, reasonable moving expenses include the reimbursement of an amount related to a loss incurred due to a sale of a primary residence, provided that the reimbursement does not exceed the loss actually incurred.

7. Limited Payments of Separation Pay

The final regulations provide that, if not otherwise excluded, a taxpayer may treat a right or rights under a separation pay plan to a payment or payments of an aggregate amount not to exceed the applicable dollar amount under section 402(g)(1)(B) for the year of the separation from service as not providing for a deferral of compensation. Commentators raised questions concerning the calculation of the excluded amount, and requested an increase in the amount. The limited payment exception is intended to avoid the application of section 409A to incidental benefits often provided upon a separation from service, where the parties may not realize that the benefits are nonqualified deferred compensation. The exception is not intended to address extended or significant benefits. Accordingly, the final regulations do not substantially increase the amount of the exclusion. However, to permit the excluded amount to automatically reflect cost-of-living increases, the maximum exclusion now equals the maximum amount of an elective deferral permitted under section 402(g) for the year of the separation from service.

The aggregate amount refers to the aggregate amount of payments to which the service provider has a right or rights. The exclusion may be applied to any type of separation pay plan, but may apply only once with respect to amounts paid by a service recipient to a service provider. So, for example, if a service provider treats a right to a payment of separation pay equal to the applicable limit under section 402(g) in the first year following a separation from service as an excluded right, the right to the amount is not treated as a deferral of compensation regardless of when the amount is actually paid (though other provisions of the Code and the constructive receipt doctrine continue to apply). However, once the right is treated as excluded, the service provider may not treat any other right with respect to the service recipient, such as an additional right to a payment equal to the applicable limit under

section 402(g) in the second year following the separation from service, as excluded under this exception.

K. Non-Taxable Benefits

The final regulations clarify that a legally binding right to receive a nontaxable benefit does not provide for a deferral of compensation for purposes of section 409A, unless the service provider has received the right in exchange for, or has the right to exchange the right for, an amount that will be includible in income (other than due to participation in a cafeteria plan described in section 125). In addition, because such benefits do not provide for a deferral of compensation, the plan aggregation rules will not result in taxation of other benefit plans merely because the terms of such nontaxable benefit arrangements would not comply with section 409A if the arrangement were covered by section 409A. For a discussion of the requirements for a taxable reimbursement plan to satisfy the payment timing requirements of section 409A, see section VII.B.2. of this preamble.

L. Legal Settlements

Commentators requested clarification of the application of section 409A to amounts paid pursuant to litigation between the service provider and service recipient, including both court awards and bona fide settlements, and including amounts characterized as wages or otherwise treated as replacing compensation. The Treasury Department and the IRS believe that section 409A was not intended to govern settlements or awards resolving bona fide legal claims based on wrongful termination, employment discrimination, the Fair Labor Standards Act, or worker's compensation statutes, regardless of whether such claims arise under Federal, state, local, or foreign laws, even where settlements or awards pursuant to such claims are treated as compensation for Federal tax purposes. The final regulations generally treat such arrangements as not providing for deferred compensation for purposes of section 409A. In addition, the final regulations generally provide that section 409A does not apply to the payment of, or reimbursement for, attorney's fees incurred in connection with the enforcement of such a claim. However, the exception covers only rights arising from the bona fide claim, and is not intended to allow such settlements or awards to act as substitutes for, or to allow for the restructuring of, preexisting deferred compensation subject to section 409A. For example, a change to the timing of the payment of a pre-existing amount of deferred compensation as part of such a settlement would be subject to the rules governing accelerated payments and subsequent deferral elections. In addition, the payment of an amount upon the execution of a waiver of any or all of such claims does not necessarily indicate that the amounts are paid as an award or settlement of an actual bona fide claim. Rather, to qualify for the exception under this provision, the amounts must be paid with respect to an actual bona fide claim for damages under the applicable law. For a discussion of the treatment of settlements of bona fide disputes regarding the right to preexisting deferred compensation subject to section 409A, see section VIII.G of this preamble.

M. Split-Dollar Life Insurance Arrangements

Some commentators requested that split-dollar life insurance arrangements be excluded from coverage under section 409A. Split-dollar life insurance arrangements are often used as a method of providing deferred compensation and there is no indication in the statute or legislative history of any legislative intent that such arrangements be excluded from coverage under section 409A. In addition, like a promise to transfer property in the future, a promise to transfer an economic benefit in the future may provide for deferred compensation. Accordingly, a split-dollar life insurance arrangement may provide for deferred compensation, and whether a split-dollar life insurance arrangement provides for deferred compensation must be determined through application of the general rules defining deferred compensation and a nonqualified deferred compensation plan. In response to requests for additional guidance, the Treasury Department and the IRS anticipate issuing a notice addressing the application of section 409A to split-dollar life insurance arrangements.

Commentators raised issues concerning the interplay between the modifications that may be needed to satisfy the requirements of section 409A and the effective date rules applicable to split-dollar life insurance arrangements under § 1.61–22(j). Commentators pointed out that the modifications necessary to meet the requirements of section 409A and these regulations may cause the arrangement to be treated as a new arrangement under § 1.61–22(j) and requested relief. The notice will also address this issue.

N. Educational Benefits

Commentators requested an exclusion from coverage under section 409A for promises to provide future taxable educational benefits to service providers. These benefits typically would be provided as an inducement to provide a period of services. Commentators expressed concern that the amount and timing of the payment of such benefits would be difficult to ascertain, because the amount and timing of the payments would depend upon the service provider's decisions with respect to further education. The final regulations generally provide an exception from coverage under section 409A for rights to educational benefits, where the benefits consist solely of educational assistance (as defined for purposes of section 127(c)) provided solely for the education of the service provider.

*IV. Definition of Plan*

A. Plan Aggregation Rules

The proposed regulations generally provided that all amounts deferred with respect to a service provider under all plans of a service recipient falling within a particular category would be treated as deferred under a single plan. The enumerated categories included amounts deferred under account balance plans, amounts deferred under nonaccount balance plans, amounts deferred under separation pay plans providing payments due solely to an involuntary termination or participation in a window program, and amounts deferred under any other plan. The final regulations adopt these provisions, subject to certain modifications described in this preamble.

The final regulations provide that the bifurcation rules applicable to plans under § 31.3121(v)(2)–1(c)(1)(iii)(B), which are permissive for purposes of the application of section 3121(v)(2), must be applied for purposes of the plan aggregation rules under section 409A. Accordingly, a portion of a nonqualified deferred compensation plan is a separate account balance plan if that portion otherwise qualifies as an account balance plan and the amount payable to service providers under that portion is determined independently of the amount payable under the other portion of the plan.

The final regulations also provide additional categories of plans for purposes of the aggregation rules. One category covers split-dollar life insurance arrangements. Another category is comprised of reimbursement plans, providing for the reimbursement of expenses incurred or the provision of

in-kind benefits (as defined in the regulations), to the extent the right to such benefits or reimbursements, separately or in the aggregate, does not constitute a substantial portion of the overall compensation earned by the service provider for performing services for the service recipient, or the overall compensation received due to a separation from service. Stock rights that constitute nonqualified deferred compensation for purposes of section 409A also comprise a separate category.

The final regulations further provide for account balance plans to be subdivided into a category for elective plans and a category for nonelective plans. Plans will only be subdivided in this manner to the extent the amounts deferred under an elective deferral arrangement (and earnings on such amounts) may be separately identified. For this purpose, a right to a match on an elective deferral will not be treated as an elective deferral arrangement.

In an additional category, any amounts deferred under a foreign plan may be treated as deferred under a separate plan from any amounts deferred under a domestic plan, provided that the deferrals under the plan are deferrals of amounts that would be treated as modified foreign earned income (meaning foreign earned income as defined under section 911(b)(1) without regard to section 911(b)(1)(B)(iv) and without regard to the requirement that the income be attributable to services performed during the period described in section 911(d)(1)(A) or (B)) if paid to the service provider at the time the amount is first deferred, and provided further that the foreign plan is not substantially identical to a domestic plan in which the service provider participates. For this purpose, a foreign plan is a plan that the service recipient provides primarily to 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)).

B. Written Plan Requirement

Commentators requested clarification and simplification of the provisions required to be included in writing in plan documents to comply with section 409A. As a general rule, the final regulations provide that to satisfy the requirement that a plan be in writing, the document or documents constituting the plan must specify, at the time an amount is deferred, the amount to which the service provider has a right to be paid (or, in the case of an amount determinable under an objective, nondiscretionary formula, the terms of such formula), and the payment schedule or payment triggering events that will result in a payment of the amount.

A plan must provide for the six-month delay requirement applicable to payments to specified employees upon a separation from service no later than the time the provision may become applicable to a separation from service of the specified employee. Accordingly, the plan must contain the provision by the time at which the employee becomes a specified employee (either because the stock of a component of the service recipient becomes publicly traded, or because the specified employee effective date has been reached for a list of specified employees that includes the employee). A provision applicable to a plan sponsored by a service recipient or a plan in which a specified employee participates is effective with respect to a specified employee only to the extent the provision is binding on the employee.

With respect to a deferral election, whether an initial or subsequent deferral election, the plan must specify no later than the time by which that election is required to be irrevocable the conditions under which that election may be made. With respect to permitted accelerations of a payment, the plan need not specify the conditions under which the accelerated payment will be made except as explicitly required in these regulations. However, the taxpayer must demonstrate that the acceleration of the payment complies with the requirements of section 409A and these regulations.

Commentators also requested clarification regarding whether the requirement that a plan be in writing also means that the plan must be contained in a single document. For purposes of this rule, the plan consists of all documents that together define the service provider's rights to the compensation. Accordingly, the terms of a plan document may be contained in more than one document including, for example, a deferral election document.

Commentators asked whether a savings clause would be sufficient to ensure compliance with section 409A, where the savings clause provides that each provision of the plan will be interpreted to be consistent with the requirements of section 409A and that any provision of the plan that does not satisfy such requirements will be of no force or effect. The final regulations provide that for purposes of determining the terms of a plan, general provisions of the plan that purport to nullify noncompliant plan terms, or to supply required specific plan terms, are disregarded. Accordingly, if a plan contains terms that do not meet the requirements of section 409A and these regulations, or fails to contain a plan term necessary to meet the requirements of section 409A and these regulations, the plan will violate the requirements of section 409A and these regulations regardless of whether the plan contains such a savings clause.

Several commentators requested that the Treasury Department and the IRS publish model amendments. Due to the complex and varied universe of deferred compensation plans, the Treasury Department and the IRS do not believe that it is feasible to publish model amendments at this time.

*V. Definition of Substantial Risk of Forfeiture*

A. In General

The final regulations generally adopt the definition of substantial risk of forfeiture set forth in the proposed regulations. Several commentators requested that the definition of substantial risk of forfeiture be the same as the definition of substantial risk of forfeiture in § 1.83–3(c). However, the definition of substantial risk of forfeiture for purposes of compensatory transfers of property under section 83 reflects different policy concerns from those involved in section 409A, and there are also practical differences between transfers of restricted property and promises to pay deferred compensation. This is reflected in the provisions of section 409A(e)(5), directing the Secretary of the Treasury Department to issue regulations disregarding a substantial risk of forfeiture in cases where necessary to carry out the purposes of section 409A. Accordingly, the final regulations do not adopt this suggestion.

A right to an amount deferred may be subject to the satisfaction of two or more different conditions that each independently would be a substantial risk of forfeiture. In that case, the substantial risk of forfeiture generally would continue until all of such conditions had been met. Alternatively, a right to an amount deferred may be subject to the satisfaction of any of two or more different conditions that each independently would constitute a substantial risk of forfeiture. In that case, the substantial risk of forfeiture generally would lapse as soon as one of the conditions had been met.

The final regulations explicitly provide that a payment conditioned on an involuntary separation from service without cause may be treated as subject

to a substantial risk of forfeiture if there is a substantial risk that the service provider will not be involuntarily separated from service without cause. Many of the comments relating to the definition of a substantial risk of forfeiture requested also that a benefit available only upon a separation from service for good reason be treated as subject to a substantial risk of forfeiture. Under the definition of an involuntary separation from service provided in the final regulations, the right to a payment upon a separation for service for good reason may, in certain circumstances, be treated as a right to a payment upon an involuntary separation from service. For a discussion of the definition of an involuntary separation from service, see section III.J.3 of this preamble.

Commentators requested that a requirement that an employee sign a release of claims to receive a benefit be treated as a substantial risk of forfeiture. Generally, conditions under the discretionary control of the service provider (other than the decision whether or not to continue providing services) are not treated as creating a substantial risk of forfeiture. Accordingly, the final regulations do not adopt this suggestion.

One commentator suggested that any right to a payment be treated as subject to a substantial risk of forfeiture until the amount of the payment is readily determinable, at least where the payment could be zero. The Treasury Department and the IRS do not believe that this standard is appropriate.

B. Election Between Vested and Nonvested Rights

The final regulations provide that an amount will not be considered subject to a substantial risk of forfeiture after the date or time at which the recipient otherwise could have elected to receive the amount of compensation, unless the present value of the amount purportedly subject to a substantial risk of forfeiture (disregarding, in calculating the present value, the risk of forfeiture) is materially greater than the present value of the vested amount the recipient otherwise could have elected to receive. For example, if a service provider can elect to receive, in lieu of a payment of current compensation, a bonus based upon a formula that would otherwise subject the bonus to a substantial risk of forfeiture, the bonus will be subject to a substantial risk of forfeiture for purposes of section 409A only if the present value of the amount of the bonus (disregarding the risk of forfeiture) is materially greater than the present value of the current compensation amount.

Some commentators asked whether this exception addressed the extension of a substantial risk of forfeiture as part of the negotiated extension of an employment contract. Commentators argued that rights a service provider obtains under a new or extended employment contract could be viewed as a right to an amount materially greater than the amount the service provider otherwise could have received. The final regulations clarify that for purposes of this rule, compensation the service provider would receive for continuing to perform services regardless of whether the service provider elected to receive the vested payment is not taken into account for purposes of determining whether the present value of the right to the nonvested payment is materially greater.

*VI. Initial Deferral Election Rules*

A. In General

The final regulations adopt the provisions contained in the proposed regulations relating to initial deferral elections, subject to the modifications described in this preamble.

The proposed regulations generally provided that in a nonelective plan, a service recipient may designate the time and form of payment on or before the date the service provider obtains a legally binding right to the payment. Commentators requested clarification of how the service recipient's discretion to designate a time and form of payment related to the requirement in the proposed regulations that a service provider's deferral election be irrevocable by the applicable deadline. Specifically, commentators requested that a deferral election by a service provider be treated as irrevocable, even if during the period during which the service recipient could have set the time and form of payment (that is, through the date the service recipient grants the service provider a legally binding right to the payment), the service recipient retains the right to override the service provider's deferral election and provide for deferral of a lesser or greater amount. The final regulations do not adopt this suggestion. If a service provider may make an initial deferral election, including an election as to the time and form of payment, the election must be irrevocable as of the date required under the rules governing such service provider elections. Accordingly, a plan may not provide for such an override, unless such override cannot occur after the deadline by which the service provider's election must be effective.

Many commentators requested a clarification of the rules with respect to a deferral of a discretionary bonus, where the legally binding right to the bonus does not arise until a year subsequent to the year in which services are performed. For example, an employer announces in 2010 that it will be awarding discretionary bonuses for services performed in 2011, and will decide which employees will receive bonuses and in what amounts at the beginning of 2012. Section 409A(a)(4) generally provides that compensation for services performed during a taxable 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 taxable year preceding the year in which the services are rendered. Accordingly, even where the bonus is discretionary such that the legally binding right to the bonus does not arise until after the period of services for which the bonus is paid has begun, a service provider's deferral election must occur before the year in which the period of services begins absent some other applicable exception (such as, for example, the deferral election rules related to performance-based compensation). The determination of the period of services for which compensation is earned is based on all the facts and circumstances, but may include periods of service before the date the service provider obtains a legally binding right to the compensation. Although not necessarily determinative, one of the factors taken into account in that determination is a designation by the service recipient of the period of services for which the compensation is earned.

B. Nonelective Deferrals

Commentators pointed out that under the proposed regulations, a service recipient might be required to designate a time and form of payment with respect to a nonelective deferral at an earlier date than the service provider would have to make such a designation if an election had been provided to the service provider. Commentators requested that the service recipient be provided the same flexibility as the service provider in such cases. The final regulations generally adopt this suggestion, so that if the service provider has no election as to the time and form of payment of an amount of deferred compensation, the service recipient may set the time and form of payment on any date on or before the later of the latest date the service provider would have been permitted under these regulations to elect such time and form of payment if an election had been provided to the service

provider, or the date the service recipient grants the legally binding right to the compensation. So, for example, where compensation is performance-based compensation, and the service recipient retains the discretion to establish the time and form of the payment, the plan generally could permit the service recipient to establish the time and form of the payment on or before the date six months before the end of the relevant performance period.

C. Performance-Based Compensation

The final regulations generally adopt the definition of performance-based compensation contained in the proposed regulations, subject to the modifications described in this preamble. The final regulations clarify that where a portion of an award would qualify as performance-based compensation if the portion were the sole amount available under the plan, that portion of the award will not fail to qualify as performance-based compensation merely because another portion of the award does not qualify as performance-based compensation, if the portion that would qualify as performance-based compensation is designated separately or otherwise separately identifiable under the terms of the plan and each portion is determined independently of the other.

Commentators asked whether in order to use the deferral rules regarding performance-based compensation, a service provider must be required to perform services during the entire performance period, or from the date the performance criteria are set through the end of the performance period. Commentators argued that because a payment cannot be substantially certain to be made at the time of the deferral election under the deferral election rules applicable to performance-based compensation, a service provider's ability to manipulate the timing of income inclusion under a performance-based compensation arrangement is limited. The final regulations require only that the service provider provide services from the later of the date the performance period starts or the date the performance criteria are established through the date the initial deferral election is made.

Commentators suggested that a provision in a plan for automatic payment to occur upon death, disability, or a change in control event (as defined for purposes of section 409A) should not result in a failure of the arrangement to qualify as performance-based compensation. The final regulations adopt this suggestion, provided that where such an event occurs before a deferral election has been made, the right to the payment will no longer be treated as performance-based compensation so that a deferral election may not be effective unless made in accordance with another applicable deferral election rule.

In response to comments, the requirement that a deferral election under the rule applicable to performance-based compensation be made before the compensation has become substantially certain to be paid has been modified, and now requires that the election be made before the amount is readily ascertainable. Where the right to a specified amount is subject to a performance requirement being met (for example, a right to a payment of $10,000 if a certain profit level is attained), the amount is treated as readily ascertainable when it is substantially certain that the performance requirement will be met. With respect to the right to an amount of compensation that varies based upon the level of performance, the payment, or any portion of the payment, is treated as readily ascertainable to the extent the amount or the payment is calculable and the performance requirement is substantially certain to be met. For this purpose, a right to a payment is bifurcated between the amount that is readily ascertainable and the amount that is not readily ascertainable. Accordingly, any minimum amount that is calculable and for which the performance requirement entitling the service provider to the payment is substantially certain to be met generally will be treated as readily ascertainable.

For example, a service recipient agrees to pay $100 for every additional widget meeting certain quality requirements that is produced in a calendar year in excess of 100 widgets. At the end of the six months, 125 widgets have been produced and no election to defer has been made. As of that date, the performance-based compensation with respect to which an election to defer can be made does not include the $2500 ((125–100) multiplied by $100) that is calculable and for which the performance requirement is substantially certain to be met. In addition, the performance-based compensation does not include any additional amount that the service provider is substantially certain to earn based on the number of additional widgets that the service provider is substantially certain to produce before the end of the year. However, the payment is bifurcated so that any additional amount that is not substantially certain to be paid may be treated as performance-based compensation such that an election to defer such compensation may be made.

Commentators requested clarification of the circumstances under which compensation, the amount of which is determined by reference to the value of service recipient stock, may qualify as performance-based compensation. The fair market value of stock at any given time generally incorporates the market's perception of the probability that the stock will increase or decrease in value. Accordingly, compensation payable for a service period that is equal to the value of a predetermined number of shares of stock, and is variable only to the extent that the value of such shares appreciates or depreciates, generally will not be performance-based compensation. However, if the right to such compensation is subject to a performance-based vesting requirement, such compensation may be performance-based compensation. Also, the attainment of a prescribed value for the service recipient (or a portion thereof), or a share of stock of the service recipient, may be used as a performance-based criterion, if it is a condition for receiving the compensation and the other requirements are met.

D. Initial Eligibility

Section 409A(a)(4)(B)(ii) provides that in the case of the first year in which a service provider becomes eligible to participate in the plan, an initial deferral election may be made within 30 days after the date the service provider becomes eligible to participate in the plan, with respect to compensation for services to be performed subsequent to the election. The final regulations adopt the provisions implementing the initial eligibility deferral election rules set forth in the proposed regulations, subject to the following modifications.

Many of the commentators on the initial eligibility deferral election rule expressed concerns about the application of the plan aggregation rules. The proposed regulations provided that the plan aggregation rules would apply in determining whether a service provider was newly eligible for a plan, so that if a service provider was already participating in an arrangement that is required to be aggregated with the arrangement for which the service provider is initially eligible, the service provider would not be able to take advantage of the initial eligibility deferral election rule. Some commentators requested that the plan aggregation rules not apply for this purpose. However, the Treasury Department and the IRS believe that such a rule would result in the potential

for the adoption of serial plans as a means to claim repeated initial eligibility and the ability thereby to make late deferral elections. In addition, such a rule would require difficult determinations of whether one plan was sufficiently dissimilar from another plan to qualify as a separate plan.

Other commentators requested that the plan aggregation rules apply, but that plans allowing elections between current and deferred compensation, or the part of a plan allowing such elections, be treated separately from nonelective plans or nonelective benefits in each category. The final regulations generally adopt this rule through the modifications to the plan aggregation rules described in section IV.A of this preamble.

Other comments focused on the application of the initial eligibility deferral election rule in the case of a rehire or a change in position within a service recipient. Commentators pointed out that under the standard in the proposed regulations, if an employee had not received a distribution after the initial termination of employment, or had transferred to a position not participating in the plan without receiving a distribution and then transferred back to a position participating in the plan, the rehired or returning employee would still retain the right to benefits under the plan and thus would not be able to use the initial eligibility deferral election rules. The final regulations provide that the initial eligibility deferral election rules are applicable to a service provider provided that the service provider has not been an active participant in the plan (applying the plan aggregation rules) for at least 24 months. For this purpose, a service provider is an active participant in the plan if, under the plan's terms and without further amendment or action by the plan sponsor, the service provider is eligible to accrue benefits under the plan (even if the service provider has elected not to participate in the plan), other than earnings on amounts previously deferred.

Commentators requested relief with respect to the timing rules for initial elections establishing the time and schedule of payments under nonelective excess benefit plans. Commentators noted that under such plans, a service provider often automatically becomes a participant when the service provider's benefits under the qualified plan become limited under the rules governing qualified plans. Because determining whether a service provider is a participant requires calculations, commentators observed that both the service provider and the service recipient may be unaware that the service provider has become a participant in the plan for some time after the service provider actually first becomes eligible. The final regulations generally provide that with respect to a nonelective excess benefit plan, a service provider is treated as initially eligible to participate in the plan as of the first day of the service provider's taxable year immediately following the first year the service provider accrues a benefit under such plan, so that an initial deferral election with respect to the time and form of payment may be effective for benefits accrued under the plan based on services performed during the taxable year immediately preceding the year in which the election is made. This rule may only be used once with respect to a service provider's participation in a plan.

E. Initial Deferral Elections With Respect to Certain Forfeitable Rights

The proposed regulations provided a rule for initial deferral elections with respect to certain forfeitable rights, generally intended to address ad hoc awards. Under the rule in the proposed regulations, if a legally binding right to a payment in a subsequent year 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. The final regulations retain this rule, subject to the modifications described in this preamble.

Commentators suggested that the requirement of at least a 12-month service period following the deferral election during which the right could be forfeited due to a separation from service be shortened to 11 months, because the combination of the 30-day election period plus the 12-month service period requirement generally resulted in a requirement of at least a 13-month performance period. The requirement of a 12-month service period after an election is made ensures that the election occurs while at least an entire year (12 months) of services is still required. This conforms in many respects to the general rule that the deferral election must be made in the year before the year in which the services are performed. Any shorter period would permit service providers to make deferral elections in the same taxable year in which all of the services are performed. The Treasury Department and the IRS do not believe that such a rule is consistent with the legislative intent.

The final regulations also provide that this rule is available even if the right to the compensation may vest earlier than 12 months following the election due to the service provider's death or disability, or due to a change in control event (as defined for purposes of section 409A) with respect to the service recipient. However, if death, disability, or a change in control event occurs and the condition lapses before the end of such 12-month period, a deferral election may be given effect only if the deferral election is permitted under the regulations without regard to this rule.

F. Initial Deferral Election With Respect to Fiscal Year Compensation

The final regulations retain the initial deferral election rule with respect to fiscal year compensation that was in the proposed regulations. The final regulations clarify that the rule with respect to the deferral of fiscal year compensation is based upon the service recipient's taxable year, regardless of whether the service recipient's taxable year is the calendar year or some other period. Accordingly, where a service recipient with a calendar year taxable year is providing fiscal year compensation to a service provider based upon a calendar year, a service provider with a non-calendar year taxable year generally could take advantage of the rule to defer such fiscal year compensation on or before the December 31 preceding the calendar year upon which the fiscal year compensation is based.

G. Initial Deferral Elections With Respect to Commissions

The final regulations continue to provide a special deferral election rule with respect to commission payments. These rules are intended to address concerns that, for many commission arrangements, it is difficult to determine when the services related to a particular commission payment began, so that it is difficult to apply the general rule that requires that a deferral election be made before the year in which any services are performed. This rule is not intended to address whether, absent such a deferral election, a particular commission arrangement would result in deferred compensation. Whether a commission arrangement otherwise provides for deferred compensation must be determined through the

application of the general rules defining deferred compensation. However, where a commission arrangement requires that the service provider be providing services at the time of the payment to be entitled to the payment, the commission is paid in the normal course, and neither the service provider nor the service recipient has a right to specify a payment date, the arrangement generally will not provide for the deferral of compensation.

The final regulations generally adopt the deferral election rule set forth in the proposed regulations treating the services related to a commission payment as performed in the year in which the customer remits payment to the service recipient. For this purpose, the proposed regulations provided that commissions include only compensation contingent upon the service recipient receiving payment from an unrelated customer for the product or services provided.

Commentators asked that this rule be extended to cover arrangements under which the service recipient paid the commission based upon consummation of a transaction, regardless of whether the customer paid the service recipient for the service or good purchased from the service recipient. For example, commentators stated that in some industries the service recipient pays a salesperson commissions based on the amount of sales recorded, even though the customer is not obligated to pay the service recipient until a later date. The final regulations generally adopt this suggestion by permitting the taxable year in which the sale occurs to be substituted for the year in which the customer remits payment. However, to avoid manipulation of the deferral election timing rules, the taxable year of the sale may be used only if it is applied consistently to all similarly situated service providers.

Commentators also asked that this rule be extended to commissions earned due to the increase in value, or maintenance of overall value, of a pool of assets or accounts. In response, the final regulations provide that, for purposes of the initial deferral election rules, the services with respect to investment commission compensation are deemed to be performed over the 12 months immediately preceding the date as of which the overall value of the assets or asset accounts is determined for purposes of the calculation of the investment commission compensation. For this purpose, investment commission compensation means compensation earned by a service provider if a substantial portion of the services provided by such service provider to a service recipient consists of sales of financial products or the provision of other direct customer services to an unrelated customer with respect to customer assets or customer asset accounts. For this purpose, amounts will only be treated as investment commission compensation if the customer retains the right to terminate the customer relationship and transfer or withdraw the assets or asset accounts without undue delay (which may be subject to a reasonable notice period), the compensation paid by the service recipient to the service provider consists of a portion of the value of the overall assets or asset account balance, an amount substantially all of which is calculated by reference to the increase in the value of the overall assets or account balance during a specified period, or both, and the value of the overall assets or account balance and investment commission compensation is determined at least annually.

Commentators also requested that the exception for commissions be expanded to address arrangements involving customers related to either the service provider or the service recipient. The Treasury Department and the IRS are concerned that where arrangements involve related parties, there is the potential for manipulation of the timing of the payment and the commission, but also understand that many of such arrangements may not involve abuse. Therefore, the final regulations provide that the special rules with respect to commissions apply to arrangements involving a customer related to the service provider or the service recipient provided that substantial sales or substantial services occur between the service recipient and a significant number of unrelated customers, and the sales or service arrangement and the commission arrangement with respect to a customer related to either the service recipient or the service provider are bona fide and arise in the ordinary course of business, and both the terms and practices are substantially the same as the terms and practices applicable to customers to whom the service provider and service recipient are not related, and to whom, either individually or in the aggregate, the service recipient has made substantial sales or provided substantial services.

### H. Involuntary and Voluntary Separations From Service

The final regulations provide that with respect to separation pay paid upon an actual involuntary separation from service, where the service provider had no prior right to such separation pay, and where the separation pay is the subject of bona fide, arm's length negotiations, the initial deferral election may be made at any time before the service provider obtains a legally binding right to the payment. The final regulations expand this rule to include voluntary separations from service as well as involuntary separations, as long as all of the other conditions in the previous sentence are met. The exception addresses both a choice between a current and a deferred payment, and the establishment of the time and form of payment of deferred compensation.

The exception is intended to address legally binding rights to deferred compensation arising as part of the process of separating from service and not based upon previously existing legally binding rights. The exception is intended to alleviate concern that where such rights are expressed or calculated based on prior compensation or service, any election by the service provider as to the timing of the payment during the negotiation process could be viewed as a late initial deferral election made during or after the year in which the services were performed, and to avoid the potential for the plan aggregation rules to eliminate the ability to make an initial eligibility deferral election. The Treasury Department and the IRS have become aware that certain taxpayers have attempted to apply this provision to existing deferred compensation plans, believing that the exception allows new elections provided that the separation pay was the subject of bona fide negotiations. This application is inconsistent with the explicit provision of the proposed regulations and these final regulations. The provision does not address preexisting legally binding rights to deferred compensation, including legally binding rights that are subject to a substantial risk of forfeiture. Any change in the time and form of payments under those arrangements would be required to meet the rules governing subsequent deferral elections and accelerated payments (including any applicable relief provided during the transition period). For a discussion of the treatment of benefits forfeitable upon the separation from service, see section III.J.1 of this preamble.

### I. Elections To Annualize Recurring Part-Year Compensation

Commentators asked how the deferral election rules would apply to an election by certain employees providing services over less than a 12-month period to receive payments for services on an annualized basis. For example, teachers performing services during a school year running from September of

one year through June of the next year often are provided an election to receive the compensation on an annualized basis over 12 months instead of during only the school year. This raises issues under the general initial deferral election rules under section 409A because the teacher is permitted to elect after the beginning of the calendar year to defer some of the compensation that would be paid in September through December of that year to a period in the subsequent year.

The final regulations provide that with respect to recurring part-year compensation, an election to defer all or a portion of the compensation to be earned during a particular period of service may be made at any time before the period of service begins, provided that no amounts are deferred under the election to a date after the last day of the 13th month following the first day of the performance period. For this purpose, recurring part-year compensation is defined as compensation paid for services rendered in a capacity that the service recipient reasonably anticipates will continue in subsequent years on similar terms and conditions, and will require services to be provided over successive service periods of less than 12 months, each of which begins in one taxable year of the service provider and ends in the next such taxable year. For example, a teacher earning compensation from September 15 of one year through June 30 of the subsequent year could elect to defer compensation earned during such period on any date on or before September 15 of the first year, provided that no amount deferred in accordance with this rule is deferred beyond October 31 of the following year. This exception may be applied to a particular amount of compensation only once, so that an amount deferred under this exception may not be deferred a second time through treatment of the amount as earned in a subsequent service period.

J. USERRA

The final regulations provide that the initial deferral election rules are deemed satisfied to the extent that a deferral election provided to a service provider is necessary to satisfy the requirements of the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended, 38 U.S.C. 4301–4334. Similar relief has been provided with respect to changes in the time and form of payment and accelerations of payments.

*VII. Time and Form of Payment*

A. In General

The final regulations clarify that except as explicitly provided otherwise, a single time and form of payment must be designated with respect to each payment that is payable upon a payment event. For example, a plan must designate how an amount will be paid upon a change in control event, and generally cannot provide one time and form of payment upon a particular type of change in control event, and another time and form of payment upon another type of change in control event. The final regulations retain the rule, however, that permits a plan to provide for a different time and form of payment, depending upon whether the permissible payment event occurs before or after a specified date. In addition, the final regulations also provide for a limited ability to designate different times and forms of payment based upon the conditions under which a service provider's separation from service occurs. See section VII.C.5. of this preamble for a discussion of payments upon a separation from service.

The proposed regulations provide that for purposes of applying the payment rules, a payment will be treated as made on a fixed date or on a fixed schedule if the payment or payments are made by the end of the calendar year in which a specified fixed payment date, or due date of a payment under a fixed schedule, occurs or, if later, the 15th day of the third month following such fixed date or due date. The final regulations clarify that the same flexibility applies to making a payment on account of a payment event. So, for example, where a payment is scheduled to be made upon the death of a service provider whose taxable year is the calendar year, the payment is timely if made on or before the later of December 31 of the calendar year in which the death occurs, or the 15th day of the third month following the date of death. If the service provider's taxable year is not the calendar year, the final regulations specify that the service provider's taxable year is used for purposes of this rule.

Commentators also requested that where a payment is scheduled to be made on a fixed date, a service recipient be permitted to pay at any preceding date within the same calendar year. Commentators argued that if the regulations permitted a payment to be made later within the same calendar year because the amount would be reflected on the same income tax return in the case of an individual service provider, then the same rationale should permit payments to be made earlier in the same calendar year. Because the adoption of this provision would conflict with the administration of the rules governing subsequent deferrals, the final regulations do not adopt this suggestion.

The subsequent deferral rules require that any election to extend the deferral period must not be effective for at least one year after the date the payment is due. If a payment due on a specified date during a calendar year could always be made on January 1 or any subsequent date during the calendar year, then the one-year waiting period would have to begin to run on the previous January 1, regardless of the actual payment date the plan specified.

For example, if a plan specified December 31 as the payment date, but the payment could be made on January 1, then any subsequent deferral election would need to be made on or before January 1 of the preceding calendar year, making the deadline for a subsequent deferral election almost two years before the actual specified payment date. Such a rule would unduly burden service providers who cannot actually receive a payment before the date specified in the plan. However, to lower the potential for unintentional violations, the final regulations provide that a payment will be deemed made at the scheduled time of payment if made not earlier than 30 days before the scheduled date, provided that the service provider is not permitted, directly or indirectly, to designate the taxable year of the payment.

In addition, the final regulations continue to provide that a plan may designate an entire taxable year of the service provider, rather than a specific date, as the specified date of payment. If a plan provides only for the taxable year of payment, the payment may be made at any time during such year. For purposes of the subsequent deferral rules, the payment will be treated as scheduled to be paid on the first day of the service provider's taxable year.

Commentators also requested clarification of the treatment of deadlines for payment, where the plan does not designate a specific payment date or taxable year of the service provider. For example, commentators asked whether a provision requiring payment as soon as administratively feasible but in no event later than the 15th day of the third month following the end of the year would be treated as having a fixed date of payment. The final regulations provide that such a provision will be a specified payment

date only if the period during which such payment may be made is restricted either to a specified taxable year of the service provider or a period of not more than 90 days and the service provider is not provided an election as to the taxable year of the payment. If a specific payment date is not established, the first possible date on which a payment could be made under the plan is the specified payment date for purposes of the rules relating to subsequent deferral elections. For example, a payment scheduled to be made at any time on or after January 1, 2008, and on or before July 1, 2008, to a service provider whose taxable year is the calendar year will be deemed to have a fixed payment date. For purposes of the subsequent deferral rules, January 1, 2008, is the specified payment date.

By contrast, a payment scheduled to be made to such a service provider at any time on or before July 1, 2008, would not be deemed to have a fixed payment date, because the payment could be made before January 1, 2008. In addition, a payment scheduled to be made to a service provider, for example, within 180 days of a separation from service generally will not provide for a specified time and form of payment under the final regulations, because it specifies neither the taxable year of the service provider in which the payment must be made following the separation from service, nor a period of 90 days or less following the separation from service in which the payment must be made. Because such a payment schedule would not provide an objective payment date based upon the separation from service event, the payment also would not be eligible for the relief provided for payments made by the later of the end of the taxable year of the service provider or the 15th day of the third month following the specified payment date. However, a plan provision providing that the payment will be made within 90 days of a separation from service generally will be treated as a specified payment date, and for purposes of the subsequent deferral rules the date of the separation from service will be treated as the scheduled payment date.

B. Specified Time or Fixed Schedule of Payments

1. In General

The final regulations generally adopt the rules defining a specified time or fixed schedule of payments, including the ability to designate a service provider's taxable year as the year of payment rather than a specific date. For example, a plan provision providing for payment within the service provider's taxable year that includes December 31, 2008, would be treated as a fixed date of payment.

2. Reimbursement and In-Kind Benefit Plans

Many commentators requested additional guidance regarding ways in which rights to taxable reimbursements or in-kind benefits might be structured to meet the definition of a fixed schedule of payments. In response, the final regulations provide that a right to reimbursements or in-kind benefits will meet the requirement of a fixed time and form of payment if certain requirements are satisfied. For this purpose, a reimbursement plan must provide for the reimbursement of expenses incurred during an objectively prescribed period (including a period beginning or ending based upon a service provider's death), where the amount of reimbursable expenses incurred or in-kind benefits available in one taxable year of the service provider cannot affect the amount of reimbursable expenses or in-kind benefits available in a different taxable year. In addition, the reimbursement payment must be made by no later than the end of the service provider's taxable year following the taxable year in which the expense is incurred. Such reimbursement or in-kind benefit rights may not be subject to liquidation or exchange for another benefit.

For example, a right to a reimbursement of membership fees incurred for each of three specified and consecutive calendar years by a former employee, where the former employee is entitled to reimbursement of the expenses incurred each year without regard to the expenses incurred in a different year, and where the former employee cannot exchange the right for cash or any other benefit, generally will be treated as providing for a fixed time and form of payment if the plan requires that the reimbursement payment be made by no later than the end of the calendar year following the year in which the expense is incurred. In contrast, a right to reimbursement of membership fees of up to $30,000 over three years would not meet the requirement of a fixed time and form of payment, because the extent to which the former employee incurred the expense in the first year would affect the amount available for reimbursement in a subsequent year.

This rule applies similarly to the provision of in-kind benefits, such as a right to use a corporate vehicle or aircraft. The final regulations also provide a special rule for arrangements reimbursing medical expenses to permit certain aggregate limits on the benefits provided, such as lifetime maximums.

3. Payment Schedules With Fixed or Formula Payment Limitations

Commentators asked whether payment schedules with fixed or objective formula limitations on the amount that may be paid during any particular period would meet the requirement of a fixed schedule or time and form of payment. Where the fixed or formula limitation is established on or before the date the time and form of payment is otherwise required to be set, the fixed or formula limitation is based on a fixed or nondiscretionary, objectively determinable formula limitation on the amount that may be paid in a particular period where all the factors relevant to the determination of such limit are beyond the control of the service provider and not subject to any exercise of discretion by the service recipient, and the plan specifies the time and form of payment of any additional amount due in excess of the fixed or formula limitation amount, the schedule will be deemed to be a fixed schedule of payments because it is not subject to manipulation. However, a change in the limits or a change in the allocation method for the payment of the unpaid excess amounts that will be paid after the original due dates due to application of the limit may constitute a subsequent deferral election or the acceleration of a payment. Similarly, where the total amount payable under a plan with multiple participants is limited, the time and form of payment requirement may be met if the plan specifies, from the date the time and form of payment is otherwise required to be set, the following: (1) A fixed or nondiscretionary, objectively determinable limit on the amount that may be paid in a particular period such that none of the factors relevant to the determination of such limit is in the control of the service provider or subject to the exercise of any discretion by the service recipient; (2) where there is an overall limitation on the aggregate amount that may be paid to a group of service providers during a specified period, a nondiscretionary, objectively determinable method to allocate the payments that can be made in accordance with the limitation among the service providers participating in the plan over which neither the service recipient nor any service provider retains control or discretion; and (3) the time and form of payment of any amount that will be paid after its original due date because of the formula limitation.

For example, a plan may provide that all payments to all participants under the plan in a given year may not exceed $1 million, provided that the plan must provide an objective, nondiscretionary method of currently allocating the $1 million of payments if the amounts otherwise payable exceed $1 million (such as proportionately to each participant based on the amount otherwise payable to such participant absent the limit), and specifies the time and form of payment of any amount not paid currently because of the limitation (such as at the earliest time possible without exceeding the applicable limitation for any subsequent year). However, a change in the limits or a change in the allocation method may constitute a subsequent deferral election or an acceleration of a payment.

Commentators also asked whether the same analysis would apply where the limit on a payment is calculated pursuant to a formula related to business performance, such as a specified percentage of cash flow for the period. A payment schedule may be conditioned on a formula limitation if the formula limitation is specified at the time the schedule of payments is otherwise required to be set, the limitation is nondiscretionary and objectively determinable based on the business performance of the service recipient, and the service provider retains no control over the determination or application of the formula limitation. For this purpose, a formula limitation based on profits or other indicia of general business performance is not treated as discretionary or in the control of the service recipient. Thus, a plan providing that the maximum payment during a year will equal no more than a set percentage of the service recipient's cash flow for the previous year generally would meet the requirement of a fixed time and form of payment. However, a change in the formula limitation may constitute a subsequent deferral election or an acceleration of a payment. For a discussion of schedules of payments based upon the timing of payments received by the service recipient, see section VII.B.6 of this preamble.

4. Tax Gross-Up Payments

Commentators requested clarification of how section 409A applies to a right to a tax gross-up payment that provides the service provider with the right to a payment of taxes otherwise payable by the service provider as well as any additional taxes resulting from the service recipient's payment of the taxes. The final regulations provide that a right to a tax gross-up payment is a right to deferred compensation that satisfies the requirement of a fixed time and form of payment if the plan provides that the tax gross up payment will be made, and the payment is made, by the end of the service provider's taxable year next following the service provider's taxable year in which the related taxes are remitted to the taxing authority.

In addition, the final regulations provide that a right to the reimbursement of expenses incurred due to a tax audit or litigation, whether Federal, state, local, or foreign, satisfies the requirement of a fixed time and form of payment if the right to the reimbursement provides that payment will be made, and the payment is made, by the later of the end of the service provider's taxable year next following the year in which the taxes that are the subject of the audit or litigation are remitted to the taxing authority, or, if no taxes are to be remitted, the end of the service provider's taxable year next following the year in which the audit or litigation is completed. Nothing in the provisions relating to tax gross-up payments modifies the application of section 409A to any underlying compensation arrangement that results in the taxes that are subject to the tax gross-up arrangement.

5. Payment Schedules Based on Payments to the Service Recipient

Commentators requested guidance on payment schedules contingent on the receipt of certain payments by the service recipient. For example, commentators requested clarification whether a plan requiring an annual payment equal to a percentage of certain accounts receivable collected during the prior 12-month period would qualify as a fixed time and form of payment. The ability to schedule payments based upon the time the service recipient receives a customer's payment raises issues regarding the ability to, in effect, create an impermissible event-based payment through characterizing the payment as a schedule (for example, a payment ''schedule'' that pays an amount every year if a specified transaction occurs in that year actually pays based on whether and when the transaction occurs, which is not a permissible payment event under section 409A). In addition, these arrangements raise issues regarding the ability of the service recipient (or service provider) to control the timing of the payment of deferred compensation through an ability to influence the timing of the payment by the customer. Accordingly, the final regulations generally provide that a schedule based upon the timing of payments to the service recipient is not a fixed schedule of payments. However, the final regulations also provide certain parameters under which such a plan may qualify as having a fixed time and form of payment. First, if the service recipient is comprised of more than one entity, the payments must be due from a person that is not one of such entities (for example, not a payment due from a subsidiary corporation to a parent corporation). Second, the payments must stem from bona fide and routine transactions in the ordinary course of business of the service recipient, and the service provider must not at the time such payments are due retain effective control over the service recipient, the person from whom the payments to the service recipient are due, or the collection of the payments. Third, the payment schedule must provide for a nondiscretionary, objective method of identifying the customer payments to the service recipient from which the amount of the payment is determined, and a nondiscretionary, objective schedule under which payments of the nonqualified deferred compensation will be made (for example, a payment every March 1 of 10 percent of the accounts receivable collected during the previous calendar year). Finally, the sales to which the payment relates must be of a type that the service recipient is in the trade or business of making and makes frequently, and either all such sales must be taken into account or there must be a legitimate, nontax business purpose for limiting the sales taken into account.

C. Separation From Service

1. In General

The final regulations generally adopt the provisions in the proposed regulations defining the circumstances under which a separation from service is deemed to occur, subject to the modifications described in this preamble. Some commentators requested that the parties to a nonqualified deferred compensation plan be permitted to define when a separation from service occurs, at least if they apply the definition consistently. The Treasury Department and IRS believe that a definition of separation from service that is objectively determinable, nondiscretionary and predictable, and not subject to negotiations between the parties is necessary to properly implement the legislative intent behind section 409A. The definitions of separation from service suggested by the commentators do not meet this standard. For example, a plan that defines separation from

service as the date a service provider is removed from a payroll would leave to the parties the discretion to determine a payment date by an action that may have little practical significance, especially when compared to the effect on the service provider's deferred compensation amounts. The Treasury Department and the IRS continue to believe that the definition of separation from service should be based upon an objective determination of whether the service provider continues to provide significant services to the service recipient.

2. Employees

a. In General

The proposed regulations provided that an employee separated from service with the employer if the employee died, retired, or otherwise had a termination of employment with the employer. Whether a termination of employment had occurred would be determined based on the facts and circumstances. The proposed regulations provided that where the facts and circumstances indicated that the employer and the employee did not intend for the employee to provide more than insignificant future services, the employee would be treated as having a separation from service. For this purpose, an employer and employee would not be presumed to have intended only insignificant services be provided if the employee continued providing services at a rate equal to at least 20 percent of the rate of the previous three years. Where an employee continued providing services in another capacity (for example, as an independent contractor), the employee would be deemed not to have a separation from service if the service provider continued providing services at a rate equal to at least 50 percent of the services provided during the previous three years. Different rules were provided for service providers who were not employees.

Commentators criticized this standard in various respects. The proposed regulations applied one presumption where an employee continued providing services as an independent contractor, and another where an employee continued providing services as an employee. Commentators asked why the same presumptions did not apply regardless of whether the employee purports to continue service (or separate from service) as an employee or purports to continue service (or separate from service) as an independent contractor. Commentators also suggested that the presumptions should be based on the intent of the employer and employee at the time of the purported separation from service (or purported continuation of services), rather than the actual subsequent conduct. Commentators also argued that the employer and employee could be found to have violated section 409A based on subsequent actual conduct, even where the parties had a bona fide belief that a separation from service had or had not occurred, but circumstances changed.

In response to these comments, the final regulations provide a simplified standard, applicable whether an employee continues to provide services as an employee or as an independent contractor. The general standard for determining whether the employee has terminated employment is based on whether the facts and circumstances indicate that the service recipient and employee reasonably anticipated either that no further services would be performed after a certain date or that the level of bona fide services the employee would perform after such date (whether as an employee or as an independent contractor) would permanently decrease to no more than 20 percent of the average level of bona fide services performed over the immediately preceding 36-month period (or the full period in which the employee provided services to the employer (whether as an employee or as an independent contractor) if the employee has been providing services for less than 36 months). For this purpose, periods during which the employee is on an unpaid bona fide leave of absence are disregarded (including for purposes of determining the relevant 36-month period), and periods during which the employee is on a paid bona fide leave of absence are treated as periods during which the employee provided services at the level at which the employee would have been required to perform services to receive the compensation if not on a bona fide leave of absence. Facts and circumstances to be considered in determining whether the employee and employer reasonably anticipated that the service provider's future services would be permanently reduced to less than 20 percent of the average level of bona fide service provided during the previous 36-month period include, but are not limited to, whether the employee continues to be treated as an employee for other purposes (such as continuation of salary and participation in employee benefit programs), whether similarly situated service providers have been treated consistently, and whether the employee is eligible to perform services for, and realistically available to perform services for, other employers in the same line of business.

To assist in applying this standard, certain rebuttable presumptions are provided. An employee generally will be presumed to have separated from service where the level of bona fide services performed (whether as an employee or an independent contractor) changes to a level equal to 20 percent or less of the average level of services provided during the previous 36 months (whether as an employee or an independent contractor). An employee will be presumed not to have separated from service where the level of bona fide services rendered continues at a level that is 50 percent or more of the average level of services provided during the previous 36 months. No presumption applies to a change to a level of services between 20 percent and 50 percent of the average level of services provided during the previous 36 months. For purposes of the presumption, the entire period during which the employee has provided services to the employer is substituted for 36 months if the employee has been providing services to the employer for less than 36 months, and periods during which the employee is on a bona fide leave of absence are treated in the same manner as such periods are treated for the general rule.

The presumptions are rebuttable, by demonstrating that the employer and the employee reasonably anticipated that as of a certain date the level of bona fide services would be reduced permanently to a level less than or equal to 20 percent of the average level of services provided during the immediately preceding 36-month period or full period in which the employee has provided services if the employee has been providing services to the employer for a period of less than 36 months (or that the level of bona fide services would not be so reduced). For example, an employee may demonstrate that the service recipient and employee anticipated that the employee would cease providing services, but that (subsequent to the original cessation of services) business circumstances such as termination of the employee's replacement caused the employee to return to employment. Although the employee's return to employment may cause the employee to be presumed to have continued in employment because the rehired employee is providing services at a rate equal to the rate at which he was providing services before the termination of employment, the facts and circumstances in this case

would demonstrate that at the time the employee terminated employment, the employee and the service recipient reasonably anticipated that the employee would not provide any services in the future.

Similarly, where the loss of a business client of the employer results in a permanent reduction in the level of bona fide services performed by the employee of more than 80 percent, so that the employee would be presumed to have separated from service, the taxpayer may rebut the presumption that a separation from service occurred by showing that the employer and employee reasonably anticipated that the level of services would not be so reduced. The separation from service would then be deemed to occur at the time that the employer and employee reasonably anticipated that such reduction would continue.

Commentators requested additional flexibility to treat certain employees as having experienced a separation from service, even where the employee continues to provide services in a reduced capacity. This is often referred to as a phased retirement, in which an employee obtains retirement benefits despite continuing to provide services on a part-time or reduced basis. The Treasury Department and the IRS believe that providing flexibility to alter the definition of a separation from service after an amount has been deferred is inconsistent with the statute and legislative intent, and could be subject to manipulation.

However, the final regulations permit certain flexibility for a plan to define a separation from service as including a change to a reduced level of bona fide services, if the definition is specified no later than the time and form of payment are elected or otherwise specified. Specifically, the final regulations provide that rather than treating a separation from service as requiring an anticipated permanent reduction in the level of bona fide services to 20 percent or less of the average level of bona fide services provided in the immediately preceding 36 months, a plan may treat another level of anticipated permanent reduction in the level of bona fide services as a separation from service, provided that the level of permanent reduction required must be set forth in the plan as a specific percentage, and the anticipated permanently reduced level of bona fide services must be greater than 20 percent but less than 50 percent of the average level of bona fide services provided in the immediately preceding 36 months. The plan must specify the definition of separation from service on or before the date at which a separation from service is designated as a time of payment of an amount deferred, and once designated, any change to the definition of separation from service with respect to such amount deferred will be subject to the rules regarding subsequent deferrals and the acceleration of payments.

For example, on or before the time at which a plan must designate a time and form of payment for a deferred amount, the plan may specify that a separation from service will be deemed to occur at any time that the employee and employer reasonably anticipate that the bona fide level of services the employee will perform (whether as an employee or an independent contractor) will be permanently reduced to a level that is less than 50 percent of the average level of bona fide services the employee performed during the immediately preceding 36 months (or the entire period the employee has provided services if the employee has been providing services to the employer less than 36 months).

b. Identification of the Service Recipient

Commentators requested that the definition of the term service recipient be expanded for purposes of determining whether a separation from service has occurred. The final regulations generally adopt this suggestion, so that for purposes of determining whether a service provider has separated from service with an employer or other service recipient, the service recipient is defined as including all entities that would be treated as part of the group of entities comprising the service recipient under section 414(b) and (c) and the accompanying regulations, but substituting a 50 percent ownership level for the 80 percent ownership level in section 414(b) and (c) and the accompanying regulations. A plan may specify that a higher or lower percentage ownership level will be used, provided that the ownership level may not be higher than 80 percent or lower than 20 percent, and provided further that an ownership level of less than 50 percent may be used only where such use is based on legitimate business criteria. As discussed, the plan must specify the percentage on or before the date at which a separation from service is designated as a time of payment of the amount deferred, and where a plan changes the definition of separation from service with respect to amounts previously deferred, such a change will be subject to the rules governing changes to the time and form of payment, including the anti-acceleration provisions.

Commentators also requested special treatment with respect to the identification of the service recipient in instances where an amount is deferred pursuant to a bona fide collective bargaining agreement covering service with multiple employers, and the employee may be expected to perform services covered by the bona fide collective bargaining agreement for a number of different employers. Specifically, commentators expressed concern that an employee not be treated as having separated from service when a particular period of service with an employer is completed, if the employee has made herself available to perform services covered by the bona fide collective bargaining agreement for another employer. The final regulations generally provide that where the amount is deferred pursuant to a plan provided under a bona fide collective bargaining agreement covering services with multiple employers, and where service providers may reasonably anticipate providing services for more than one of the participating employers, the plan may define a separation from service in a manner that treats the service provider as not having separated from service when the service provider stops performing services for one employer covered by the agreement and provides services for another employer covered by the agreement. The final regulations also provide that the plan may not treat a service provider as having separated from service during periods where the service provider is not providing services but has made herself available to perform services for a participating employer, provided that the definition requires that the service provider be deemed to have separated from service no later than the end of any 12-month period in which the service provider has not provided services covered by the bona fide collective bargaining agreement to any employer.

c. Bona Fide Leave

Many of the comments with respect to the definition of separation from service for an employee concerned the treatment of bona fide leaves of absence. For purposes of determining whether a service provider has separated from service (and not for purposes of determining whether a vacation or sick leave plan is a bona fide vacation or sick leave plan), a bona fide leave of absence refers to a leave of absence where there is a reasonable expectation the service provider will return to service with the service recipient. The final regulations provide that an employment relationship is treated as continuing while the individual is on sick leave, or

other bona fide leave of absence, if the period of such leave does not exceed six months, or if longer, so long as the individual retains a right to reemployment with the service recipient under an applicable statute or by contract. For example, where a tenured professor takes a leave of absence, but the professor retains a right to reemployment with the university as part of the professor's tenured status, the professor will not be deemed to have terminated from employment merely due to the leave of absence from the university. If the period of leave exceeds six months and the individual does not retain a right to reemployment under an applicable statute or by contract, the employment relationship is deemed to terminate on the first date immediately following such six-month period. However, the final regulations modify the provisions in the proposed regulations with respect to disability leave. With respect to disability leave, the employment relationship will be treated as continuing for a period of up to 29 months, unless otherwise terminated by the employer or the employee, regardless of whether the employee retains a contractual right to reemployment. For this purpose, disability leave refers to leave due to the employee's inability to perform the duties of his or her position of employment or any substantially similar position of employment 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 six months.

d. Salary Continuation Programs and Terminal Leave

Commentators requested that salary continuation programs be permitted to delay the occurrence of a separation from service, where an employee continues to receive salary and benefits and is otherwise treated as an employee, although not required to perform any further meaningful services. Some commentators also requested this treatment for terminal leave, or leave intended to bridge a service provider to a separation from service date that would permit continuation of benefits or accrual of additional benefits under, for example, a qualified plan. The Treasury Department and the IRS believe that these types of actions are subject to manipulation and should not delay the time when a service provider is treated as having separated from service for purposes of section 409A. Accordingly, the final regulations do not recognize extensions of leave or salary and benefits as a means of delaying the date of separation from service for purposes of section 409A. In addition, terminal leave with no intent to return generally would not be treated as bona fide leave for purposes of the rule for employees addressing bona fide leave.

Commentators expressed concern that the service recipient may wish to continue providing certain employee benefits, including in-kind benefits and reimbursement plans, during a salary continuation or terminal leave period. With respect to the application of section 409A, such plans generally may be structured to avoid providing for the deferral of compensation, or to provide deferred compensation in compliance with the requirements of section 409A. See sections III.J.6 and VII.B.2 of this preamble. The definition of separation from service for purposes of section 409A is not applicable for purposes of other Code provisions, such as those provisions governing qualified retirement plans or non-taxable benefits.

e. Rehires and Suspensions of Benefits

Commentators also requested that the regulations address rehires, and specifically whether payments of deferred compensation could be suspended during a subsequent period of employment or other service until a subsequent separation from service. Such a suspension generally would violate the rules governing changes in the time and form of payment because payments would be delayed in a manner that does not satisfy the rules applicable to subsequent deferral elections. Neither the statutory language of section 409A nor the legislative history indicates any intent to permit such additional flexibility. Moreover, the Treasury Department and the IRS believe that suspension of benefits rules would add significant complexity to the administration of the Code section. However, many of the desired results of a suspension of benefits provision often may be obtained through deferrals of future compensation after rehire.

f. Mergers and Acquisitions

Comments with respect to the application of the separation from service standard in the case of a merger or acquisition generally focused on two areas. First, commentators requested that the final regulations adopt permissive use of the rule generally referred to as the ''same desk'' rule, allowing the parties to an asset purchase agreement to decide whether employees of the selling corporation that continue in the same position with the purchaser of the assets will be treated as separating from service. The final regulations adopt a rule providing that where as part of a sale of assets by one service recipient (seller) to an unrelated service recipient (buyer), a service provider of the seller would otherwise experience a separation from service with the seller, the seller and the buyer may specify whether a service provider providing services to the seller immediately before the asset purchase transaction and providing services to the buyer after and in connection with the asset purchase transaction has experienced a separation from service, provided that the asset purchase transaction results from bona fide, arm's length negotiations, all service providers providing services to the seller immediately before the asset purchase transaction and providing services to the buyer after and in connection with the asset purchase transaction are treated consistently (regardless of position at the seller) for purposes of applying the provisions of any nonqualified deferred compensation plan, and such treatment is specified no later than the closing date of the asset purchase transaction. For this purpose, a sale of assets refers to a transfer of substantial assets, such as a plant or division or substantially all of the assets of a trade or business.

Second, commentators requested clarification whether a spin-off of a subsidiary could result in a separation from service of an employee of the subsidiary, where the nonqualified deferred compensation plan defines a separation from service as including any action resulting in the employee no longer being an employee of the controlled group of corporations including the parent corporation. Generally such a transaction would not result in a termination of employment for an employee of the subsidiary, because the employee is continuing employment with the same employer both before and after the transaction. However, the rules that provide a service recipient discretion to terminate and liquidate a plan following a change in control transaction afford taxpayers the flexibility to pay out their deferred compensation liabilities in particular circumstances. See section VIII.B of this preamble.

3. Directors

The final regulations provide generally that where a service provider provides services to a service recipient both as an employee and as an independent contractor, the service provider must separate from service both as an employee and as an independent contractor to be treated as having separated from service. But where a service provider provides services both as an employee and a

member of the board of directors of a corporate service recipient, the services provided as a director are not taken into account for purposes of determining whether the service provider has a separation from service as an employee for purposes of a nonqualified deferred compensation plan in which the service provider participates in his or her capacity as an employee that is not aggregated with any plan in which the service provider participates as a director. Accordingly, where an employee-director participates in a separate plan as an employee, his or her termination of services as an employee will constitute a separation from service for purposes of the employee plan, regardless of whether he or she continues providing services as a director (and vice versa). However, if a non-employee director is also providing additional services as an independent contractor, he or she cannot have a separation from service for purposes of section 409A until he or she has separated from service both as a director and as an independent contractor.

4. Delay for Specified Employees

Section 409A(a)(2)(B) provides that with respect to a specified employee, a payment of nonqualified deferred compensation on account of separation from service may not occur before the date that is six months after the date of separation from service (or, if earlier, the date of death of the employee). For this purpose, a specified employee is a key employee of a corporation any stock of which is publicly traded on an established securities market or otherwise. With respect to identifying specified employees, the final regulations generally adopt the provisions set forth in the proposed regulations, subject to the modifications and clarifications described in this preamble.

a. Identification of Specified Employees

Several commentators asked whether an employee may be subject to the six-month delay requirement if the service recipient stock is publicly traded only on a foreign exchange or is traded on a U.S. exchange only as American depositary receipts or American depositary shares (ADRs). The final regulations define an established securities market for purposes of the six-month delay rule by reference to the rules in § 1.897–1(m), which generally include foreign securities markets. Accordingly, the six-month delay may apply to an employee of a service recipient the stock of which is publicly traded solely on a foreign exchange, or is traded on a U.S. exchange only as ADRs. In the case of a service recipient comprised of multiple entities, this rule would apply if one of the entities had stock that was publicly traded on a foreign exchange.

Some commentators requested that the final regulations provide that specified employees are limited to common law employees, and do not include other individuals. Section 409A(a)(2)(B) defines a specified employee as a key employee as defined in section 416(i) (without regard to section 416(i)(5)). Accordingly, where an individual is treated as a key employee for purposes of section 416(i), that individual generally is a specified employee for purposes of section 409A.

Commentators requested clarification of how the definition of compensation under section 415 applies for purposes of identifying the key employees that may ultimately be specified employees. The final regulations clarify that the general definition of compensation under § 1.415(c)–2(a), applied as if the service recipient were not using any safe harbor provided in § 1.415(c)–2(d), any of the special timing rules provided in § 1.415(c)–2(e), or any of the special rules provided in § 1.415(c)–2(g), will be treated as the general definition of compensation for purposes of identifying specified employees. However, the final regulations also provide that a service recipient may use any available definition of compensation under section 415 and the accompanying regulations, including any available safe harbor and any available election under the timing rules or special rules, provided that the definition is applied consistently to all employees of the service recipient for purposes of identifying specified employees. A service recipient may elect to use such a definition of compensation regardless of whether another definition of compensation is being used for purposes of a qualified plan sponsored by the service recipient. However, once a list of specified employees has become effective, the service recipient cannot change the definition of compensation for purposes of identifying specified employees for the period with respect to which such list is effective. For a discussion of the methods for making an election regarding the definition of compensation, see section VII.C.4.e of this preamble.

Commentators requested clarification of the treatment of the compensation of certain nonresident alien employees. As discussed in the preceding paragraph, for purposes of identifying key employees, the general definition of compensation under § 1.415(c)–2(a) applies. A service recipient may elect to apply the rule of § 1.415–2(g)(5)(ii) and not treat as compensation certain compensation excludible from an employee's gross income on account of the location of the services or the identity of the employer that is not effectively connected with the conduct of a trade or business within the United States. If no such election is made, the provisions of § 1.415(c)–2(g)(5)(i) would apply, requiring the treatment as compensation of certain compensation excludible from an employee's gross income due to the location of the services or the identity of the service recipient.

b. Alternative Methods for Applying the Six-Month Delay Requirement

Commentators expressed concern that an attempt to identify key employees could result in an underinclusive list. Rather than risk a violation, commentators suggested that service recipients be permitted to use an alternative method for determining employees subject to the six-month delay requirement, even where such an alternative method may result in an over-inclusive list. A nonqualified deferred compensation plan may provide that all payments upon separation from service will commence six months after the separation from service, regardless of whether the service provider is a specified employee. In addition, the final regulations provide that a plan may use an alternative method identifying the service providers whose distributions will be subject to a six-month delay, provided that the alternative method is reasonably designed to include all specified employees, the alternative method is an objectively determinable standard providing no direct or indirect election to any service provider regarding the application of the rule, and the alternative method results in no more than 200 service providers being identified in the class as of any date. Use of such an alternative method to delay a payment in accordance with the rules governing the delay of payments to a specified employee will not be treated as a change in the time and form of payment for purposes of the subsequent deferral rules even if the service provider is not a specified employee when the payment is delayed. However, if the list fails to include any individual who is a specified employee and that individual has a right to a payment of deferred compensation upon a separation from service without the required six-month delay, the plan providing such right to such individual will not be in compliance with section

409A. For a discussion of the method of initiating an alternative method designation, see section VII.C.4.e of this preamble.

c. Specified Employee Effective Date Issues

Under the proposed regulations, the employees identified as of an identification date would become specified employees effective as of the first day of the fourth month following the identification date. Commentators stated that service recipients who could compile the list of specified employees more quickly should be permitted to make the list effective at an earlier date. The final regulations provide that the first day of the fourth month will be the specified employee effective date if the service recipient does not specify another date. However, the final regulations permit a service recipient to specify a specified employee effective date following the specified employee identification date upon which the new list of specified employees will become effective, provided that the specified employee effective date may not be later than the first day of the fourth month following the specified employee identification date. For example, an employer that designates December 31 as a specified employee identification date for purposes of identifying key employees for purposes of the six-month delay rule, may specify any subsequent date on or before the following April 1 as the first date of the 12-month period during which such list of key employees will be treated as specified employees. To prevent manipulation, any change to the specified employee effective date may not become applicable until 12 months following the change in such specified employee effective date.

The final regulations also clarify that the six-month delay requirement applies only where the service provider is a specified employee as of the date of separation from service, and does not become applicable if the service provider is not a specified employee as of the date of separation from service even if the service provider subsequently would have become a specified employee if the separation had not occurred.

d. Corporate Transactions

In response to comments, the final regulations significantly alter the proposed rules governing the identification of specified employees following a corporate transaction, such as a merger or spin-off. Commentators requested clarification of the determination of the next applicable specified employee identification date following the corporate transaction. In addition, commentators generally objected to any rule that resulted in the treatment of more than 50 employees as specified employees due to a corporate transaction (in addition to 1-percent and 5-percent owners treated as specified employees). The final regulations generally permit service recipients to avoid this result, but also permit service recipients to simply combine the pre-transaction separate lists of specified employees where it is determined that such treatment would be administratively less burdensome. Service recipients can determine whether to combine such lists on a case-by-case basis, if there are multiple transactions during the same year.

With respect to mergers and acquisitions, the final regulations address combinations of two public corporations, and combinations of a public and a closely-held corporation. For purposes of the discussion of the rules regarding the treatment of the identification of specified employees following such a transaction, references to specified employees include specified employees determined under any permissible method that the entities participating in the transaction used immediately before the transaction. Where two public corporations merge and become one public corporation, or a public corporation becomes a subsidiary of another public corporation, the final regulations provide that the resulting service recipient's next specified employee identification date and the first specified employee effective date following the transaction is the specified employee identification date and specified employee effective date that the acquiring service recipient would have been required to use absent the merger. For the period after the date of the transaction and before the next specified employee effective date, the specified employee list of the resulting service recipient consists of the 50 most highly compensated service providers appearing on the combined lists of the two service recipients' specified employees in effect as of the date of the transaction, ranking such specified employees in order of the amount of compensation used to determine each specified employees' status as a specified employee, plus any 1-percent and 5-percent owners not otherwise included who would be treated as specified employees. Alternatively, however, the resulting service recipient may use any other reasonable method to determine its specified employees immediately after the transaction, provided that such method is adopted not later than 90 days after the merger and applied prospectively from the date of adoption. For a discussion of the procedures for adopting such a method, see section VII.C.4.e of this preamble.

Where a public corporation and a private corporation merge and become a public corporation, or where a private corporation becomes a subsidiary of a public corporation, the resulting service recipient's next specified employee identification date and specified employee effective date following the transaction will be the specified employee identification date and specified employee effective date that the pre-transaction public corporation would have been required to use absent such transaction. For the time period after the transaction and before the next specified employee effective date, the specified employees of the pre-transaction public service recipient immediately before the transaction will continue to be the specified employees of the resulting service recipient, and service providers of the pre-merger private service recipient will not become specified employees until the next specified employee effective date. Consequently, the nonqualified deferred compensation plans in which service providers of the formerly private service recipient participate will not be required to contain a plan term delaying a payment upon separation from service of such service providers, or to delay such a payment, until the next specified employee effective date.

The final regulations also address spin-off transactions. Where as part of a corporate transaction, a public service recipient becomes two separate public service recipients, the final regulations provide that the next specified employee identification date and specified employee effective date of each of the post-transaction service recipients is the specified employee identification date and specified employee effective date that the pre-transaction service recipient would have been required to use absent such transaction. For the period after the date of the transaction and before the next specified employee effective date, the specified employees of the pre-transaction service recipient immediately before the transaction continue to be the specified employees of the post-transaction service recipients.

The final regulations provide guidance on initial public offerings and other corporate transactions where all or part of a private service recipient becomes one or more public service

recipients. In that case, except as discussed in this paragraph, each post-transaction public service recipient will have a December 31 specified employee identification date and an April 1 specified employee date. Alternatively, the new public service recipient may establish a different specified employee identification date and specified employee effective date, provided that the specified employee identification date and specified employee effective date must be established on or before the date of the initial public offering or other corporate transaction.

For the period between the date of the initial public offering or other corporate transaction and the first specified employee effective date, the list of specified employees of each post-transaction public service recipient is comprised of the service providers that at the time of the corporate transaction or public offering would have been classified as specified employees of the former private service recipient, had such service recipient adopted the same specified employee identification date and specified employee effective date as selected by such post-transaction public service recipient, and had such former private service recipient been a public service recipient as of such specified employee identification date.

e. Alternatives for the Identification of Specified Employees

As discussed in this preamble, the final regulations provide certain default definitions for purposes of identifying specified employees, where the service recipient has not adopted another definition. These default rules include the following provisions: the specified employee identification date is December 31; the specified employee effective date is April 1; the general definition of compensation under § 1.415(c)–2(a) will apply (without giving effect to any use of the special timing rules under § 1.415(c)–2(e) or of a safe harbor definition of compensation under § 1.415(c)–2(d)); and certain rules regarding the identification of specified employees after a merger of public service recipients or an initial public offering or other transaction involving a formerly nonpublic service recipient becoming a public service recipient will apply.

Alternatively, the final regulations also provide that the service recipient may use other permissible rules and definitions, provided that such alternatives become effective only in accordance with the rules and deadlines set forth in the final regulations. In addition, the final regulations permit a service recipient to use an alternative method for purposes of identifying specified employees, with certain limitations, and to make an election under § 1.415(c)–2(g)(5)(i) regarding the treatment as compensation of certain compensation excludible from an employee's gross income due to the location of the services or the identity of the employer. For purposes of these rules, a service recipient may use one of these alternatives when all necessary corporate action has been taken to make such alternative binding for purposes of all affected deferred compensation plans in which service providers of the service recipient participate. Accordingly, as a practical matter, the service recipient may find it expedient either to specify the definition of specified employee in all of its nonqualified deferred compensation plans or to retain the discretion in all such plans to make such determinations and take any necessary corporate action in accordance with each such plan.

f. Application of the Six-Month Delay Rule

The final regulations reflect the statutory language that a plan may provide that a payment will be made, notwithstanding the six-month delay, upon the service provider's death. A commentator requested similar treatment for the occurrence of a disability, unforeseeable emergency, or change in control event during the six months following the separation from service. The Treasury Department and the IRS do not believe that the statute permits such flexibility, but rather categorically prohibits any distribution due to a separation from service during the six months following the separation from service except where the service provider dies. Accordingly, where a payment on account of a separation from service has been delayed because the service provider is a specified employee, the payment may not be accelerated due to disability, a change in control event, or an unforeseeable emergency. However, where a payment is made to a specified employee on account of disability, a change in control event, or an unforeseeable emergency (as defined for purposes of section 409A), the payment need not be delayed merely because the specified employee separates from service after incurring the disability or unforeseeable emergency, or after the change in control event.

Commentators further requested that various types of periodic benefit payments be excluded from the six-month delay requirement, even if such payments constitute a payment of deferred compensation. Commentators argued that the requirement to delay such payments would be excessively burdensome and impracticable, given the nature and amount of benefits generally available under such arrangements. The Treasury Department and the IRS are not convinced that periodic payment or reimbursement plans should be excluded from the six-month delay rule; otherwise, deferred compensation could simply be converted to such programs to avoid the delay. However, as clarified in the final regulations, certain plans that provide for reimbursements or in-kind benefits during the six months following a separation from service will not be treated as nonqualified deferred compensation plans under the rules governing separation pay plans. See section III.J.6 of this preamble.

The final regulations also provide that the required delay of a payment to a specified employee upon a separation of service is not violated where the payment is made before the end of the six-month period due to an acceleration of a payment in compliance with the provisions of the regulations permitting accelerated distributions due to a domestic relations order, to satisfy a Federal, state, local, or foreign ethics law, or to pay certain employment taxes (see section VIII of this preamble).

5. Different Times and Forms of Payment on Separation From Service Under Specified Circumstances

The final regulations continue to provide that a time and form of payment must be specified with respect to each permissible payment event. Under the proposed regulations, a second time and form of payment could be established for a payment due to a permissible payment event where the distinction was based upon the event occurring before or after a certain date, such as the service provider reaching a certain age. Commentators requested that different times and forms of payment be permitted if based upon different types of separations from service. The final regulations generally provide that the time and form of payment upon a separation from service may vary depending upon either or both of the following: (1) Whether the separation from service occurs during a limited period of time not to exceed two years following a change in control event as defined for purposes of section 409A; or (2) whether the separation from service occurs before or after a specified date (for example, the attainment of a specified age), or before or after a combination of a specified date and a specified period of service determined under a predetermined objective

formula or pursuant to the method for crediting service under a qualified plan sponsored by the service recipient. The addition or deletion of such a different time and form of payment applicable to an existing deferral is subject to the subsequent deferral election rules and the anti-acceleration rules.

D. Disability

The final regulations generally adopt the definition of disability and other provisions related to the payment of an amount upon a service provider becoming disabled contained in the proposed regulations, subject to the modifications described in this preamble. For this purpose, a participant is disabled if the participant 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 expected to last for a continuous period of not less than 12 months, or 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 participant's employer. The determination of whether a service provider is disabled may be made by any person, including the administrator of a disability insurance program, and the plan need not specify who will make the determination. However, the plan will be treated as complying with section 409A only if the disability required for a payment complies with the definition of disability under the regulations, and a payment due to a disability will be deemed to comply with section 409A if the service provider has actually suffered a qualifying disability. The final regulations also provide that a plan may provide that a service provider will be deemed disabled if the service provider is determined to be totally disabled by the Social Security Administration or the Railroad Retirement Board.

Commentators raised questions concerning the ability to pay upon the occurrence of a disability that does not qualify as a disability under the statute, where as a result of the disability the service provider has a separation from service. Such a payment would not constitute a payment due to a disability that complied with section 409A. However, if the plan provided for a payment due to the separation from service, a payment would constitute a payment due to a separation from service regardless of whether the separation from service resulted from such a disability and regardless of whether the service provider's right to receive such payment was conditioned upon the service provider being disabled under such disability definition. For a discussion of the ability to provide for different times and forms of payment due to different types of separations from service, including separations from service due to certain disabilities, see section VII.C.4 of this preamble.

E. Death

Most of the comments with respect to amounts that are payable due to the death of a service provider related to whether a beneficiary of the service provider could be given the opportunity to elect a time and form of payment under a plan without violating section 409A. The final regulations clarify that elections with respect to the time and form of payment to a beneficiary are subject to the general rules governing subsequent deferrals and accelerated payments, including elections by either the service provider or the beneficiary (with an exception for amounts payable under a domestic relations order). However, a change in a beneficiary will not be treated as a change in the time and form of payment, if the change in the time of payment stems solely from the different life expectancy of the new beneficiary, such as in the case of a joint and survivor annuity. Commentators requested that beneficiaries be permitted a limited period of time in which to change the time and form of payment without being subject to the subsequent deferral and anti-acceleration provisions. The Treasury Department and the IRS do not believe that the statutory language supports this type of late deferral election or payment acceleration. Accordingly, these suggestions are not adopted in the final regulations.

F. Change in Ownership or Effective Control of a Corporation

The final regulations generally adopt the provisions contained in the proposed regulations with respect to the definition of a change in control event, as well as certain special rules with respect to payments upon a change in control event, subject to the modifications described in this preamble.

One commentator requested that the threshold for a change in the effective control of a corporation be lowered from 35 percent to 20 percent, especially for a public corporation. The legislative history of section 409A indicates that the definition of a change in control event is to be based upon, but more restrictive than, the definition provided in section 280G. H.R. Conf. Rep. No. 108–755, at 730 (2004). Given that § 1.280G–1, Q&A–28(a)(1) provides for a 20 percent standard, the adoption of that standard is not appropriate in light of the legislative history. However, the final regulations lower the threshold to 30 percent.

One commentator requested guidance with respect to the application of the change in control provisions to non-stock, non-profit corporations. The Treasury Department and the IRS are considering whether such guidance is appropriate, and if so what types of changes could be treated as analogous to a change in control event involving a stock corporation. Until further guidance, a non-stock, non-profit corporation may apply the change in effective control provisions in § 1.409A–3(i)(5) (relating to a change in the composition of the board of directors) by analogy to changes in the composition of its board of directors, trustees, or other governing body.

The final regulations continue to provide that in the case of a payment on account of certain change in control events (a change in ownership of a corporation or a change in the ownership of a substantial portion of a corporation's assets), compensation payable pursuant to the service recipient's purchase of service recipient stock or a service recipient stock right held by a service provider, or payment of amounts of deferred compensation calculated by reference to the value of service recipient stock, generally may be treated as complying with the requirements of section 409A if paid under the terms and conditions that govern the payments to shareholders or the service recipient in connection with the change in control event. The final regulations continue to require that such amounts be paid no later than five years after the change in control event. However, the final regulations also provide that where such compensation is made subject to a condition on payment that constitutes a substantial risk of forfeiture under section 409A (without regard to the prohibition on additions or extensions of forfeiture conditions), and such compensation is payable under the same terms and conditions as apply to payments made to shareholders generally with respect to stock of the service recipient, or to the service recipient itself, pursuant to the change in control event, for purposes of determining whether such compensation is a short-term deferral the requirements of the short-term

deferral rule are applied as if the legally binding right to such compensation arose on the date that it became subject to the substantial risk of forfeiture. The regulations also provide rules under which certain pre-existing forfeiture conditions may be extended or modified in connection with such a change in control event.

G. Unforeseeable Emergency

The final regulations apply the provisions set forth in section 409A(a)(2)(B)(ii) regarding payments upon an unforeseeable emergency. The final regulations provide that 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 plan. The final regulations clarify that for these purposes, the availability of payments due to the unforeseeable emergency under any other nonqualified deferred compensation plan as defined for purposes of section 409A, including plans that would be nonqualified deferred compensation plans for purposes of section 409A except due to the effective date of the statute, or under any qualified plan (including any assets available by obtaining a loan under a qualified plan), need not be considered in determining whether an emergency is or may be relieved through other means. Accordingly, a payment due to an unforeseeable emergency may be made pursuant to a nonqualified deferred compensation plan that is subject to section 409A even though the financial need could be satisfied through an available distribution or loan from a qualified plan, from a grandfathered nonqualified deferred compensation plan, or from another nonqualified deferred compensation plan that is subject to section 409A.

Section 826 of the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780) modified the rules governing payments upon an unforeseeable emergency. Specifically, section 826 requires that the Treasury Department and the IRS modify the rules for determining whether a service provider has had an unforeseeable emergency for purposes of section 409A(a)(2)(B)(ii) to provide that if an event would constitute a hardship under the plan if it occurred with respect to the service provider's spouse or dependent, such event will, to the extent permitted under a plan, constitute a hardship if it occurs with respect to a person who is a beneficiary under the plan with respect to the service provider. The final regulations reflect this modification.

H. Multiple Payment Events

The final regulations provide that a plan may provide for a payment based upon the earlier of, or the later of, a series of events, provided that each payment event would otherwise satisfy the requirements of section 409A. The final regulations also provide that for purposes of the subsequent deferral and acceleration rules, each payment event will be viewed separately for purposes of analyzing the effect of a change in the time and form of payment. For a discussion of the effect of the addition or deletion of a permissible payment event from such a list, see section IX.C of this preamble.

I. Delay in Payment by the Service Recipient

Commentators requested that a service recipient be permitted to delay a payment, where the delay is due to bona fide business concerns such as cash flow considerations. Where a payment is delayed due to the operation of a pre-specified objective, nondiscretionary formula related to the business performance of the service recipient, the payment generally may be delayed (for example, where payments in any given year are limited to a certain percentage of cash flow) provided that the time for later payment is governed by the objective, nondiscretionary formula. See section VII.B.3 of this preamble. In addition, the final regulations provide that if at the time of a specified payment date the making of the payment would jeopardize the ability of the service recipient to continue as a going concern, the payment will be treated as made upon the specified payment date if the payment is made during the first taxable year of the service provider in which the making of the payment would not have such effect. This provision is not required to be explicitly provided in the plan.

Because this provision permits the service recipient to delay any payment the making of which would jeopardize the ability of the service recipient to continue as a going concern, the provision in the proposed regulations permitting a delay in payment required to avoid a violation of a loan covenant or similar contractual obligation, where such violation would cause material harm to the service recipient, has not been adopted in the final regulations. Rather, where the payment would result in a violation of a loan covenant or similar contractual obligation, and the violation would jeopardize the ability of the service recipient to continue as a going concern, the payment can be delayed under the general provision.

The final regulations adopt the provision of the proposed regulations that permits a delay in payment necessary to avoid the application of the deduction limitation under section 162(m), subject to the following modifications. First, a plan is not required to provide explicitly for such a delay. However, the final regulations require that where any payment in a service recipient's taxable year is delayed in accordance with this provision, then all payments that could be delayed in accordance with this provision must be delayed (though some payments may be delayed until after separation from service and others until the earliest taxable year in which the deduction limitation no longer applies). Second, except as provided in the next sentence, the regulations provide that the payment must be made either during the service provider's first taxable year in which the service recipient reasonably anticipates, or reasonably should anticipate, that if the service recipient makes such payment during such year such payment will not fail to be deductible because of section 162(m) or, if later, during the period beginning on the day the service provider separates from service and ending on the later of the last day of the service provider's taxable year in which the separation from service occurs or the 15th day of the third month following the separation from service. Finally, the final regulations provide that where the payment has been delayed until the service provider's separation from service, the six-month delay requirement for specified employees may apply. Although commentators argued that the six-month delay rule should not apply because the original payment would not have been subject to the rule, this same argument could be made with respect to any deferral election to have current compensation paid instead at a separation from service, and accordingly is not adopted in the final regulations.

J. Disputed Payments and Refusals to Pay

The final regulations adopt the provisions in the proposed regulations with respect to disputed payments and refusals to pay, subject to certain modifications. If a payment is not made due to a service recipient's refusal to pay an amount, the amount generally will be treated as paid in a timely

manner if the service provider makes reasonable, good faith efforts to collect the payment. This provision is intended to address not only intentional refusals to pay, but also inadvertent delays (but, in either case, only if there is no collusion between the service provider and service recipient). For example, where through oversight a service recipient fails to make a payment on the required payment date, the payment will be treated as made on the specified date if the service provider makes reasonable, good faith efforts to collect the payment, generally through providing timely notice to the service recipient that the payment is due and unpaid. For this purpose, efforts to collect the payment will be presumed not to be reasonable, good faith efforts if notice is not given to the service recipient within 90 days of the latest date upon which the payment could have been timely made in accordance with the terms of the plan and the regulations and, if not paid, further measures to enforce the payment are not taken within 180 days after such date. For a discussion of payments that are accelerated due to a settlement of a bona fide dispute as to the service provider's right to the payment, see section VIII.G of this preamble.

K. Back-to-Back Arrangements

The proposed regulations addressed certain arrangements under which an entity (the intermediate service recipient) receives services from a service provider and provides services to a client (the ultimate service recipient), and the time the intermediate service recipient is entitled to receive a payment for services rendered to the ultimate service recipient is controlled by the date on which the intermediate service recipient is obligated to make a payment of deferred compensation to the service provider. For example, assume an intermediate service recipient provides investment management services for a group of investors. Pursuant to a nonqualified deferred compensation plan, the intermediate service recipient has agreed to pay its employee a sum certain when the employee terminates employment. Under the intermediate service recipient's agreement with the investor group, the investors will pay the same sum certain to the intermediate service recipient when the employee terminates employment. The proposed regulations referred to these types of arrangements as back-to-back arrangements.

The final regulations adopt the proposed provisions that addressed back-to-back nonqualified deferred compensation arrangements, subject to the modifications described in this section. The final regulations clarify that the rules addressing back-to-back arrangements apply regardless of whether the arrangement between the service provider and the intermediate service recipient is actually subject to section 409A, as long as each arrangement that is part of the overall back-to-back scheme complies with the requirements of section 409A without regard to whether such arrangement is actually subject to section 409A. Accordingly, the accommodations afforded to back-to-back arrangements are only applicable to the extent that each arrangement satisfies the requirements of section 409A as if those requirements applied to each such arrangement (modified in accordance with the back-to-back rules).

Commentators also requested that, with respect to taxpayers providing management services that are not eligible for the exception from coverage for independent contractors with multiple unrelated customers, the exception from the general payment timing rules permitting certain back-to-back arrangements be expanded to include not only arrangements where the payment from an ultimate service recipient to the intermediate service recipient is based upon the timing of a required payment under a section 409A compliant plan from the intermediate service recipient to a service provider (a forward back-to-back arrangement), but also where the payment to the service provider is based upon a required payment under a section 409A compliant arrangement from the ultimate service recipient to the intermediate service recipient (a reverse back-to-back arrangement). For example, a service recipient that provides investment management services to an investor group may have an arrangement whereby the investors are required to pay all amounts due to the investment manager service recipient if the investor group terminates the client relationship, and the investment manager service recipient in turn has an agreement with an employee to pay the employee a certain percentage of the amount the investor group pays to the investment manager service recipient, following termination of the client relationship. The final regulations do not provide an exception from the requirements of section 409A for reverse back-to-back arrangements, but the Treasury Department and the IRS will continue to study the matter.

*VIII. Prohibition of Accelerated Payments*

A. In General

Section 409A(a)(3) provides that a plan may not permit the acceleration of the time or schedule of any payment under the plan, except as provided in regulations by the Secretary. The final regulations retain the provisions in the proposed regulations relating to accelerated payments, subject to the modifications described in this preamble.

The final regulations generally provide that a payment of an amount as a substitute for a payment of deferred compensation will be treated as a payment of the deferred compensation, including for purposes of the prohibition on accelerated payments. Where a payment of an amount results in an actual or potential reduction of, or an actual or potential current or future offset to, an amount of deferred compensation, or the service provider receives a loan the repayment of which is secured by or may be accomplished through an offset of a nonqualified deferred compensation benefit, then the payment or loan is a substitute for the deferred compensation and is treated as a payment of the deferred compensation itself. If a service provider's rights to deferred compensation are subject to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, attachment, or garnishment by creditors of the service provider or the service provider's beneficiary, such amounts are treated as having been paid to the service provider.

The receipt of a payment of compensation, or right to a payment of compensation, proximate to the purported forfeiture or voluntary relinquishment of a right to deferred compensation generally is treated as a substituted payment for the payment of the deferred compensation. For example, where the right to an amount of deferred compensation is purportedly relinquished or forfeited, and concurrently or subsequently the service provider receives a current bonus payment, the bonus payment will be presumed to be a substitute payment for the amount of deferred compensation. The presumption is rebuttable by a showing that the compensation paid would have been paid regardless of the relinquishment or forfeiture of the right to the deferred compensation. For a discussion of the application of this provision to amounts forfeitable upon a separation from service, see section III.J.1 of this preamble.

A plan may not provide discretion to a service provider regarding whether a

payment will be accelerated under one of the rules permitting the acceleration of payments under specified circumstances (for example, to comply with a domestic relations order), including through the provision of an election. However, where a plan provides a service recipient discretion to accelerate payments under one of the rules permitting the acceleration of a payment, the failure to accelerate such a payment will not constitute a subsequent deferral election.

B. Plan Termination and Liquidation

The proposed regulations contained provisions permitting a service recipient to terminate and liquidate a nonqualified deferred compensation plan, including when the service recipient has declared bankruptcy, when the service recipient has participated in certain change in control events, or at the discretion of the service recipient, all subject to certain restrictions and limitations. Commentators expressed concern over the restrictions and limitations. Some comments reflected confusion as to the meaning of these terms in the context of section 409A. The termination and liquidation of a nonqualified deferred compensation plan involves both the amendment of the plan to cease deferrals under the plan and provide for payment of all benefits accrued under the plan, and the accelerated payment of benefits accrued under the plan.

Several comments suggested that the final regulations expand the circumstances under which a service recipient may terminate and liquidate a nonqualified deferred compensation plan. Generally these comments requested discretion in case of a change in business conditions or circumstances, resulting in the service recipient's desire to terminate and liquidate the plan. The final regulations expand the circumstances under which a sale of assets of a corporation will result in a separation from service. See section VII.C.2.f of this preamble. In addition, the final regulations continue to allow the service recipient to terminate and liquidate a plan during a defined period following a change in control event. Outside of these particular business events, the comments failed to provide an objective standard or category of changes in business conditions or circumstances that would provide a safeguard against the use of plan termination and liquidation provisions to circumvent the prohibition on accelerations. Accordingly, the final regulations do not expand the ability of a service recipient to exercise its discretion to terminate and liquidate a deferred compensation plan. However, the period of time during which a service recipient may not commence a new plan after terminating and liquidating a nonqualified deferred compensation plan has been shortened from five years to three years. Also, the final regulations provide that a discretionary plan termination and liquidation will not qualify for this exception if it is proximate to a downturn in the financial health of the service recipient.

The final regulations clarify the rules under which a deferred compensation plan may be terminated and liquidated upon a change in control event. Under the final regulations, the service recipient must, within the 30 days preceding or the 12 months following the change in control event, take all necessary action to terminate and liquidate the plan and such action must be irrevocable. In addition, for the plan to be treated as terminated and liquidated, all other arrangements that would be classified with the plan as a single plan if the same service provider participated in the plan and all the other arrangements must be terminated and liquidated, so that all service providers who are participants in the plan and all such other arrangements required to be terminated and liquidated must receive all amounts of compensation deferred under the terminated and liquidated plan and other arrangements within 12 months of the date the service recipient takes such irrevocable action to terminate and liquidate the arrangements. For purposes of the rule, the entities comprising the service recipient are determined immediately following the change in control event, and the rule only applies with respect to service providers for whom a change in control has occurred. For example, where the change in control event consists of a sale of a subsidiary corporation such that the subsidiary corporation is no longer treated as a single service recipient with the (former) parent corporation, the requirement to terminate and liquidate substantially similar arrangements applies only to the purchaser service recipient group of corporations that now owns the subsidiary corporation. In addition, the rule would apply only to the service providers that had experienced a change in control, generally consisting only of the service providers of the subsidiary corporation. Where the change in control event consists of an asset purchase, the applicable service recipient with discretion to terminate and liquidate the plan is deemed to be the entity retaining the deferred compensation liability after the transaction.

Some commentators asked whether the plan termination and liquidation rules apply if a plan is terminated and liquidated when the service provider has no vested right to a payment, and all payments are forfeited. Where the service recipient retained the unfettered discretion to terminate such a plan without paying benefits, the service provider may not have obtained a legally binding right to a payment. In addition, if a service provider forfeits benefits under a nonqualified deferred compensation plan in exchange for other taxable benefits, those benefits may be treated as a payment of amounts under the nonqualified deferred compensation plan.

C. Conflicts of Interest and Ethics Rules

The proposed regulations contained a special accelerated payment rule to permit accelerated payments required to be made by a certificate of divestiture. Notice 2006–64, 2006–29 IRB 88, see § 601.601(d)(2), expanded this exception to address situations in which a letter is received from the Office of Government Ethics that divestiture of the deferred compensation is required. Several commentators requested an expansion of these rules.

The final regulations provide that a payment may be accelerated where necessary for a Federal officer or employee in the executive branch to comply with an ethics agreement with the Federal government. The final regulations also provide that a payment may be accelerated where reasonably necessary to avoid the violation of a Federal, state, local, or foreign conflict of interest law or ethics law (including where such payment is reasonably necessary to permit the service provider to participate in activities in the normal course of his or her position in which the service provider would otherwise not be able to participate under an applicable law). For this purpose, a payment will be reasonably necessary to avoid such a violation if the making of the payment is a necessary part of a combination of actions resulting in compliance with the applicable law. A payment may be considered necessary to avoid such a violation even though actions other than making the payment could also result in compliance with the applicable law. For example, as requested by several commentators, this provision would provide a public accounting firm the ability to accelerate payments where reasonably necessary to satisfy conflict of interest rules prescribed by the Securities and Exchange Commission. This paragraph

is intended to address payments to service providers, as well as payments to a spouse or minor children where such payments are reasonably necessary to comply with the applicable law. For this purpose, foreign law is considered to be applicable only to foreign earned income from sources within the foreign country that promulgated such law.

D. State and Local Taxes, RRTA Tax and Foreign Taxes

Commentators stated that certain state and local jurisdictions tax nonqualified deferred compensation plans under a different set of rules than the Federal income tax rules, typically by reference to the rules applicable to FICA taxes. Commentators also requested that accelerations be permitted to cover applicable RRTA taxes. Finally, commentators requested that accelerated payments be permitted to account for the tax laws of foreign jurisdictions that may not be consistent with the Federal income tax rules. The final regulations adopt the suggestions with respect to state and local taxes, RRTA taxes, and foreign taxes.

E. Minimum Distributions Under Section 280H(d)

One commentator suggested that acceleration be permitted to allow a personal service corporation to make minimum distributions to avoid taxation under section 280H(d). The Treasury Department and the IRS believe that such a provision would give taxpayers excessive control over the payment of deferred amounts that would be inconsistent with the purposes of section 409A. Therefore, this suggestion was not adopted.

F. Top Hat Plan Rules

Some commentators requested that the final regulations permit a service recipient to accelerate payments or cancel deferral elections with respect to a service provider who is not part of a select group of management or highly compensated employees for purposes of the exclusion from coverage under certain provisions of the Employee Retirement Income Security Act of 1974 relating to top hat plans. See, for example, 29 U.S.C. 1051(2). Given the current lack of clarity with respect to the scope of coverage of the top hat plan rules, and the actions required when a plan participant no longer satisfies the requirement to qualify for the top hat plan rules, the Treasury Department and the IRS are not confident that an exception to the anti-acceleration provisions based upon these rules is feasible. Accordingly, the final regulations do not adopt this suggestion.

G. Settlements of Bona Fide Disputes Regarding the Right to a Payment

Commentators requested relief for certain payments made as a settlement of a dispute as to a service provider's right to a deferred amount. For example, assume that a plan provides for a payment of deferred compensation upon a termination of an employee's employment other than for cause and the employee and employer have a bona fide dispute as to whether the employee was terminated for cause, and thus whether the service provider is entitled to any payment under the plan. The final regulations provide that payments may be accelerated, including acceleration to payment as a lump sum, where the right to such payments arises as part of a settlement between the service provider and the service recipient of a bona fide dispute as to the service provider's right to the deferred amount. The provision applies only to a deferred amount, the right to which is the subject of an arm's length settlement of a bona fide dispute between the service provider and the service recipient, and only to the portion of the deferred amount that is the subject of the bona fide dispute. The provision does not apply to disputes that relate only to when (and not whether) a payment is due. Whether a payment qualifies for the exception is based on the particular facts and circumstances. A payment will be presumed not to meet this exception unless the payment is subject to a substantial reduction in the value of the payment made in relation to the amount that would have been payable had there been no dispute as to the service provider's right to the payment. For this purpose, a reduction that is less than 25 percent of the present value of the deferred amount in dispute generally is not a substantial reduction. In addition, a payment will be presumed not to meet this exception if the payment is made proximate to a downturn in the financial health of the service recipient.

H. Cashout Rules

Commentators requested various modifications to the cashout rules generally expanding the conditions under which a service recipient may exercise discretion to cash out a service provider's entire amount deferred under a plan. The final regulations generally provide that a service recipient may exercise such discretion at any time that a service provider's amount deferred under the plan is less than the applicable dollar amount under section 402(g)(1)(B) for that calendar year. For this purpose, the plan aggregation rules apply, so a service recipient may not use this rule to cash out an amount under one arrangement but not another arrangement where the two arrangements would be treated as one plan. The final regulations, unlike the proposed regulations, do not require that a service provider have separated from service for the service recipient to cash out the amount deferred. In addition, the plan does not need to be amended to provide this discretion to the service recipient. Finally, the amount has been changed from $10,000 to the limit on elective deferrals under section 402(g) to permit the amount to be adjusted for changes in the cost of living.

The final regulations also provide that a plan under which amounts are to be paid in installments may provide for immediate payment of all remaining installments if the present value of the deferred amount to be paid in the remaining installments falls below a predetermined amount, and such immediate payment will not constitute an accelerated payment for purposes of § 1.409A–3(j)(1), provided that such feature (including the predetermined amount) is established no later than the latest time at which the time and form of payment is otherwise required to be established, and provided further that any change in such feature including the predetermined amount must comply with the requirements for a change in the time and form of payment.

I. Other Acceleration Issues

Commentators requested that a service recipient be permitted to cancel a service provider's deferral elections in two situations. First, commentators asked that such a cancellation be allowed when the service provider is transferred to a position that is not eligible to participate in the plan. The Treasury Department and the IRS are not confident that a standard can be established that would clearly distinguish a bona fide transfer to an ineligible position from a pro forma transfer designed to avoid the prohibition on accelerated payments, especially when the underlying plan is specific to the service provider, as in the case of an individual employment agreement, and accordingly the final regulations do not adopt this suggestion. Second, commentators asked that a service provider's deferral election be cancelled if the service provider becomes disabled. The final regulations permit the cancellation of the service provider's deferral election due to a disability, provided that for this purpose a disability is defined as any medically determinable physical or mental

impairment resulting in the service provider's inability to perform the duties of his or her position or any substantially similar position, where such impairment can be expected to result in death or can be expected to last for a continuous period of not less than six months.

*IX. Subsequent Changes in the Time and Form of Payment*

A. In General

The final regulations clarify that the rules governing changes in the time and form of payment apply both to service providers and service recipients. Accordingly, a service provider, a service recipient, or both a service provider and a service recipient may have and exercise discretion to defer a deferred compensation payment after the time and form of payment have been specified, provided that such discretion is limited to changes that comply with the requirements of these regulations addressing subsequent changes in the time and form of payment.

B. Annuities

Many commentators requested clarification and expansion of the rules that allow taxpayers to treat actuarially equivalent life annuities as one form of payment, thereby allowing elections among such annuity forms at any time before the initial annuity payment without regard to the rules on subsequent deferral elections. The final regulations clarify the circumstances under which two actuarially equivalent life annuities may be treated as one form of payment.

The final regulations generally provide that certain specified features are ignored for purposes of determining whether a particular annuity is treated as a life annuity for purposes of the form of payment rules (but not for purposes of determining whether a life annuity with such a feature is actuarially equivalent to a life annuity without such a feature). The specified features include: (1) Term certain features (under which annuity payments continue for the longer of the life of the annuitant or a fixed period of time); (2) pop-up provisions (under which payments increase upon the death of the beneficiary or another event that eliminates the right to a survivor annuity); (3) cash refund features (under which payment is provided upon the death of the last annuitant in an amount that is not greater than the excess of the present value of the annuity at the annuity starting date over the total of payments before the death of the last annuitant); (4) Social Security or Railroad Retirement leveling features (including leveling features related to early retirement, survivor or disability benefits); and (5) features applying a permissible cost-of-living index. Accordingly, a life annuity with any of the specified features may be treated as a life annuity without regard to the fact that the features cause the annuity to fail to satisfy the general definition for life annuities, for example, because the periodic payments are not substantially equal. However, the life annuity with such a feature may only be treated as the same form of payment as a life annuity without such a feature if the two life annuities are actuarially equivalent (taking into account the feature) and have the same initial payment date.

Commentators also raised issues concerning the availability of subsidized joint and survivor annuities. The final regulations provide that for purposes of the definition of a time and form of payment, a subsidized joint and survivor annuity is treated as actuarially equivalent to a single life annuity provided that, neither the annual lifetime annuity benefit nor the annual survivor benefit available under the joint and survivor annuity is greater than the annual lifetime annuity benefit available under the single life annuity. For example, a single life annuity providing $100 a month for the lifetime of the service provider may be treated as actuarially equivalent to a joint and survivor annuity providing up to $100 a month for the lifetime of the service provider and up to $100 a month to the surviving joint annuitant.

Commentators asked whether the actuarial assumptions and methods used to determine actuarial equivalency must be applied consistently. The final regulations clarify that in determining whether two life annuities are actuarially equivalent, the same actuarial assumptions and methods must be used in valuing each life annuity. This requirement applies over the entire term of the service provider's participation in the plan, such that the annuities must be actuarially equivalent at all times for the annuity options to be treated as one time and form of payment. However, provided the actuarial methods and assumptions are reasonable, there is no requirement that consistent actuarial assumptions and methods be used over the term of the service provider's participation in the plan. Accordingly, the plan may change the actuarial assumptions and methods used to determine the life annuity payments, provided that all of the actuarial assumptions and methods are reasonable. In addition, there is no requirement that the actuarial assumptions and methods used under a nonqualified deferred compensation plan be the same as those used in a qualified plan sponsored by the service recipient.

C. Application to Multiple Payment Events

The final regulations continue to provide that the subsequent deferral and anti-acceleration rules generally will apply to the addition or deletion of a permissible payment event. Commentators asked for clarification of how these rules apply.

The Treasury Department and the IRS believe that a failure to provide for a payment event at death, disability or an unforeseeable emergency generally will result from oversight, and that the addition of such a provision generally would not be abusive. Accordingly, the final regulations provide that the addition of death, disability, or an unforeseeable emergency as a potentially earlier payment event is a permissible acceleration. This provision does not apply to the addition of death, disability, or an unforeseeable emergency as a potentially later payment event, such as through the addition of death as a payment event to a plan providing for a payment of deferred compensation on a fixed date, so that after the change the payment would be due on the later of the fixed date or death. Nor, for example, would it apply to an amendment of a plan to substitute a service provider's death as a new payment event, instead of a fixed payment date. In those cases, the rules governing subsequent deferral elections apply. In addition, the substitution of death as a payment event for an amount that is deferred compensation will not cause the plan to be treated as a death benefit plan not subject to section 409A, but the substitution or addition of a payment event other than death as a payment event in a death benefit plan may result in the plan being treated as providing for deferred compensation.

The anti-acceleration provisions apply to the addition of a specified date or fixed schedule, a change in control event, or separation from service as a potentially earlier payment event, including the substitution of one of these payment events for another payment event. In addition, the anti-acceleration provisions apply where a payment event is removed from a plan term requiring payment upon the latest of two or more payment events. The provisions governing subsequent deferral elections apply to all changes in the time and form of payment, whether resulting from the addition, deletion or substitution of another payment event.

Commentators requested clarification of how this provision would apply where the events were not specified dates, such as the substitution of a change in control payment event for a separation from service event. In such a situation, to satisfy the rules governing subsequent deferrals, this substitution would only be permissible if the change were not effective for one year, and provided that the payment would only occur upon the later of a change in control event or at least five years following a separation from service.

D. Application to Domestic Relations Orders

The final regulations provide that the rules governing changes in the time and form of payment do not apply to changes in the time and form of payment under the terms of a domestic relations order, to the extent the change in the time and form of payment applies to a payment that will be made to the alternate payee and not the service provider. Accordingly, for example, a domestic relations order generally may provide for a new time and form of payment to a spouse or former spouse of the service provider, or provide such spouse or former spouse discretion to determine the time and form of payment to such spouse or former spouse.

*X. Application to Nonqualified Deferred Compensation Plans Linked to Qualified Plans and Other Arrangements*

A. Plans Linked to Qualified Plans and Certain Broad-Based Foreign Retirement Plans

The final regulations generally adopt the relief provided in the proposed regulations with respect to the election-timing and the anti-acceleration rules for changes in the amount of benefits under a nonqualified deferred compensation plan that result from an election (or failure to elect) by a service provider, or an amendment by a service recipient, in respect of a subsidized or ancillary benefit under a qualified plan. In response to comments, this relief is similarly extended to certain broad-based foreign retirement plans. In addition, this relief is extended for benefit formulas that include a reduction for amounts credited to the service provider's account under a tax-qualified plan (which may include matching contributions) or certain broad-based foreign retirement plans that provide benefits expressed as an account balance.

In response to comments, the final regulations also clarify that the linked plan relief provided for elective deferrals (including designated Roth contributions) and matching type contributions, each up to the section 402(g) dollar limit on elective deferrals, are separate, additive limits and are not a single, coordinated limit. In addition, the final regulations clarify that the section 402(g) dollar limits are increased by the limit on catch-up contributions under section 414(v) for any year in which the service provider qualifies for such increase.

Commentators raised issues concerning other types of plans under which a service provider must participate in a qualified plan to receive nonqualified deferred compensation. Specifically, commentators asked whether a plan could comply with section 409A if it provided that an employee must defer the maximum amount permissible under a qualified plan in order to defer any amount under a nonqualified deferred compensation plan. Where the service provider can change the service provider's election to defer the maximum amount permissible under the qualified plan during the taxable year, and thereby change or discontinue deferrals under a nonqualified deferred compensation plan, the service provider can effectively make a late election to defer (or not defer) amounts under the nonqualified plan. The final regulations generally do not provide any additional relief with respect to this type of plan. However, where the additional amounts deferred under the nonqualified deferred compensation plan reflect only matching contributions that would be available under the qualified plan absent the restrictions in the qualified plan intended to reflect limits on qualified plan contributions under sections 401(m) and 401(a)(17), the final regulations provide relief but solely with respect to the matching amount that could have been contributed to the qualified plan absent such limits.

Commentators also stated that the rules in the proposed regulations did not adequately address the impact of after-tax contributions. Specifically, commentators requested relief for service providers who change their after-tax contributions (other than designated Roth contributions) under a qualified plan during a year where such decrease causes a corresponding change in nonqualified plan elective deferrals. The final regulations provide some additional relief concerning matching or other contributions contingent upon the making of an after-tax contribution. However, other suggestions were not adopted in the final regulations, because the Treasury Department and the IRS are concerned that such plans may give the service provider excessive control over amounts deferred under a nonqualified deferred compensation plan, contrary to the statutory intent.

B. Plans Linked to Cafeteria Plans

Commentators expressed concern that changes to elections under a section 125 cafeteria plan could change the amount of eligible compensation used for purposes of a benefit formula under a nonqualified deferred compensation plan and thereby create an impermissible deferral election or acceleration of payment under the nonqualified deferred compensation plan. The final regulations provide relief from the deferral election-timing and anti-acceleration rules for changes to section 125 elections properly made in accordance with the rules under section 125, to the extent that the change in the amount deferred under the nonqualified deferred compensation plan results solely from the application of the change in amount of eligible compensation resulting from the election change under the cafeteria plan to a benefit formula based upon the service provider's eligible compensation, and only to the extent that such change applies in the same manner as any other increase or decrease in the eligible compensation would apply to such benefit formula.

C. Offsets

i. In General

Some commentators requested clarification whether an arrangement under which a specified amount paid by a service recipient to a service provider reduces or offsets an amount that is payable to the service provider under a nonqualified deferred compensation plan will be treated as providing for an acceleration of a payment under the nonqualified deferred compensation plan. As an example, one commentator stated that a plan may require that any payout at separation from service of accrued leave that is determined to be in excess of the correct amount of such payment will be deducted from the amount due under a nonqualified deferred compensation plan, rather than repaid separately by the service provider. One commentator suggested that offsets be permitted for all service provider debts of a kind and in amounts customarily incurred in the ordinary course of the business relationship between the service provider and the service recipient.

The Treasury Department and the IRS believe that the unfettered discretion to settle debts between a service recipient and a service provider through offsets from payments of nonqualified deferred

compensation is not consistent with the intent of the statute, because it creates opportunities to disguise accelerated payments of deferred compensation. Accordingly, amounts that currently or in the future may be offset against nonqualified deferred compensation are treated as payments of deferred compensation and may violate the anti-acceleration rules under section 409A. See section VIII.A of this preamble. However, the Treasury Department and the IRS agree that the ability to offset small routine debts against amounts payable under a nonqualified deferred compensation plan is useful so that service recipients can avoid the administrative burden involved in paying deferred compensation amounts to a service provider while at the same time attempting to collect small amounts owed by the same service provider. Accordingly, the final regulations provide that payments of deferred compensation may be offset by amounts owed to the service recipient by the service provider, where such debt is incurred in the ordinary course of the service relationship, to the extent the entire offset in any taxable year does not exceed $5,000 and the offset is taken at the same time and in the same amount as the debt otherwise would have been due from the service provider.

ii. Social Security Benefits and Disability Benefits

Commentators requested clarification of the treatment of nonqualified deferred compensation plans that offset benefits with payments received as Social Security benefits and disability benefits. A plan provision providing for a direct, dollar-for-dollar reduction of payments due under a nonqualified deferred compensation plan by the amount of payments received or receivable as Social Security benefits will not fail to provide for a fixed schedule of payments. However, the rule relates solely to direct reductions in deferred compensation benefits to reflect eligibility for, or payment of, Social Security benefits, and does not permit other changes in the time and form of benefit based upon a service provider's eligibility or elections related to Social Security benefits. A reduction in a nonqualified deferred compensation plan benefit equal to the amount receivable under a service recipient sponsored disability plan generally will be treated similarly, provided that a substantial number of service providers participate in the disability plan. However, to allow the payment schedule to qualify as a fixed schedule, the disability plan must be established before the date the service provider becomes disabled. In addition, any subsequent amendment to the disability plan or other change in the benefit payable under the disability plan may result in an acceleration of a payment or a subsequent deferral under the nonqualified deferred compensation plan unless the facts and circumstances establish otherwise (for example, because the amendment or change results from actions taken by an independent third party, such as an unrelated insurer that issued a disability insurance policy for such disability plan, over which the service recipient and service provider have no control, or an action of the service recipient with respect to the disability plan that is generally applicable to a substantial number of other service providers who participate in such disability plan and has a material effect on the disability benefits of such other service providers).

*XI. Statutory Effective Dates*

A. Effective Dates—Earned and Vested Amounts

As provided in section 885(d) of the American Jobs Creation Act of 2004, section 409A generally is effective for amounts deferred after December 31, 2004. The final regulations adopt the definition set forth in the proposed regulations of an amount deferred on or before December 31, 2004, for purposes of the effective date, subject to the modifications described in this preamble. The final regulations clarify that the grandfathered amount includes any account balance that is earned and vested, as well as the present value of any earned and vested right to future account credits, even if such amounts had not been credited to the account as of December 31, 2004. For example, if a service provider had a vested right on December 31, 2004, to have a bonus amount added to the service provider's account balance in a nonqualified deferred compensation plan, the service provider's grandfathered amount would include the amount of such bonus even though such amount was not calculated and credited to the account until some time in 2005.

B. Effective Dates—Calculation of Grandfathered Amount

One commentator requested that the grandfathered amount in a nonaccount balance plan be expressed in terms of the form of benefit under the plan. So, for example, where the normal benefit was expressed in the form of an annuity payable at a certain age, that is how the amount of the grandfathered benefit would also be expressed. The final regulations do not adopt this suggestion, but reach a similar result by providing that any actuarial assumptions and methods that were reasonable to use as of December 31, 2004, may continue to be used in subsequent years for purposes of determining the grandfathered amount.

C. Material Modifications

Section 885(d)(2) of the American Jobs Creation Act of 2004 provides generally that amounts deferred in taxable years beginning before January 1, 2005, are treated as amounts deferred in a taxable year beginning on or after such date if the plan under which the deferral is made is materially modified after October 3, 2004. The final regulations adopt the definition set forth in the proposed regulations of a material modification for these purposes, subject to the changes described in this preamble.

For purposes of the definition of a material modification under the effective date rules, the final regulations incorporate the exclusions from the definition of a modification for purposes of the rules governing stock rights. For example, a change to a discounted grandfathered stock right that could be covered by section 409A if materially modified under the effective date rules, will not be treated as materially modified and subject to section 409A if the change would not be treated under the rules governing stock rights as a modification resulting in treatment as a new grant of a stock right or an extension resulting in treatment of the stock right as having had a deferral feature from the date of grant.

The final regulations provide that neither the amendment of a plan to include a provision allowing for a payment to a person other than the service provider due to the application of a domestic relations order, nor the making of a payment in compliance with a domestic relations order where a plan did not address the ability to make such a payment, is treated as a material modification for purposes of the grandfathering rules.

Commentators also requested that a grandfathered plan be permitted to remove a provision requiring a cancellation of deferrals for a prescribed period of time under all nonqualified deferred compensation plans to receive a distribution from the grandfathered plan, without resulting in a material modification. Commentators argued that because the enforcement of such a provision by cancelling a current deferral election generally would result in an immediate violation of section 409A, the inability to remove the requirement that the deferral election be

cancelled effectively nullifies the grandfathered right. Under the final regulations, an amendment to a grandfathered plan that changes such a provision to require a cancellation of deferrals for the equivalent period of time beginning with the first possible date that such a cancellation would not result in a prohibited accelerated payment (generally the beginning of the subsequent calendar year for a service provider with a calendar year taxable year) will not constitute a material modification. For example, taxpayers may amend an early distribution provision that requires the immediate cessation of deferrals for 12 months to apply only to deferrals over the first 12 month period with respect to which the service provider can make a timely deferral election, for example, by prohibiting deferrals of compensation attributable to services performed during the service provider's next taxable year.

Commentators requested clarification of the effect of a material modification of a plan. The specific consequences of a material modification of a plan are being considered as part of the anticipated guidance related to income inclusion and calculation. However, the final regulations provide that for amounts deferred in taxable years beginning before January 1, 2005, under a plan that is materially modified after October 3, 2004, whether the plan complies with the requirements of section 409A is determined by reference to the terms of the plan in effect, and any actions taken under the plan, on and after the date of the material modification. Accordingly, where the materially modified plan is compliant with section 409A and these regulations immediately following the material modification, the material modification generally will not itself result in a violation.

*XII. Effective Date of Final Regulations*

A. Existing Transition Relief

Nothing in this preamble or the final regulations is intended to restrict the otherwise applicable transition relief. For a description of the applicable transition relief, see Notice 2006–79, 2006–43 IRB 763 (extension of certain transition relief through 2007), Notice 2006–64, 2006–29 IRB 88 (transition relief applicable to certain accelerated payments necessary to comply with Federal ethics requirements), Notice 2006–33, 2006–15 IRB 754 (transition rules with respect to section 409A(b)), Notice 2006–4, 2006–3 IRB 307 (transition relief with respect to the valuation standards applicable to stock rights issued on or before the effective date of the final regulations for purposes of the exclusion from coverage under section 409A for certain stock rights), the preamble to the proposed regulations (extension of certain transition relief through 2006), and Notice 2005–1, 2005–1 CB 274 (initial transition relief). See § 601.601(d)(2).

B. Application of Final Regulations

The final regulations are generally effective January 1, 2008. For periods before January 1, 2008, the standards and transition rules set forth in Notice 2006–79 continue to apply. For further information regarding the transition relief for periods before the effective date of the final regulations, see Notice 2006–79 and section XI of the preamble to the proposed regulations.

Commentators requested clarification of the impact of the final regulations becoming effective January 1, 2008, on plans that continue to defer compensation on or after January 1, 2008. Specifically, commentators asked whether actions taken with respect to nonqualified deferred compensation plans that would not have resulted in income inclusion under section 409A before 2008 because such actions were consistent with applicable guidance, but would not be consistent with the final regulations, would need to be modified to avoid income inclusion under section 409A in 2008 and later years. The following sections discuss the effect of the final regulations with respect to the requirements necessary to comply with section 409A, including the various requirements necessary for a plan to be excluded from coverage under section 409A.

C. Stock Rights

Many of the comments related to stock options and stock appreciation rights. Some commentators requested that section 409A not apply to any stock rights issued before the effective date of the final regulations. Neither the statute nor the legislative history indicates an intent for such a broad exception. The Treasury Department and the IRS understand that certain aspects of the guidance on stock rights have changed. However, the final regulations generally expand the exclusion from coverage under section 409A for certain stock rights to eliminate many issues raised by the proposed regulations. In addition, with respect to certain types of stock rights, such as discounted stock options, the guidance has explicitly and consistently indicated that either rights that would be excluded from coverage under section 409A must be substituted for such rights or such rights must be modified to comply with section 409A. Accordingly, the final regulations do not adopt a categorical exclusion from coverage under section 409A of all stock rights issued before the issuance of the final regulations.

Commentators also asked whether a stock option must be repriced to avoid coverage under section 409A if the exercise price would be treated as having been set at fair market value under section 409A under the applicable guidance, but would not be treated as having been set at fair market value if the standard of the final regulations had been applicable. For this purpose, the guidance provided in Notice 2006–4, 2006–3 IRB 307, see § 601.601(d)(2), remains in effect. Notice 2006–4 provided certain standards applicable to stock rights issued before January 1, 2005, for determining whether the exercise price of such stock right would be treated as having been set at fair market value for purposes of the exclusion from coverage under section 409A for certain stock rights. As provided in Notice 2006–4, for stock rights issued before January 1, 2005, the standards applicable to incentive stock options under section 422 are applicable. Generally this means that where the sole reason the stock right would fail to qualify for the exclusion from coverage under section 409A is due to the exercise price not being set at or above fair market value, the exercise price will be treated as set at or above fair market value if based upon a good faith attempt by the issuer to set the exercise price at or above fair market value. As further explained in Notice 2006–4, for stock rights issued on or after January 1, 2005, but before January 1, 2008, the provisions of Notice 2005–1 will apply, generally requiring that fair market value for purposes of setting the exercise price of a stock right must be determined using a reasonable valuation method. In addition, for stock rights issued on any date before January 1, 2008, taxpayers may rely upon the provisions of the proposed or final regulations with regard to the determination of the fair market value of the underlying stock.

Commentators requested that taxpayers not be required to bring stock rights granted before January 1, 2008, into compliance with section 409A if such rights were properly treated as not being subject to section 409A under the applicable guidance, but instead be permitted to keep such rights outstanding and unmodified.

The final regulations significantly expand the permissible classes of stock and the permissible issuers of stock under the service recipient stock rule,

and taxpayers may rely on the final regulations for periods before the effective date of the final regulations. In addition, with respect to stock rights issued before April 10, 2007 on stock that would have constituted service recipient stock under a reasonable good faith interpretation of the statute and applicable guidance, but would not constitute service recipient stock under the final regulations, such stock will continue to constitute service recipient stock for purposes of applying section 409A to such stock right until the exercise or termination of such right, or until the stock right is modified in a manner that is treated as the grant of a new right. However, for a stock right issued on or after April 10, 2007, stock subject to such stock right will not be treated as service recipient stock after December 31, 2007, unless such stock satisfies the requirements of the final regulations, and if the stock does not satisfy these requirements, such stock right will be required to be modified either to be excluded from coverage under section 409A, or to comply with the requirements of section 409A and these regulations.

Commentators also expressed concerns about modifications and extensions of stock rights that occur before January 1, 2008. Different concerns and arguments arise depending upon whether these modifications and extensions occurred on or before the enactment of the statute (October 23, 2004), on or before the issuance of Notice 2005–1 (December 20, 2004), on or before the issuance of the proposed regulations (September 30, 2005) or on or before the effective date of the final regulations (January 1, 2008). The final regulations significantly expand the permissible types of modifications and extensions that will not result in treatment of the stock right as a new grant or as having had a deferral feature from the date of grant, and taxpayers may rely on these regulations for periods before the effective date of the regulations. In addition, any modifications or extensions occurring before the enactment of the statute (October 23, 2004) will not be considered in determining whether the right is excluded from coverage under section 409A. Finally, any extension granted before April 10, 2007 solely in order to give the holder of a stock right an additional period of time within which to exercise the stock right beyond the time originally prescribed is disregarded for purposes of the rules treating certain extensions as deferral features from the time of grant. See § 1.409A–1(b)(5)(v)(C).

D. Initial Deferral Elections

Commentators asked whether and to what extent the final regulations would impact initial deferral elections made before the effective date of the final regulations. If a deferral election made before January 1, 2008, was consistent with the proposed regulations or the applicable transition guidance, the initial deferral election will be deemed to comply with the provisions of section 409A, regardless of whether the period of deferral extends beyond December 31, 2007.

In addition, commentators asked whether and to what extent the final regulations would impact programs established before the effective date of the final regulations, where initial deferral elections have not been made by January 1, 2008. For example, commentators asked how section 409A would apply if a service recipient has interpreted a program as providing for performance-based compensation and permitted deferral elections to occur in 2008 or later in accordance with the rules governing deferrals of performance-based compensation, but such compensation does not qualify as performance-based compensation under the final regulations. For a program established before April 10, 2007 that under a reasonable, good faith interpretation of the statute and applicable guidance would have permitted an initial deferral election to be made after December 31, 2007, and on or before December 31, 2008, an initial deferral election will be deemed to comply with the initial deferral election rules if made by the deadline established in the plan. For a program established before April 10, 2007 that under a reasonable, good faith interpretation of the statute and applicable guidance would have permitted an initial deferral election to be made after December 31, 2008, an initial deferral election will be deemed to comply with the initial deferral election rules if made by December 31, 2008.

E. Designation of Time and Form of Payment

Notice 2005–1 and the preamble to the proposed regulations consistently provide that elections as to the time and form of payment of deferred compensation would need to be compliant with the final regulations by the time such regulations were effective. Both Notice 2005–1 and the preamble to the proposed regulations provide detailed transition guidance, generally permitting service providers and service recipients to change the time and form of payment at any time through the end of the transition period. Accordingly, a payment scheme that violates the provisions of the final regulations will need to be brought into compliance with the final regulations in accordance with the transition relief.

F. Service Providers in Pay Status

Commentators asked how the final regulations apply to service providers that are already in pay status, where the payment trigger is based upon a reasonable, good faith interpretation of the statute and applicable guidance but is not in compliance with the final regulations. This may occur where the service provider has already begun receiving payments before January 1, 2008, or where all events necessary to receive the payment have occurred before January 1, 2008. For example, a service provider may have been treated as having separated from service before January 1, 2008, under a reasonable, good faith interpretation of the statute, but would not be treated as having separated from service under the final regulations. Where payments have commenced before January 1, 2008, the plan may continue to make such payments consistent with the application of the plan terms at the time the payments commenced, or may halt such payments on or before December 31, 2007, and amend the time and form of any remaining payments to comply with the final regulations in accordance with the transition guidance provided. Where payments have not commenced by January 1, 2008, but all the events necessary to receive the payment have occurred, the plan may make payments in accordance with the application of the plan terms on December 31, 2007, or may amend the time and form of payments to comply with section 409A in accordance with the transition guidance provided. Similarly, where payments have not commenced on or before December 31, 2007, because the service provider was treated as not having separated from service under a reasonable, good faith interpretation, but under the final regulations the service provider would be treated as having separated from service on or before December 31, 2007, the plan must treat the service provider as having separated from service on a date on or after April 10, 2007 and on or before December 31, 2007. Nothing in this paragraph is to be construed to permit the continuation of any payment schedule based upon an application of section 409A on or before December 31, 2007, that failed to meet the requirements of the applicable transition guidance. In addition, nothing

in this paragraph is intended to waive the application of the constructive receipt doctrine or section 451 with respect to any discretion provided to the service provider (or former service provider) with respect to the application of these provisions.

In addition, commentators asked how the final regulations would apply in the case of the six-month delay for specified employees of public corporations. Where a separation from service occurs on or before December 31, 2007, under circumstances that under a reasonable, good faith interpretation of the statute and applicable guidance would not result in application of the six-month delay requirement for a payment to a specified employee, the beginning or continuation of payments of deferred compensation on or after January 1, 2008, will not result in a violation of the six-month delay requirement for a payment to a specified employee.

*XIII. Additional Transition Relief*

A. Collectively Bargained Plans

Consistent with Notice 2006–79, § 3.05, the final regulations provide that a nonqualified deferred compensation plan maintained pursuant to one or more collective bargaining agreements in effect on October 3, 2004, is not required to comply with the provisions of section 409A on or before the earlier of the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension of any agreement after October 3, 2004) or December 31, 2009.

With respect to amounts deferred under a nonqualified deferred compensation plan maintained pursuant to one or more collective bargaining agreements in effect on October 3, 2004, the plan may provide, or be amended to provide, for new payment elections with respect to both the time and form of payment of such amounts, and the election or amendment will not be treated as a change in the time or form of 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 elections are made before the date on which section 409A first applies to such plan. A deferral election may be made with respect to an amount that is a short-term deferral within the meaning of § 1.409A–1(b)(4), provided that the election is made before the date on which section 409A would apply to an amount deferred under such plan and before January 1 of the calendar year in which the amount would otherwise have been paid.

B. Requirement To Amend Plans on or Before December 31, 2007

Where there have been deferrals of compensation under a plan as of January 1, 2008 but the deferred compensation has not been paid, the plan must be made compliant with section 409A on or before December 31, 2007, with respect to such deferred compensation. These amendments are required only to bring the document into compliance effective January 1, 2008, and are not required to reflect any amendments made or actions taken under the transition rules to the extent such amendments or actions do not affect the plan's compliance with section 409A and these regulations for periods on or after January 1, 2008. For example, if a plan contains a haircut provision permitting an immediate distribution contingent on the forfeiture of a certain portion of a deferred amount, the haircut provision need not be removed retroactively for periods before January 1, 2008, where the plan has been operated in compliance with the applicable transition guidance (and thus no payment pursuant to the haircut provision has been made after December 31, 2004). In addition, a plan need not be amended to be made compliant with section 409A with respect to amounts deferred under the plan that were paid on or before December 31, 2007, in compliance with the transition guidance. However, the taxpayer must be able to demonstrate that the plan was operated in compliance with the transition guidance, including demonstrating that amounts were deferred or paid in compliance with the transition rules. For example, where payments were made in conjunction with elections of payment dates by either the service recipient or service provider during the transition period, the taxpayer must be able to demonstrate that the elections were provided and made in accordance with the transition rules.

*XIV. Calculation and Timing of Income Inclusion Amounts, Reporting and Withholding*

A. In General

These regulations do not address the calculation and timing of amounts required to be included in income under section 409A(a). Nor do these regulations address the reporting and withholding requirements applicable to service recipients providing nonqualified deferred compensation covered by section 409A. The Treasury Department and the IRS intend to issue further guidance, including such transition guidance as may be appropriate with respect to the reporting and withholding requirements. See Notice 2006–100, 51 IRB 1109, for transition rules applicable to the reporting and withholding requirements for 2005 and 2006. See § 601.601(d)(2).

B. Operational Violations During the Transition Period

Commentators on the proposed regulations and Notice 2006–100 asked whether a service provider whose nonqualified deferred compensation plan violated section 409A in operation before January 1, 2008, would be required to include an amount in income under section 409A only in the taxable year of the service provider in which the operational failure occurred (assuming this was the only year of an operational failure), or in such year and all prior years beginning after December 31, 2004. Commentators argued that for years before the operational violation, the taxpayer could be treated as operating the plan in reasonable, good faith compliance with the statute and Notice 2005–1, and therefore should be required to include an amount in income under section 409A only for the year in which the operational violation occurred. For example, where a taxpayer exercised a discounted stock option covered by section 409A in 2006, commentators argued that the taxpayer should be treated as operating the plan in reasonable, good faith compliance with section 409A during 2005, so that the taxpayer would be required to include an amount in income as a result of the section 409A violation only to 2006.

Where an operational failure occurs in 2006 or 2007, and no operational failures occurred in any prior year, the taxpayer (including the service recipient) may report the amounts required to be included in income under section 409A as taxable income only in the year of the operational failure. In addition, where the violation results from a payment, a taxpayer may include the required amount in income only for the year in which such violation occurs, regardless of whether the portion of the deferred compensation plan under which such payment was made is ever amended to comply with the requirements of section 409A for periods before such payment. For example, where a taxpayer exercises a discounted stock option subject to section 409A in 2006, and there was no operational violation in 2005, the taxpayer may include an amount in income under section 409A for 2006, and the taxpayer will not be required to include an amount in income with respect to such stock option for 2005,

even if the taxpayer does not amend the stock option to comply with section 409A for 2005. However, where all or part of the total amount deferred in the year of the violation was also an amount deferred in one or more prior years that was not subject to a substantial risk of forfeiture in such year, taxpayers are also required to calculate and pay any applicable tax under section 409A(a)(1)(B)(i)(I) (based on the amount of interest determined under section 409A(a)(1)(B)(ii)). For example, if the discounted stock right in the previous example was not subject to a substantial risk of forfeiture as of December 31, 2005, the taxpayer would be required to compute and report the additional tax under section 409A(a)(1)(B)(i)(I) on the taxpayer's 2006 return. For purposes of this paragraph, the service recipient should treat the application of section 409A in the same manner for purposes of income tax withholding and reporting obligations.

C. Application of Plan Aggregation Rules During the Transition Period

Notice 2006–100 provides that where there is a required income inclusion under section 409A in 2006, the plan aggregation rules apply in determining the amount includible in income. Commentators asked whether the plan aggregation rules would apply where the taxpayer violates section 409A in 2006 with respect to one arrangement (the first arrangement), but retains the right to modify another arrangement (the second arrangement) to exclude a right to an amount provided under the second arrangement from coverage under section 409A, where the second arrangement would otherwise be aggregated with the first arrangement. For this purpose, if the legally binding right to the amount under the second arrangement ultimately is modified (including, where permitted by applicable guidance, by the substitution of another right for such right), so that the right to the amount is excluded from coverage under section 409A, then the right to the amount is treated as always having been excluded from coverage under section 409A. Accordingly, the amount payable under the second arrangement would not be required to be aggregated with the first arrangement for purposes of determining the amount includible in income under section 409A. However, if the right to the amount under the second arrangement is not timely modified to be excluded from coverage under section 409A, the right to the amount under the second arrangement will remain subject to the plan aggregation rules regardless of whether the second arrangement is, or is amended to be, compliant with the requirements of section 409A. In such a case, because the right to the amount under the second arrangement could have been modified to be excluded from coverage under section 409A, and would not have been subject to the plan aggregation rules, the violation with respect to the second arrangement is not treated as occurring until the first taxable year of the service provider during which the arrangement could not have been so modified.

For example, assume a taxpayer with a calendar year taxable year exercised a discounted stock right during 2006 in violation of section 409A and that the taxpayer held another unexercised discounted stock right described in Notice 2006–79, § 3.07 (relating to certain stock rights issued to corporate insiders) that could have been modified by December 31, 2006, to be excluded from coverage (by exchanging such stock right for another stock right pursuant to the preamble to the proposed regulations). If the unexercised stock right was not so modified by December 31, 2006, it would violate section 409A on January 1, 2007. Alternatively, assume a second taxpayer exercised a discounted stock right in 2006 in violation of section 409A and that taxpayer held another unexercised discounted stock right (not described in Notice 2006–79, § 3.07) that could have been modified by December 31, 2007, to be excluded from coverage. If the second taxpayer failed to timely modify such unexercised stock right, the unexercised stock right would violate section 409A on January 1, 2008.

D. Failures to Amend During the Transition Period to Comply With the Rules of Section 409A

Commentators asked how section 409A and these regulations would apply to a plan that was operated in compliance with the transition guidance through December 31, 2007, but is not amended to become compliant with section 409A and these regulations by December 31, 2007. For these purposes, the plan will be treated as failing to comply with the requirements of section 409A and these regulations as of January 1, 2008, so that no amounts will be required to be included in income under section 409A with respect to such a violation for any taxable year ending before January 1, 2008. However, this does not affect the application of the tax imposed by section 409A(a)(1)(B)(i)(I) to amounts that were deferred in taxable years ending before January 1, 2008, to the extent that such amounts were not subject to a substantial risk of forfeiture in one or more of such earlier taxable years.

*XV. Offshore Trusts and Arrangements With Financial Triggers*

These regulations do not address the application of section 409A(b), generally prohibiting the use of offshore trusts associated with nonqualified deferred compensation plans, and the use of triggers whereby amounts held in a trust or other arrangement become restricted to the use for payment of nonqualified deferred compensation upon an event related to the financial health of the service recipient. For transition guidance related to the application of section 409A(b) to certain outstanding arrangements, see Notice 2006–33, 2006–15 IRB 754. See § 601.601(d)(2). Taxpayers may continue to rely upon Notice 2006–33 until further guidance is issued.

**Applicability Date**

These regulations are applicable for taxable years beginning on or after January 1, 2008. Taxpayers may relay on the provisions of these final regulations for taxable years beginning before January 1, 2008.

**Effect on Other Documents**

Notice 2005–1, 2005–1 CB 274, is obsoleted for taxable years beginning on or after January 1, 2008, except for the following sections of the guidance which remain effective as modified by any other applicable guidance: Q&A–6 (application to arrangements covered by section 457); Q&A–7 (application to arrangements between a partnership and a partner of the partnership); and Q&A–24 through Q&A–38 (information reporting and withholding guidance). For a discussion of the effect of reliance upon Notice 2005–1 or the proposed regulations for taxable years beginning before January 1, 2008, for arrangements continuing into taxable years beginning on or after January 1, 2008, see section XII of this preamble. See § 601.601(d)(2).

Notice 2006–4, 2006–3 IRB 307, addressing certain stock rights issued before January 1, 2008, is superseded by these final regulations with respect to stock rights issued in taxable years of the service provider beginning on or after January 1, 2008. For a discussion of the effect of reliance upon Notice 2005–1, Notice 2006–4, or the proposed regulations for taxable years beginning before January 1, 2008, for stock rights remaining outstanding on or after January 1, 2008, see section XII of this preamble.

Notice 2006–33, 2006–15 IRB 754, Notice 2006–79, 2006–43 IRB 763, and Notice 2006–100, 2006–51 IRB 1109, are

not affected by these final regulations. Notice 2006–64, 2006–29 IRB 88, is superseded by the final regulations effective for taxable years of a service provider beginning on or after January 1, 2008. See § 601.601(d)(2).

**Special Analyses**

It has been determined that this Treasury decision 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, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

**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.

**Adoption of Amendments to the Regulations**

■ Accordingly, 26 CFR part 1 is amended as follows:

## PART 1—INCOME TAXES

■ **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–0 through 1.409A–6 are added to read as follows:

### § 1.409A–0 Table of contents.

This section lists captions contained in §§ 1.409A–1, 1.409A–2, 1.409A–3, 1.409A–4, 1.409A–5 and 1.409A–6.

*§ 1.409A–1 Definitions and covered plans.*

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(ii) Participation by nonresident aliens, certain resident aliens, and bona fide residents of possessions.
(iii) Participation by U.S. citizens and lawful permanent residents.
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(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.
(ii) Identification of relevant corporation.
(A) In general.
(B) Majority shareholder.
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(A) Certain transaction-based compensation.
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(v) Change in the ownership of a corporation.
(A) In general.
(B) Persons acting as a group.
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(A) In general.
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(A) In general.
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(6) Certain back-to-back arrangements.
(i) In general.
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(j) Prohibition on acceleration of payments.
(1) In general.
(2) Application to multiple payment events.
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(A) Compliance with ethics agreements with the Federal government.
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(iv) Section 457 plans.
(v) Limited cashouts.
(vi) Payment of employment taxes.
(vii) Payment upon income inclusion under section 409A.
(viii) Cancellation of deferrals following an unforeseeable emergency or hardship distribution.
(ix) Plan terminations and liquidations.
(x) Certain distributions to avoid a nonallocation year under section 409(p).
(xi) Payment of state, local, or foreign taxes.
(xii) Cancellation of deferral elections due to disability.
(xiii) Certain offsets.
(xiv) Bona fide disputes as to a right to a payment.
(5) Nonqualified deferred compensation plans linked to qualified employer plans or certain other arrangements.
(6) Changes in elections under a cafeteria plan.

*§ 1.409A–4 Calculation of income inclusion [Reserved]*

*§ 1.409A–5 Funding [Reserved]*

*§ 1.409A–6 Application of section 409A and effective dates.*

(a) Statutory application and effective dates
(1) Application to amounts deferred.
(i) In general.
(ii) Collectively bargained plans.
(2) Identification of date of deferral for statutory effective date purposes.
(3) Calculation of amount of compensation deferred for statutory effective date purposes.
(i) Nonaccount balance plans.
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(iii) Equity-based compensation plans.
(iv) Earnings.
(v) Definition of plan.
(4) Material modifications.
(i) In general.
(ii) Adoptions of new plans.
(iii) Suspension or termination of a plan.
(iv) Changes to investment measures—account balance plans.
(v) Stock rights.
(vi) Rescission of modifications.
(vii) Definition of plan.
(b) Regulatory applicability date.

**§ 1.409A–1 Definitions and covered plans.**

(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). Whether a plan provides for the deferral of compensation generally is determined at the time the service provider obtains a legally binding right to the compensation under the plan, and is not affected by any retroactive change to the plan to characterize the right as one that does not provide for the deferral of compensation. For example, amounts deferred under a nonqualified deferred compensation plan do not become an excluded death benefit if the plan is amended so that the amounts are payable only upon the death of the service provider. If a principal purpose of a plan is to achieve a result with respect to a deferral of compensation that is inconsistent with the purposes of section 409A, the Commissioner may treat the plan as a nonqualified deferred compensation plan for purposes of section 409A and the regulations thereunder.

(2) *Qualified employer plans.* The term *nonqualified deferred compensation plan* does not include a qualified employer plan. The term *qualified employer plan* means any of the following plans:

(i) Any plan described in section 401(a) and a trust exempt from tax under section 501(a) or that is described in section 402(d).

(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 plan 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)).

(viii) Any plan described in section 415(m).

(ix) Any plan described in § 1022(i)(2) of the Employee Retirement Income Security Act of 1974, Public Law 93–406 (88 Stat. 829, 942) (Sept. 2, 1974) (ERISA).

(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, arrangement, or plan maintained with respect to such individual, to the extent contributions made by or on behalf of such individual to such scheme, trust, arrangement, or plan, or credited allocations, accrued benefits, earnings, or other amounts constituting income, of such individual under such scheme, trust, arrangement, or plan, 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, certain resident aliens, and bona fide residents of possessions.* With respect to an alien individual for a taxable year during which such individual is a nonresident alien, a resident alien classified as a resident alien solely under section 7701(b)(1)(A)(ii) (and not section 7701(b)(1)(A)(i)), or a bona fide resident of a possession (within the meaning of section 937(a)), 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).

(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), other than an individual who is also a bona fide resident of a possession (within the meaning of section 937(a)), 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), but only with respect to a plan, or a portion of a plan where such portion may be distinguished, providing for nonelective deferrals of modified foreign earned income, and earnings with respect to such nonelective deferrals, and only to the extent that the amounts deferred under all such plans of the service recipient, or all portions of such plans, in which the service provider participates in such taxable year, do not exceed the applicable limits under section 415(b) (applied to nonaccount balance plans as defined in paragraph (c)(2)(i)(C) of this section) and section 415(c) (applied to account balance plans as defined in paragraph (c)(2)(i)(A) of this section) that would be applicable if such plans were plans subject to section 415 and the modified foreign earned income of such individual were treated as compensation for purposes of applying section 415(b) and (c). For purposes of this paragraph (a)(3)(iii), the term *modified foreign earned income* means foreign earned income as defined in section 911(b)(1) without regard to section 911(b)(1)(B)(iv) and without regard to the requirement that the income be attributable to services performed during the period described in section 911(d)(1)(A) or (B). The provisions of this paragraph (a)(3)(iii) do not apply to any individual with respect to any taxable year in which the individual is simultaneously eligible to participate in a broad-based foreign retirement plan and a qualified employer plan described in paragraph (a)(2) of this section. For purposes of this paragraph (a)(3)(iii), an individual is eligible to participate in a qualified employer plan if under the terms of the plan and without further amendment or action by the plan sponsor, the individual is eligible to make or receive contributions or accrue benefits under the plan (regardless of whether the individual has elected to participate in the plan).

(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 (42 U.S.C. 433) 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 foreign retirement plan.* The term *broad-based foreign retirement plan* means a scheme, trust, arrangement, or plan (regardless of whether sponsored by a U.S. person) that is written and that, in the case of an employer-maintained plan, satisfies the following conditions:

(A) The plan is nondiscriminatory insofar as the employees who, under the terms of the plan (alone or in combination with other comparable plans) and without further amendment or action by the employer, are eligible to make or receive contributions or accrue benefits under the plan other than earnings (regardless of whether the employee has elected to participate in the plan), are a wide range of employees, substantially all of whom are nonresident aliens, resident aliens classified as resident aliens solely under section 7701(b)(1)(A)(ii) (and not section 7701(b)(1)(A)(i)), or bona fide residents of a possession (within the meaning of section 937(a)), including rank and file employees.

(B) The plan (alone or in combination with other comparable plans) actually provides significant benefits for a substantial majority of such covered employees.

(C) The benefits actually provided under the plan to such covered employees are nondiscriminatory.

(D) The plan contains provisions or is the subject of tax law provisions or other legal restrictions that generally discourage employees from using plan benefits for purposes other than retirement or restrict access to plan benefits before separation from service, including (but not limited to), restricting in-service distributions except in events similar to an unforeseeable emergency (as defined in § 1.409A–3(i)(3)(i)) or hardship (as defined for purposes of section 401(k)(2)(B)(i)(IV)), or for educational purposes or the purchase of a primary residence.

(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 non-employees 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). For purposes of the application of section 409A to a plan to which section 457 applies, a payment under the plan generally means the provision of cash or property to the service provider, provided that for purposes of the application of the short-term deferral rule set forth in paragraph (b)(4) of this section, the inclusion in income of an amount under section 457(f) is treated as a payment of the amount.

(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, provided that for purposes of this paragraph, such disability pay and death benefits may be provided through insurance and the lifetime benefits payable under the plan are not treated as including the value of any taxable term life insurance coverage or taxable disability insurance coverage provided under the plan. 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 such that the benefits or reimbursements provided under such arrangement are not includible in income.

(b) *Deferral of compensation*—(1) *In general.* Except as otherwise provided in paragraphs (b)(3) through (b)(12) 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, pursuant to the terms of the plan, is or may be payable to (or on behalf of) the service provider in a later taxable year. Such compensation is deferred compensation for purposes of section 409A, this section and §§ 1.409A–2 through 1.409A–6. A legally binding right to an amount that will be excluded from income when and if received does not constitute a deferral of compensation, unless the service provider has received the right in exchange for, or has the right to exchange the right for, an amount that will be includible in income (other than due to participation in a cafeteria plan described in section 125). A service provider does not have a legally binding right to compensation to the extent 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 discretion to reduce or eliminate the compensation lacks substantive significance depends on all the relevant facts and circumstances. 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 a nondiscretionary, 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 another plan (including 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 or deferred compensation include references to earnings. When the right to earnings is specified under the terms of the plan, the legally binding right to earnings arises at the time of the deferral of the compensation to which the earnings relate. A plan may provide that the time and form of payment of earnings is treated separately from the time and form of payment of the underlying compensation, so that, 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–3(e).

(*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 the plan under which a payment (as defined in § 1.409A–2(b)(2)) is made does not provide for a deferred payment and the service provider actually or constructively receives such payment on or before the last day of the applicable 2½ month period. The following rules apply for purposes of this paragraph (b)(4)(i):

(A) The applicable 2½ month period is the period ending on the later of the 15th day of the third month following the end of the service provider's first taxable year in which the right to the payment 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 right to the payment is no longer subject to a substantial risk of forfeiture.

(B) A payment is treated as actually or constructively received if the payment is includible in income, including if the payment is includible in income under section 83, the economic benefit doctrine, section 402(b), or section 457(f).

(C) A right to a payment 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 payment.

(D) A plan provides for a deferred payment if the plan provides that any payment will be made or completed on or after any date, or upon or after the occurrence of any event, that will or may occur later than the end of the applicable 2½ month period, such as a separation from service, death, disability, change in control event, specified time or schedule of payment, or unforeseeable emergency, regardless of whether an amount is actually paid as a result of the occurrence of such a payment date or event during the applicable 2½ month period. If a plan provides that the service provider or service recipient may make an election under the plan (including an election under § 1.409A–2(a)(4)) of a different payment date, schedule, or event, such right is disregarded for this purpose. In such cases, whether a plan provides for a deferred payment is determined based on the payment date, schedule, or event that would apply if no such election were made, except that if the plan would not provide for a deferred payment absent such an election, and the service provider or service recipient makes such an election, whether the plan provides for a deferred payment is determined based upon the payment date, schedule, or event that the service provider or service recipient in fact elected.

(E) A stock right provides for a deferred payment if such right includes any provision pursuant to which the holder of the stock right will or may have the right to exercise the stock right after the applicable 2½ month period.

(F) This paragraph (b)(4)(i) is applied separately to each payment (as defined in § 1.409A–2(b)(2)) required to be made under a plan.

(G) If a plan provides for a deferred payment with respect to part of a payment (for example a life annuity or a series of installment amounts treated as a single payment), the plan provides for a deferred payment with respect to the entire payment.

(ii) *Certain delayed payments.* A payment that otherwise qualifies as a short-term deferral under paragraph (b)(4)(i) of this section but is made after 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 and, as of the date upon which the legally binding right to the compensation arose, such impracticability was unforeseeable, or the taxpayer establishes that making the payment by the end of the applicable 2½ month period would have jeopardized the ability of the service recipient to continue as a going concern, and provided further that the payment is made as soon as administratively practicable or as soon as the payment would no longer have such effect. 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. In addition, a payment that otherwise qualifies as a short-term deferral under paragraph (b)(4)(i) of this section but is made after the applicable 2½ month period may continue to qualify as a short-term deferral if the taxpayer establishes that the service recipient reasonably anticipated that the service recipient's deduction with respect to such payment otherwise would not be permitted by application of section 162(m), and, as of the date the legally binding right to the payment arose, a reasonable person would not have anticipated the application of section 162(m) at the time of the payment, and provided further that the payment is made as soon as reasonably practicable following the first date on which the service recipient anticipates or reasonably should anticipate that, if the payment were made on such date, the service recipient's deduction with respect to such payment would no longer be restricted due to the application of section 162(m). For additional rules applicable to certain transaction-based compensation, see § 1.409A–3(i)(5)(iv)(A).

(iii) *Examples.* The following examples illustrate the provisions of this paragraph (b)(4). In these examples, except as otherwise noted, each employee and each employer has a calendar year taxable year and each employee is an individual who is employed by the specified employer.

*Example 1.* On November 1, 2008, Employer Z awards a bonus to Employee A such that Employee A has a legally binding right to the payment as of November 1, 2008, that is not subject to a substantial risk of forfeiture. The bonus plan does not provide for a payment date or a deferred payment. The bonus plan will not be considered to have provided for a deferral of compensation if the bonus is paid or made available to Employee A on or before March 15, 2009.

*Example 2.* Employer Y has a taxable year ending August 31. On November 1, 2008, Employer Y awards a bonus to Employee B so that Employee B has a legally binding right to the payment as of November 1, 2008, that is not subject to a substantial risk of forfeiture. The bonus plan does not provide for a payment date or a deferred payment. The bonus plan will not be considered to have provided for a deferral of compensation if the bonus is paid or made available to Employee B on or before November 15, 2009.

*Example 3.* On November 1, 2008, Employer X awards a bonus to Employee C such that Employee C has a legally binding right to the payment as of November 1, 2008. Under the bonus plan, Employee C will forfeit the bonus unless Employee C continues performing services through December 31, 2010. The right to the payment is subject to a substantial risk of forfeiture through December 31, 2010. Employee C has the right to make a written election not later than December 31, 2009, to receive the bonus on or after December 31, 2015, but Employee C does not make such election. The bonus plan does not provide for a default payment date or a deferred payment in the absence of an election by Employee C. The bonus plan will not be considered to have provided for a deferral of compensation if the bonus is paid or made available to Employee C on or before March 15, 2011 (and generally any payment before June 1, 2011 would constitute an impermissible acceleration of a payment).

*Example 4.* On November 1, 2008, Employer W awards a bonus to Employee D such that Employee D has a legally binding right to the payment as of November 1, 2008. Under the bonus plan, the bonus will be determined based on services performed during the period from January 1, 2009 through December 31, 2010. The bonus is scheduled to be paid as a lump sum payment on February 15, 2011. Under the bonus plan, Employee D will forfeit the bonus unless Employee D continues performing services through the scheduled payment date (February 15, 2011). Provided that at all times before the scheduled payment date Employee D is required to continue to perform services to retain the right to the bonus, and the bonus is paid on or before March 15, 2012, the bonus plan will not be considered to have provided for a deferral of compensation.

*Example 5.* On November 1, 2008, Employer V awards a bonus to Employee E such that Employee E has a legally binding right to the payment as of November 1, 2008. Under the bonus plan, Employee E will forfeit the bonus unless Employee E continues performing services through December 31, 2010. Under the bonus plan, the bonus is scheduled to be paid as a lump sum payment on July 1, 2011. By specifying a payment date after the applicable 2½ month period, the bonus plan provides for a deferred payment. The bonus plan provides for a deferral of compensation, and will not qualify as a short-term deferral regardless of whether the bonus is paid or made available on or before March 15, 2011.

*Example 6.* On November 1, 2008, Employer U awards a bonus to Employee F such that Employee F has a legally binding right to the payment as of November 1, 2008, that is not subject to a substantial risk of forfeiture. The bonus plan provides for a lump sum payment upon Employee F's separation from service. Because the separation from service is an event that may occur after the applicable 2½ month period, the bonus plan provides for a deferred payment and therefore provides for a deferral of compensation. Accordingly, the bonus plan will not qualify as a short-term deferral regardless of whether Employee F separates from service and the bonus is paid or made available on or before March 15, 2009.

*Example 7.* On November 1, 2008, Employer T grants Employee G a legally binding right to the payment of a life annuity with the first annuity payment on November 1, 2013, provided that Employee G continues performing services for Employer T continuously through November 1, 2013. Because the life annuity is treated as a single payment, and because all payments of the life annuity may not occur during the applicable 2½ month period, the plan provides for a deferred payment and none of the amounts payable under the annuity will qualify as a short-term deferral, so that section 409A applies to all amounts that are payable under the plan.

*Example 8.* On November 1, 2008, Employer S grants Employee H a stock right providing for an exercise price less than the fair market value of the underlying stock on November 1, 2008. The stock right is subject to a substantial risk of forfeiture requiring services through November 1, 2010. The stock right becomes exercisable when the substantial risk of forfeiture lapses and expires on November 1, 2013. Employee H continues providing services through November 1, 2010, at which time the substantial risk of forfeiture lapses. The stock right provides for a deferred payment and will not qualify as a short-term deferral regardless of whether Employee H exercises the stock right on or before March 15, 2011.

(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 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 the following:

(*i*) The exercise or disposition of the option under § 1.83–7.

(*ii*) 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 based on the appreciation in value of a specified number of shares of service recipient stock 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 excess of 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 over an amount specified on the date of grant of the stock appreciation right (the stock appreciation right exercise price), 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 exercise price 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 generally will 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 excess of 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

over 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, the grant of the stock appreciation right generally will 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 provides a right other than the right to receive cash or stock on the date of exercise and such additional right would otherwise allow compensation to be deferred beyond the date of exercise, 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.* For purposes of this paragraph (b)(5)(i), the right, directly or indirectly contingent upon the exercise of a stock right, to receive an amount equal to all or part of the dividends or other distributions (other than stock dividends described in paragraph (b)(5)(v)(H) of this section) 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 right to be subject to section 409A). A plan providing a right to dividends or other distributions declared and paid on the number of shares underlying a stock right, the payment of which is not contingent upon, or otherwise payable on, the exercise of the stock right, may provide for a deferral of compensation, but the existence of the right to receive such an amount will not be treated as a reduction to the exercise price of (or an increase to the compensation payable under) the stock right. Thus, a right to such dividends or distributions that is not contingent, directly or indirectly, upon the exercise of a stock right will not cause the related stock right to fail to satisfy the requirements of the exclusion from the definition of a deferral of 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, the exclusion for statutory stock options under 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 for purposes of this paragraph (b) as if it had been a nonstatutory stock option from the date of the original grant. Accordingly, if such modification, extension, or renewal of the stock option would have been treated as the grant of a new option or as causing the option to have had a deferral feature from the date of grant under paragraph (b)(5)(v) of this section, the modification, extension, or renewal of the stock option is treated as the grant of a new option or as causing the option to have had a deferral feature from the date of grant for purposes of this paragraph (b)(5).

(iii) *Service recipient stock*—(A) *In general.* Except as otherwise provided in paragraphs (b)(5)(iii)(B), (C), and (D) of this section, the term *service recipient stock* means a class of stock that, as of the date of grant, is common stock for purposes of section 305 and the regulations thereunder of a corporation that is an eligible issuer of service recipient stock (as defined in paragraph (b)(5)(iii)(E) of this section). Notwithstanding the foregoing, the term *service recipient stock* does not include a class of stock that has any preference as to distributions other than distributions of service recipient stock and distributions in liquidation of the issuer. The term *service recipient stock* also does not include any stock that is subject to a mandatory repurchase obligation (other than a right of first refusal), or a put or call right that is not a lapse restriction as defined in § 1.83–3(i), if the stock price under such right or obligation 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.* 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 recipient stock.

(C) *Mutual company units.* 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 or association. 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 such fixed percentage. For example, an appreciation right based on the appreciation of 10 mutual company units, where each unit is defined as one 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), the shares of which are not readily tradable on an established securities market.

(D) *Other entities.* An interest in an entity other than a corporation or non-stock mutual company or association may constitute service recipient stock 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).

(E) *Eligible issuer of service recipient stock*—(*1*) *In general.* The term *eligible issuer of service recipient stock* means only the corporation for which the service provider provides direct services on the date of grant of the stock right (if the entity receiving such services is a corporation), and any corporation in a chain of corporations or other entities in which each corporation or other entity has a controlling interest in another corporation or other entity in the chain, ending with the corporation or other entity that has a controlling interest in the corporation or other entity for which the service provider provides direct services on the date of grant of the stock right. For this purpose, the term *controlling interest* has the same meaning as provided in § 1.414(c)–2(b)(2)(i), provided that the language ''at least 50 percent'' is used instead of ''at least 80 percent'' each place it appears in § 1.414(c)–2(b)(2)(i). 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 *controlling interest* has the same meaning as provided in § 1.414(c)–

2(b)(2)(i), provided that the language ''at least 20 percent'' is used instead of ''at least 80 percent'' each place it appears in § 1.414(c)–2(b)(2)(i). For purposes of determining ownership of an interest in an organization, the rules of §§ 1.414(c)–3 and 1.414(c)–4 apply. The determination of whether a grant is based on legitimate business criteria is based on the facts and circumstances, focusing primarily on whether there is a sufficient nexus between the service provider and the issuer of the stock right so that the grant serves a legitimate non-tax business purpose other than simply providing compensation to the service provider that is excluded from the requirements of section 409A. For example, stock of a corporation that owns an interest in a joint venture involving an operating business, used with respect to stock rights granted to service providers of the joint venture who are former service providers of such corporation, generally will constitute use of service recipient stock based upon legitimate business criteria, and therefore could constitute service recipient stock with respect to such service providers if the corporation owns at least 20 percent of the joint venture and the other requirements of this paragraph (b)(5)(iii) are met. Similarly, the legitimate business criteria requirement generally would be met if the corporate venturer issued such a right to an employee of the joint venture who it reasonably expected would in the future become an employee of the corporate venturer. However, where a service provider has no real nexus with a corporate venturer, such as generally happens when the corporate venturer is a passive investor in the service recipient joint venture, a stock right issued to that employee on the investor corporation's stock generally would not be based upon legitimate business criteria. Similarly, where a corporation holds only a minority interest in an entity that in turn holds a minority interest in the entity for which the service provider performs services, such that the corporation holds only an insubstantial indirect interest in the entity receiving the services, legitimate business criteria generally would not exist for issuing a stock right on the corporation's stock to the service provider.

(*2*) *Investment vehicles.* Notwithstanding the provisions of paragraph (b)(5)(iii)(E)(*1*) of this section, except as to a service provider providing services directly to such corporation, for purposes of this paragraph (b)(5), an eligible issuer of service recipient stock does not include any corporation whose primary purpose is to serve as an investment vehicle with respect to the corporation's minority ownership interests in entities other than the service recipient.

(*3*) *Corporate structures established or transactions undertaken for purposes of avoiding coverage under section 409A.* Notwithstanding the provisions of paragraph (b)(5)(iii)(E)(*1*) of this section, an eligible issuer of service recipient stock does not include any corporation within a group of entities treated as a single service recipient if a purpose of the establishment of the structure of the ownership, or a purpose of a significant transaction between or among two or more entities comprising a single service recipient, is to provide deferred compensation not subject to the application of section 409A. If an entity becomes a member of a group of corporations or other entities treated as a single service recipient, and the primary source of income or value of such entity arises from the provision of management services to other members of the service recipient group, it is presumed that such structure was established for purposes of avoiding the application of section 409A if any stock rights are issued with respect to such entity.

(*4*) *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 this section and §§ 1.409A–2 through 1.409A–6, the stock underlying the stock right that replaced 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 if such underlying stock otherwise satisfies the requirements of paragraph (b)(5)(iii)(A) of this section. For example, if by reason of a spinoff transaction (under which the stock of a subsidiary corporation is distributed to the stockholders of a distributing corporation), a 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 (each otherwise satisfying the requirements of paragraph (b)(5)(iii)(A) of this section), 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.

(iv) *Determination of the fair market value of service recipient stock*—(A) *Stock readily tradable on an established securities market.* For purposes of paragraph (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, the arithmetic mean of the high and low prices on the trading day before or the trading day of the grant, or any other reasonable method using actual transactions in such stock as reported by such market. The determination of fair market value also may be determined using an average selling price during a specified period that is within 30 days before or 30 days after the applicable valuation date, provided that the program under which the stock right is granted, including a program with a single participant, must irrevocably specify the commitment to grant the stock right with an exercise price set using such an average selling price before the beginning of the specified period. For this purpose, the term *average selling price* refers to the arithmetic mean of such selling prices on all trading days during the specified period, or the average of such prices over the specified period weighted based on the volume of trading of such stock on each trading day during such specified period. To satisfy this requirement, the service recipient must designate the recipient of the stock right, the number and class of shares of stock that are subject to the stock right, and the method for determining the exercise price including the period over which the averaging will occur, before the beginning of the specified averaging period. Notwithstanding the forgoing provisions of this paragraph (b)(5)(iv)(A), where applicable foreign law requires that a compensatory stock right be priced based upon a specific price averaging method and period, a stock right granted in accordance with such applicable foreign law will be treated as meeting the requirements of this paragraph (b)(5)(iv)(A), provided that the averaging period does not exceed 30 days.

(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 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 anticipated 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 the stock of which is to be valued, the value of which can be readily determined through nondiscretionary, objective means (such as through trading prices on an established securities market or an amount paid in an arm's length private transaction), recent arm's length transactions involving the sale or transfer of such stock or equity interests, 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 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 as of a date that is no more than 12 months before the relevant transaction to which the valuation is applied (for example, the date of grant 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 any substantially similar class of stock) to the issuer or any person that owns stock possessing more than 10 percent of the total combined voting power of all classes of stock of the issuer (applying the stock attribution rules of § 1.424–1(d)), other than an arm's length transaction involving the sale of all or substantially all of the outstanding stock of the issuer, 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)(iv)(B)(*1*) of this section, of illiquid stock of a start-up corporation. For this purpose, illiquid stock of a start-up corporation means service recipient stock of a corporation that has no material 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, call, or other 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(i)(5)(v) or § 1.409A–3(i)(5)(vii) within the 90 days following the action to which the valuation is applied, or make a public offering of securities within the 180 days following the action to which the valuation is applied. 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 that the corporation reasonably determines is qualified to perform such a valuation based on the person's or persons'' significant knowledge, experience, education, or training. Generally, a person will be qualified to perform such a valuation if a reasonable individual, upon being apprised of such knowledge, experience, education, and training, would reasonably rely on the advice of such person with respect to valuation in deciding whether to accept an offer to purchase or sell the stock being valued. For this purpose, significant experience generally means at least five years of relevant experience in business valuation or appraisal, financial accounting, investment banking, private equity, secured lending, or other comparable experience in the line of business or industry in which the service recipient operates.

(*3*) *Use of alternative methods.* For purposes of this paragraph (b)(5), a different valuation method may be used for each separate action for which a valuation is relevant, provided that a single valuation method is used for each separate action and, once used, may not retroactively be altered. For example, one valuation method may be used to establish the exercise price of a stock option, and a different valuation method may be used to determine the value at the date of the repurchase of stock pursuant to a put or call right. However, once an exercise price or amount to be paid has been established, the exercise price or amount to be paid may not be changed through the retroactive use of another valuation method. In addition, notwithstanding the foregoing, where after the date of grant, but before the date of exercise or transfer, of the stock right, the service recipient 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, substitutions, and assumptions of stock rights*—(A) *Treatment of modified and extended stock rights.* A modification of the terms of a stock right within the meaning of paragraph (b)(5)(v)(B) of this section is considered to be the grant 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. If there is an extension of a stock right (within the meaning of paragraph (b)(5)(v)(C) of this section), the stock right is treated as having had an additional deferral feature from the original date of grant of the stock right, and therefore will be treated as a plan providing for the deferral of compensation from the original grant date for purposes of this paragraph (b).

(B) *Modification in general.* Except as otherwise provided in paragraph (b)(5)(v) of this section, the term *modification* means any change in the terms of the 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 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 regardless of whether the holder in fact benefits from the change in terms. 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 the exercise price or the 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*—(*1*) *In general.* An extension of a stock right refers to the provision to the holder of an additional period of time within which to exercise the stock right beyond the time originally prescribed under the terms of the stock right, the conversion or exchange of a stock right for a legally binding right to compensation in a future taxable year, or the addition of any feature for the deferral of compensation not permitted in paragraph (b)(5)(i)(A)(*3*) of this section (in the case of a stock option) or not permitted in paragraph (b)(5)(i)(B)(*3*) of this section (in the case of a stock appreciation right) to the terms of the stock right, other than at a time when the exercise price of the stock right equals or exceeds the fair market value of the service recipient stock that could be purchased (in the case of an option) or the fair market value of the service recipient stock used to determine the payment to the service provider (in the case of a stock appreciation right), and includes a renewal of such right that has such effect. It is not an extension if the exercise period of a stock right is extended to a date no later than the earlier of the latest date upon which the stock right could have expired by its original terms under any circumstances or the 10th anniversary of the original date of grant of the stock right. If the exercise period of a stock right is extended at a time when the exercise price of the stock right equals or exceeds the fair market value of the service recipient stock that could be purchased (in the case of an option) or the fair market value of the service recipient stock used to determine the payment to the service provider (in the case of a stock appreciation right), it is not an extension of the original stock right. Instead, in such a case, the original stock right is treated as modified rather than extended and a new stock right is treated as having been granted for purposes of this section. In addition, it is not an extension of a stock right if the expiration of the stock right is tolled while the holder cannot exercise the stock right because such an exercise would violate an applicable Federal, state, local, or foreign law, or would jeopardize the ability of the service recipient to continue as a going concern, 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 an applicable Federal, state, local, and foreign laws or would first no longer jeopardize the ability of the service recipient to continue as a going concern. For this purpose, a provision of foreign law shall be considered applicable only to foreign earned income (as defined under section 911(b)(1) without regard to section 911(b)(1)(B)(iv) and without regard to the requirement that the income be attributable to services performed during the period described in section 911(d)(1)(A) or (B)) from sources within the foreign country that promulgated such law.

(*2*) *Certain extensions before April 10, 2007.* An extension of a stock right before April 10, 2007 solely in order to provide the holder of such stock right an additional period of time beyond the time originally prescribed under the terms of such stock right within which to exercise the stock right is disregarded for purposes of applying the rules contained in paragraph (b)(5)(v)(C)(*1*) of this section. For purposes of applying the rules contained in paragraph (b)(5)(v)(C)(*1*) of this section on and after April 10, 2007, such a stock right is treated as having specified at the date of grant the time within which to exercise such stock right that was prescribed under the terms of such stock right in effect on April 10, 2007. Nothing in this paragraph (b)(5)(v)(C)(*2*) affects any other action treated as the extension of a stock right, including the addition of a deferral feature.

(*3*) *Examples.* The following examples illustrate the provisions of this paragraph (b)(5)(v)(C). In the examples, each employee is an individual employed by the specified employer, and each employee and each employer has a calendar year taxable year.

*Example 1.* On July 1, 2009, Employer Z grants Employee A a nonstatutory stock option that does not provide for the deferral of compensation in accordance with paragraph (b)(5)(i)(A) of this section. The terms of the nonstatutory stock option provide that the exercise period of the stock option expires on the earlier of July 1, 2019, or 3 months after Employee A's separation from service. On July 1, 2011, Employee A separates from service. On the same day, Employee A and Employer Z change the exercise period of the option so that it expires on July 1, 2013. Because the exercise period of the stock right is not extended beyond July 1, 2019, the change is not an extension for purposes of this paragraph (b)(5)(v)(C).

*Example 2.* The facts are the same as in *Example 1* except that Employee A separates from service on July 1, 2018, and on the same day, Employee A and Employer Z change the exercise period of the option so that it expires on July 1, 2020. As of July 1, 2018, the fair market value of the underlying stock exceeds the exercise price. Because the exercise period of the stock right is extended beyond July 1, 2019, the change is an extension for purposes of this paragraph (b)(5)(v)(C).

*Example 3.* The facts are the same as in *Example 2* except that as of July 1, 2018, the fair market value of the underlying stock is less than the exercise price of the option. Because the exercise period of the stock right is extended at a time when the fair market value of the underlying stock is less than the exercise price, the change is not an extension for purposes of this paragraph (b)(5)(v)(C) and the change is treated as a modification of the option, resulting in the extension of the exercise period being treated as the grant of a new option on July 1, 2018.

*Example 4.* On July 1, 2009, Employer Y grants to Employee B a stock appreciation

right with respect to 200 shares of Employer Y common stock that does not provide for the deferral of compensation in accordance with paragraph (b)(5)(i)(B) of this section. Upon exercise of the stock appreciation right, Employee B is entitled to receive the excess of the fair market value of a share of Employer Y common stock on the date of exercise over $100 (the fair market value of a share of Employer Y common stock on July 1, 2009), multiplied by the number of shares with respect to which Employee B is exercising the right. The exercise period of the right expires on the earlier of July 1, 2019, or 3 months after Employee B separates from service. Employee B cannot exercise the stock appreciation right with respect to more than 100 shares unless Employee B continues to be employed by Employer Y through June 30, 2014. On July 1, 2011, when the fair market value of a share of Employer Y common stock is $200, Employee B and Employer Y amend the stock appreciation right to provide that the right will be exercisable only during calendar year 2018, except that before January 1, 2017, Employee B may elect to designate calendar year 2023 or any subsequent calendar year before 2033 as the year in which the right will be exercisable. The amendment constitutes an extension of the stock appreciation right under paragraph (b)(5)(v)(C)(1) of this section. Under paragraph (b)(5)(v)(A) of this section, the stock appreciation right is treated as having had an additional deferral feature from the original date of grant (July 1, 2009) of the right, and therefore is treated as a plan providing for the deferral of compensation from that date. During the period from July 1, 2009, through June 30, 2011, the provisions of the stock appreciation right relating to the time and form of payment did not satisfy the requirements of § 1.409A–3(a). Therefore, the stock appreciation right provides for a deferral of compensation that does not comply with section 409A.

(D) *Substitutions and assumptions of stock rights by reason of a corporate transaction.* If the requirements of § 1.424–1 (without regard to the requirement described in § 1.424–1(a)(2) that an eligible corporation be the employer of the optionee) would be met if the stock right were a statutory option, the substitution of a new stock right pursuant to a corporate transaction (as defined in § 1.424–1(a)(3)) 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 this section and §§ 1.409A–2 through 1.409A–6. 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) related to the fair market value of the stock may be satisfied by—

(*1*) Using the last sale before or the first sale after the specified date as of which such valuation is being made, the closing price on the last trading day before or the trading day of a specified date, the arithmetic mean of the high and low prices on the last trading day before or the trading day of such specified date, or any other reasonable method using actual transactions in such stock as reported by such market on a specified date, for the stock of the distributing corporation and the stock distributed in the transaction, provided the specified date is designated before such specified date, and such specified date is not more than 60 days after the transaction;

(*2*) Using the arithmetic mean of such market prices on trading days during a specified period designated before the beginning of such specified period, where such specified period is not longer than 30 days and ends no later than 60 days after the transaction; or

(*3*) Using an average of such prices during such prespecified period weighted based on the volume of trading of such stock on each trading day during such prespecified period.

(E) *Acceleration of date when exercisable.* Although with respect to a stock right not immediately exercisable in full, a change in the terms of the right solely to accelerate or delay, within the original term of the stock right, the time at which the stock right (or any portion of such stock right) may be exercised is not a modification for purposes of this section, with respect to a stock right subject to section 409A, such an acceleration may constitute an impermissible acceleration of a payment date under § 1.409A–3(j) or a subsequent deferral under § 1.409A–2(b).

(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 or extension, then the addition of such discretion is a modification or extension 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 there is no modification of the stock right 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.* A 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) is not considered a modification or extension 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 service provider's taxable year during which such change occurred. Thus, for example, if the terms of a stock right granted to an individual employee with a calendar year taxable year are changed on March 1 in a manner that would result in an extension of the stock right, and the change is rescinded on November 1 of the same year, and the stock right is not exercised before the change is rescinded, the stock right is not considered extended under this paragraph (b)(5)(v).

(J) *Successive modifications and extensions.* The rules of this paragraph (b)(5)(v) apply as well to successive modifications and extensions.

(K) *Modifications and extensions in effect on October 23, 2004.* For purposes of the application of section 409A and

these regulations to a stock right, if a legally binding right to a modification or extension of such stock right existed on October 23, 2004, such modification or extension is disregarded, and the stock right is treated as if granted with the terms and conditions in effect on October 23, 2004.

(vi) *Meaning and use of certain terms*—(A) *Option.* The term *option* means the right or privilege of an individual to purchase stock from a corporation by virtue of an offer of the corporation continuing for a stated period of time, whether or not irrevocable, to sell such stock at a price determined under paragraph (b)(5)(vi)(D) of this section, such individual being under no obligation to purchase. While no particular form of words is necessary, the option must express an offer to sell at the option price, the maximum number of shares purchasable under the option, and the period of time during which the offer remains open. The term *option* includes a warrant that meets the requirements of this paragraph (b)(5)(vi)(A). An option may be granted as part of or in conjunction with an employee stock purchase plan or subscription contract. An option must be in writing (in paper or electronic form) provided that such writing is adequate to establish an option right or privilege that is enforceable under applicable law.

(B) *Date of grant of option.* (*1*) The language the *date of grant of the option,* and similar phrases, refer to the date when the granting corporation completes the corporate action necessary to create the legally binding right constituting the option. A corporate action creating the legally binding right constituting the option is not considered complete until the date on which the maximum number of shares that can be purchased under the option and the minimum exercise price are fixed or determinable, and the class of underlying stock and the identity of the service provider is designated. Ordinarily, if the corporate action provides for an immediate offer of stock for sale to a service provider, or provides for a particular date on which such offer is to be made, the date of the granting of the option is the date of such corporate action if the offer is to be made immediately, or the date provided as the date of the offer, as the case may be. However, an unreasonable delay in the giving of notice of such offer to the service provider will be taken into account as indicating that the corporation provided that the offer was to be made at the subsequent date on which such notice is given.

(*2*) If the corporation imposes a condition on the granting of an option (as distinguished from a condition governing the exercise of the option), such condition generally will be given effect in accordance with the intent of the corporation. However, if the grant of an option is subject to approval by stockholders, the date of grant of the option will be determined as if the option had not been subject to such approval. A condition that does not require corporate action, such as the approval of, or registration with, some regulatory or government agency, for example, a stock exchange or the Securities and Exchange Commission, is ordinarily considered a condition upon the exercise of the option unless the corporate action clearly indicates that the option is not to be granted until such condition has been satisfied.

(*3*) In general, a condition imposed upon the exercise of an option will not operate to make ineffective the granting of the option. For example, on June 1, 2008, Corporation A grants to X, an employee, an option to purchase 5,000 shares of the corporation's common stock, exercisable by X on or after June 1, 2009, provided X is employed by the corporation on June 1, 2009, and provided that A's profits during the fiscal year preceding the year of exercise exceed $200,000. Such an option is granted to X on June 1, 2008, and will be treated as outstanding as of such date.

(C) *Stock.* The term *stock* means capital stock of any class, including voting or nonvoting common or preferred stock. Except as otherwise provided, the term stock includes both treasury stock and stock of original issue. Special classes of stock authorized to be issued to and held by employees are within the scope of the term stock for this purpose, provided such stock otherwise possesses the rights and characteristics of capital stock.

(D) *Exercise price.* The term *exercise price* means the consideration in cash or property that, pursuant to the terms of the option, is the price at which the stock subject to the option is purchased. The term *exercise price* does not include any amounts paid as interest under a deferred payment plan or treated as interest.

(E) *Exercise.* The term *exercise,* when used in reference to an option, means the act of acceptance by the holder of the option of the offer to sell contained in the option. In general, the time of exercise is the time when there is a sale or a contract to sell between the corporation and the individual. A promise to pay the exercise price does not constitute an exercise of the option unless the holder of the option is subject to personal liability on such promise. An agreement or undertaking by the service provider to make payments under a stock purchase plan does not constitute the exercise of an option to the extent the payments made remain subject to withdrawal by or refund to the service provider.

(F) *Transfer.* The term *transfer,* when used in reference to the transfer to an individual of a share of stock pursuant to the exercise of an option, means the transfer of ownership of such share, or the transfer of substantially all the rights of ownership. Such transfer must, within a reasonable time, be evidenced on the books of the corporation. A transfer may occur even if a share of stock is subject to a substantial risk of forfeiture or is not otherwise transferable immediately after the date of exercise. A transfer does not fail to occur merely because, under the terms of the arrangement, the individual may not dispose of the share for a specified period of time, or the share is subject to a right of first refusal or a right to acquire the share at the share's fair market value at the time of the sale.

(G) *Readily tradable.* For purposes of this section and §§ 1.409A–2 through 1.409A–6, stock is treated as readily tradable if it is regularly quoted by brokers or dealers making a market in such stock.

(H) *Application to stock appreciation rights.* For purposes of this section and §§ 1.409A–2 through 1.409A–6, the definitions provided in paragraphs (b)(5)(vi)(A) through (G) of this section may be applied by analogy to the issuance of, exercise of, or payment upon the exercise of, a stock appreciation right.

(6) *Restricted property, section 402(b) trusts, and section 403(c) annuities*—(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 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). In addition, for purposes of this paragraph (b), a right to compensation income that will be required to be included in income under section

402(b)(4)(A) is not a deferral of compensation.

(ii) *Promises to transfer property.* A plan under which a service provider obtains a legally binding right to receive property in a future taxable year where the property will be substantially vested (as defined in § 1.83–3(b)) at the time of transfer of the property may provide for the deferral of compensation and, accordingly, may constitute a nonqualified deferred compensation plan. A legally binding right to receive property in a future taxable year where the property will be substantially nonvested (as defined in § 1.83–3(b)) at the time of transfer of the property will not provide for the deferral of compensation and, accordingly, will not constitute a nonqualified deferred compensation plan unless offered in conjunction with another legally binding right that constitutes a deferral of compensation.

(7) *Arrangements between partnerships and partners.* [Reserved.]

(8) *Certain foreign plans*—(i) *Plans with respect to compensation covered by treaty or other international agreement.* A plan in which a service provider participates does not provide for a deferral of compensation for purposes of this paragraph (b) to the extent that the compensation under the plan 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) *Plans with respect to certain other compensation.* A plan in which a service provider participates does not provide for a deferral of compensation for purposes of this paragraph (b) to the extent that compensation under the plan 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, the compensation would have been foreign earned income within the meaning of section 911(b)(1) (without regard to section 911(b)(1)(B)(iv)) if paid at such time, and the amount of such compensation was equal to or less than the excess (if any) of the maximum exclusion amount under section 911(b)(2)(D) for such taxable year over the amount of foreign earned income actually excluded 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.

(D) The compensation would have been excludible from gross income under section 931 or section 933.

(iii) *Tax equalization agreements.* Compensation paid under a tax equalization agreement does not provide for a deferral of compensation if payments made under such tax equalization agreement are made no later than the end of the second taxable year of the service provider beginning after the taxable year of the service provider in which the service provider's U.S. Federal income tax return is required to be filed (including any extensions) for the year to which the compensation subject to the tax equalization payment relates, or, if later, the second taxable year of the service provider beginning after the latest such taxable year in which the service provider's foreign tax return or payment is required to be filed or made for the year to which the compensation subject to the tax equalization payment relates. Where such payments arise due to an audit, litigation or similar proceeding, the right to the payments will not be treated as resulting in a deferral of compensation if the payments are scheduled and made in accordance with the provisions of § 1.409A–3(i)(1)(v) (timing of tax gross-up payments). For purposes of this paragraph (b)(8)(iii), the term *tax equalization agreement* refers to an agreement, method, program, or other arrangement that provides payments intended to compensate the service provider for some or all of the excess of the taxes actually imposed by a foreign jurisdiction on the compensation paid 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, state, and local income tax, or some or all of the excess of the United States Federal, state, and local income tax actually imposed on the compensation paid by the service to the service provider over the taxes that would be imposed if the compensation were subject solely to taxes in the foreign jurisdiction, provided that the payment made under such agreement, method, program, or other arrangement may not exceed such excess and the amount necessary to compensate for the additional taxes on the amount paid under the agreement, method, program, or other arrangement.

(iv) *Certain limited deferrals of a nonresident alien.* With respect to a nonresident alien, a foreign plan does not provide for a deferral of compensation if the amounts deferred under the foreign plan based upon services performed by the nonresident alien in the United States (including amounts deferred based upon service credits or compensation received due to services performed in the United States) do not exceed the applicable dollar amount under section 402(g)(1)(B) for the taxable year. If the amounts deferred under the foreign plan based upon the services performed by the nonresident alien in the United States exceed the applicable dollar amount, an amount of such deferrals equal to such amount is treated as not deferred under a nonqualified deferred compensation plan. For purposes of this paragraph (b)(8)(iv), the term *foreign plan* means a plan that, together with all substantially similar plans, is maintained by a service recipient for a substantial number of participants, 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)).

(v) *Additional foreign plans.* A plan in which a service provider participates 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).

(vi) *Earnings.* Earnings on compensation excluded from the definition of deferral of compensation pursuant to this paragraph (b)(8) are also not treated as a deferral of compensation.

(9) *Separation pay plans*—(i) *In general.* A plan 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, paragraphs (b)(9)(ii), (iii), (iv), and (v) of this section provide rules concerning the extent to which certain separation pay plans do not provide for the deferral of compensation. The exceptions contained in paragraphs (b)(9)(ii), (iii),

(iv), and (v) of this section may be used in combination, such that compensation under a plan that would be excepted under one of those paragraphs may be treated as excepted under another of those paragraphs, so that other compensation under a plan may be treated as excepted under the first of such paragraphs. 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 plan. If a service provider receives a payment at separation from service and also has a legally binding right to an amount of deferred compensation that would be forfeited upon the separation from service, whether the payment acts as an acceleration of vesting and substitute payment for the amount of deferred compensation forfeited, or whether the deferred compensation is treated as forfeited and the amount paid is treated as a separate payment of current compensation, is determined based on the facts and circumstances, provided that, where the separation from service is voluntary, it is presumed that the payment results from an acceleration of vesting followed by a payment of the deferred compensation that is subject to section 409A. Accordingly, any change in the payment schedule to accelerate or defer the payments would be subject to the rules of section 409A. The presumption that a right to a payment is not a new right, but is instead a right substituted for a pre-existing forfeited right, may be rebutted by demonstrating that the service provider would have obtained the right to the payment regardless of the forfeiture of the nonvested right. A factor indicating that the service provider would have obtained a right to a payment regardless of the forfeiture of the nonvested right is that the amount to which the service provider obtains a right is materially less than an amount equal to the present value of the forfeited amount multiplied by a fraction, the numerator of which is the period of service the service provider actually completed, and the denominator of which is the full period of service the service provider would have been required to complete to receive the full amount of the payment. For example, where a service provider is entitled to a future payment only if the service provider completes three years of service and at the time of termination the service provider has completed one year of service, the presumption could be rebutted if the payment to the service provider is materially less than the present value of one-third of the nonvested amount. Another such factor is that the payment to the service provider is of a type customarily made to service providers who separate from service with the service recipient and do not forfeit nonvested rights to deferred compensation (for example, a payment of accrued but unused leave or a payment for a release of actual or potential claims).

(ii) *Collectively bargained separation pay plans.* A separation pay plan does not provide for a deferral of compensation to the extent the plan is a collectively bargained separation pay plan that provides for separation pay only upon an involuntary separation from service or pursuant to a window program. Only the portion of the separation pay plan attributable to employees covered by a bona fide collective bargaining agreement is considered to be provided under a collectively bargained separation pay plan. A collectively bargained separation pay plan is a separation pay plan that meets the following conditions:

(A) The separation pay plan 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 arm's 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 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 only upon an involuntary separation from service (as defined in paragraph (n) of this section) or pursuant to a window program does not provide for a deferral of compensation to the extent that the separation pay, or portion of the separation pay, provided under the plan meets the following requirements:

(A) The separation pay (other than amounts described in paragraphs (b)(9)(iv) and (v) of this section) does not exceed two times the lesser of—

(*1*) The sum of the service provider's annualized compensation based upon the annual rate of pay for services provided to the service recipient for the taxable year of the service provider preceding the taxable year of the service provider in which the service provider has a separation from service with such service recipient (adjusted for any increase during that year that was expected to continue indefinitely if the service provider had not separated from service); or

(*2*) The maximum amount that may be taken into account under a qualified plan pursuant to section 401(a)(17) for the year in which the service provider has a separation from service.

(B) The plan provides that the separation pay described in paragraph (b)(9)(iii)(A) of this section must be paid no later than the last day of the second taxable year of the service provider following the taxable year of the service provider in which occurs the separation from service.

(iv) *Foreign separation pay plans.* A separation pay plan (including a plan providing payments upon a voluntary separation from service) does not provide for deferred compensation to the extent the plan provides for amounts of separation pay required to be provided under the applicable law of a foreign jurisdiction. For this purpose, a provision of foreign law shall be considered applicable only to foreign earned income (as defined under section 911(b)(1) without regard to section 911(b)(1)(B)(iv) and without regard to the requirement that the income be attributable to services performed during the period described in section 911(d)(1)(A) or (B)) from sources within the foreign country that promulgated such law.

(v) *Reimbursements and certain other separation payments*—(A) *In general.* To the extent a separation pay plan (including a plan providing payments upon a voluntary separation from service) entitles a service provider to payment by the service recipient of reimbursements that are not otherwise excludible from gross income, for expenses that the service provider could otherwise 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 plan does not provide for a deferral of compensation to the extent such rights apply during a limited period of time (regardless of whether such rights extend beyond the limited period of time). For purposes of this paragraph (b)(9)(v)(A), the reimbursement of reasonable moving expenses includes the reimbursement of all or part of any loss the service provider actually incurs due to the sale of a primary residence in connection with a separation from service.

(B) *Medical benefits.* To the extent a separation pay plan (including a plan providing payments due to a voluntary separation from service) entitles a service provider to reimbursement by the service recipient of payments of medical expenses incurred and paid by the service provider but not reimbursed by a person other than the service recipient 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 plan does not provide for a deferral of compensation to the extent such rights apply during the period of time during which the service provider would be entitled (or would, but for such plan, be entitled) to continuation coverage under a group health plan of the service recipient under section 4980B (COBRA) if the service provider elected such coverage and paid the applicable premiums.

(C) *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, is 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)(v).

(D) *Limited payments.* If not otherwise excluded, a taxpayer may treat a right or rights under a separation pay plan to a payment or payments as not providing for a deferral of compensation to the extent such payments in the aggregate do not exceed the applicable dollar amount under section 402(g)(1)(B) for the year of the separation from service.

(E) *Limited period of time.* For purposes of paragraphs (b)(9)(v)(A) and (C) of this section, a limited period of time in which expenses may be incurred, or in which in-kind benefits may be provided by the service recipient or a third party that the service recipient will pay, does not include periods beyond the last day of the second taxable year of the service provider following the taxable year of the service provider in which the separation from service occurred, provided that the period during which the reimbursements for such expenses must be paid may not extend beyond the third taxable year of the service provider following the taxable year of the service provider in which the separation from service occurred.

(vi) *Window programs—definition.* The term *window program* refers to a program established by a service recipient in connection with an impending separation from service to provide separation pay, where such program is made available by the service recipient for a limited period of time (no longer than 12 months) 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.

(10) *Certain indemnification and liability insurance plans.* A plan in which a service provider participates does not provide for a deferral of compensation for purposes of this paragraph (b) to the extent that the plan provides (to the extent permissible under applicable law), for the indemnification of, or the purchase of an insurance policy providing for payments of, all or part of the expenses incurred or damages paid or payable by a service provider with respect to a bona fide claim against the service provider or service recipient, including amounts paid or payable by the service provider upon the settlement of a bona fide claim against the service provider or service recipient, where such claim is based on actions or failures to act by the service provider in his or her capacity as a service provider of the service recipient.

(11) *Legal settlements.* An agreement to which a service provider is a party does not provide for a deferral of compensation for purposes of this paragraph (b) to the extent that the agreement provides for amounts paid as settlements or awards resolving bona fide legal claims based on wrongful termination, employment discrimination, the Fair Labor Standards Act, or worker's compensation statutes, including claims under applicable Federal, state, local, or foreign laws, or for reimbursements or payments of reasonable attorneys fees or other reasonable expenses incurred by the service provider related to such bona fide legal claims, regardless of whether such settlements, awards, or reimbursement or payment of expenses pursuant to such claims are treated as compensation or wages for Federal tax purposes. Whether the execution of a waiver of any or all of such types of claims indicates that the amounts are paid as an award or settlement of an actual bona fide claim for damages under applicable law is determined based on the facts and circumstances. This paragraph (b)(11) does not apply to any deferred amounts that did not arise as a result of an actual bona fide claim for damages under applicable law, such as amounts that would have been deferred or paid regardless of the existence of such claim, even if such amounts are paid or modified as part of a settlement or award resolving an actual bona fide claim. For this purpose, a provision of foreign law shall be considered applicable only to foreign earned income (as defined under section 911(b)(1) without regard to section 911(b)(1)(B)(iv) and without regard to the requirement that the income be attributable to services performed during the period described in section 911(d)(1)(A) or (B)) from sources within the foreign country that promulgated such law.

(12) *Certain educational benefits.* A plan in which a service provider participates does not provide for a deferral of compensation to the extent the plan provides for taxable educational benefits. For purposes of this paragraph (b)(12), the term *educational benefits* refers solely to benefits provided to a service provider, consisting solely of educational assistance for the education of the service provider, as defined in section 127(c) and the accompanying regulations, and does not refer to any benefits provided for the education of any other person, including any spouse,

child, or other family member of the service provider.

(c) *Plan*—(1) *In general.* The term *plan* includes any agreement, method, program, or other arrangement, including an agreement, method, program, or other 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, program, or other arrangement may constitute a plan regardless of whether it is an employee benefit plan under section 3(3) of 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. For purposes of determining the terms of a plan, general provisions of the plan that purport to nullify noncompliant plan terms, or to supply any specific plan terms required by this section, § 1.409A–2 or § 1.409A–3, are disregarded.

(2) *Plan aggregation rules*—(i) *In general.* Except as otherwise provided, the following rules apply with respect to the application of this section and §§ 1.409A–2 through 1.409A–6 to deferrals of compensation with respect to a service provider:

(A) All deferrals of compensation at the election of that service provider under all plans of the service recipient that are account balance plans, except to the extent that the plan is described in paragraph (c)(2)(i)(D), (E), (F), (G), or (H) of this section, are treated as deferred under a single plan. For purposes of this paragraph, the term *account balance plan* means—

(*1*) An agreement, method, program, or other arrangement that is an account balance plan as defined in § 31.3121(v)(2)–1(c)(1)(ii)(A) of this chapter, including mandatorily bifurcating the agreement, method, program, or other arrangement in accordance with the rules provided in § 31.3121(v)–1(c)(1)(iii)(B) of this chapter; or

(*2*) An agreement, method, program, or other arrangement that would be described in paragraph (c)(2)(i)(A)(*1*) of this section if the service provider were an employee.

(B) All deferrals of compensation other than at the election of that service provider, including deferrals reflecting matching by the service recipient with respect to amounts a service provider elects to defer, under all plans of the service recipient that are account balance plans, except to the extent the plan is described in paragraph (c)(2)(i)(D), (E), (F), (G), or (H) of this section, are treated as deferred under a single plan. For purposes of this paragraph (c)(2)(i)(B), the term ''account balance plan'' has the same meaning as provided in paragraph (c)(2)(i)(A) of this section.

(C) All deferrals of compensation with respect to that service provider under all plans of the service recipient that are nonaccount balance plans, except to the extent such plan is described in paragraph (c)(2)(i)(D), (E), (F), (G), or (H) of this section, are treated as deferred under a single plan. For purposes of this paragraph (c)(2)(i)(C), the term *nonaccount balance plan* means—

(*1*) An agreement, method, program, or other arrangement that is a nonaccount balance plan as defined in § 31.3121(v)(2)–1(c)(2)(i) of this chapter, including mandatorily bifurcating the agreement, method, program, or other arrangement in accordance with the rules provided in § 31.3121(v)–1(c)(1)(iii)(B) of this chapter; or

(*2*) An agreement, method, program, or other arrangement that would be described in paragraph (c)(2)(i)(C)(*1*) of this section if the service provider were an employee.

(D) All deferrals of compensation with respect to that service provider under all separation pay plans (as defined in paragraph (m) of this section) of the service recipient to the extent an amount deferred under the plans is not described in paragraph (c)(2)(i)(E) of this section and is payable solely upon an involuntary separation from service within the meaning of paragraph (n) of this section or as a result of participation in a window program, are treated as deferred under a single plan.

(E) All deferrals of compensation with respect to that service provider under all plans of the service recipient to the extent such amounts deferred consist of rights to in-kind benefits or reimbursements of expenses, such as membership fees, or expenses related to aircraft or vehicle usage, to the extent that the right to the in-kind benefit or reimbursement, separately or in the aggregate, does not constitute a substantial portion of either the overall compensation earned by the service provider for performing services for the service recipient or the overall compensation received due to a separation from service, are treated as deferred under a single plan.

(F) All deferrals of compensation with respect to that service provider under all plans of the service recipient to the extent that the taxation of such compensation is governed by § 1.61–22 or § 1.7872–15 (split-dollar life insurance arrangements), or the taxation of such compensation would be governed by § 1.61–22 or § 1.7872–15 but for the operation of § 1.61–22(j) (effective date provisions), are treated as deferred under a single plan.

(G) All deferrals of compensation with respect to that service provider under all agreements, methods, programs, or other arrangements of the service recipient to the extent the deferrals under the agreements, methods, programs, or other arrangements are deferrals of amounts that would be treated as modified foreign earned income (meaning foreign earned income as defined under section 911(b)(1) without regard to section 911(b)(1)(B)(iv) and without regard to the requirement that the income be attributable to services performed during the period described in section 911(d)(1)(A) or (B)) if paid to the service provider at the time the amount is first deferred, and provided further that substantially all the participants in such agreements, methods, programs, or other arrangements and any substantially similar agreements, methods, programs, or other arrangements are nonresident aliens and that the service provider does not participate in a substantially identical agreement, method, program, or other arrangement that does not meet the requirements of this paragraph (c)(2)(i)(G) (a domestic arrangement), are treated as deferred under a single plan.

(H) All deferrals of compensation with respect to that service provider under all plans of the service provider to the extent such plans are stock rights (as defined in paragraph (c)(2)(l) of this section) subject to section 409A, are treated as deferred under a single plan.

(I) All deferrals of compensation with respect to that service provider under all plans of the service recipient to the extent such plans are not described in paragraph (c)(2)(i)(A), (B), (C), (D), (E), (F), (G), or (H) of this section are treated as deferred under a single plan.

(ii) *Dual status.* Agreements, methods, programs, and other arrangements in which a service provider participates are not aggregated with other agreements, methods, programs, and other arrangements to the extent the service provider participates in one set of agreements, methods, programs, and other arrangements due to status as an employee of the service recipient (employee arrangements) and another set of agreements, methods, programs, and other 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 independent contractor arrangement while providing services as an independent contractor, and then

becomes eligible for and defers amounts under a separate employee 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 is a member of the board of directors 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 (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 arrangements providing benefits to non-employee directors. To the extent a plan in which an employee director participates is not substantially similar to arrangements in which non-employee directors participate, such plan is treated as an employee plan for purposes of this paragraph (c)(2). Director plans and independent contractor plans are aggregated for purposes of this paragraph (c)(2).

(3) *Establishment of plan*—(i) *In general.* A plan does not satisfy the requirements of section 409A and this section and §§ 1.409A–2 through 1.409A–3 and §§ 1.409A–5 through 1.409A–6, unless the plan is established and maintained by a service recipient in accordance with the requirements of this section, §§ 1.409A–2 through 1.409A–3 and §§ 1.409A–5 through 1.409A–6. For purposes of this paragraph (c)(3), a plan 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. The material terms of the plan may be set forth in writing in one or more documents. For purposes of this paragraph (c)(3)(i), a plan 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 plan include the amount (or the method or formula for determining the amount) of deferred compensation to be provided under the plan and the time and form of payment. Notwithstanding the foregoing, a plan will be deemed to be established as of the date the participant obtains a legally binding right to a deferral of compensation, provided that the plan is otherwise established under the rules of this paragraph (c)(3)(i) by the end of the taxable year of the service provider in which the legally binding right arises, or with respect to an amount not payable in the year immediately following the taxable year of the service provider in which the legally binding right arises (the subsequent year), the 15th day of the third month of the subsequent year.

(ii) *Initial deferral election provisions.* If a plan provides a service provider or a service recipient with an initial deferral election, the plan satisfies the requirements of this paragraph (c)(3) if the plan sets forth in writing, on or before the date the applicable election is required to be irrevocable to satisfy the requirements of § 1.409A–2(a), the conditions under which such election may be made.

(iii) *Subsequent deferral election provisions.* If a plan permits a subsequent deferral election described in § 1.409A–2(b), the plan satisfies the requirements of this paragraph (c)(3) if the plan sets forth in writing, on or before the date the election is required to be irrevocable to meet the requirements of § 1.409A–2(b), the conditions under which such election may be made.

(iv) *Payment accelerations.* Except as explicitly provided in § 1.409A–3, a plan is not required to set forth in writing the conditions under which a payment may be accelerated if such acceleration is permitted under § 1.409A–3(j)(4).

(v) *Six-month delay for specified employees.* A plan must provide that distributions to a specified employee 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 (the six-month delay rule). The six-month delay rule, required for payments due to the separation from service of a specified employee, must be written in the plan. A plan does not fail to be established and maintained merely because it does not contain the six-month delay rule when the service provider who has a right to compensation deferred under such plan is not a specified employee. However, such provision must be set forth in writing on or before the date such service provider first becomes a specified employee. In general, this means the provision must be set forth in writing on or before the specified employee effective date (as defined in paragraph (i)(3) of this section) for the first list of specified employees that includes such service provider.

(vi) *Plan amendments.* In the case of an amendment that increases the amount deferred under a nonqualified deferred compensation plan, the plan is not considered established with respect to the additional amount deferred until the plan, as amended, is established in accordance with paragraph (c)(3)(i) of this section.

(vii) *Transition rule for written plan requirement.* For purposes of this paragraph (c)(3), a legally enforceable unwritten plan that was adopted and effective before December 31, 2007, 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 plan are set forth in writing on or before December 31, 2007.

(viii) *Plan aggregation rules.* The plan aggregation rules of paragraph (c)(2)(i) of this section do not apply to the requirements of this paragraph (c)(3). Accordingly, deferrals of compensation under an agreement, method, program, or other arrangement that fails to meet the requirements of section 409A solely due to a failure to meet the requirements of this paragraph (c)(3) are not aggregated with deferrals of compensation under other agreements, methods, programs, or 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 or equity value or completion of an initial public offering). For purposes of this paragraph (d), if a service provider's entitlement to the amount is conditioned on the occurrence of the service provider's involuntary separation from service without cause, the right is subject to a substantial risk of forfeiture if the possibility of forfeiture is substantial. 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 the performance of services. Except as provided with respect to certain transaction-based compensation under § 1.409A–3(i)(5)(iv), the addition of any 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 risk of forfeiture, is disregarded for purposes of determining whether such compensation is subject to a substantial risk of forfeiture. 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 present value of the amount subject to a substantial risk of forfeiture (disregarding, in determining the present value, the risk of forfeiture) is materially greater than the present value of the amount the recipient otherwise could have elected to receive absent such risk of forfeiture. For this purpose, compensation that the service provider would receive for continuing to perform services regardless of whether the service provider elected to receive the amount that is subject to a substantial risk of forfeiture is not taken into account in determining whether the present value of the right to the amount subject to a substantial risk of forfeiture is materially greater than the amount the recipient otherwise could have elected to receive absent such risk of forfeiture. For example, a salary deferral generally may not be made subject to a substantial risk of forfeiture. But, for example, where a bonus plan provides an election between a cash payment or restricted stock units with a present value that is materially greater (disregarding the risk of forfeiture) than the present value of such cash payment and 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 is 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 is 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 (where the service provider's ownership is determined with application of the attribution rules under section 318 if the service recipient is a corporation, or if the service recipient is an entity that is not a corporation, with application by analogy of the attribution rules under section 318), 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 the amount of which, or the entitlement to which, is contingent on the satisfaction of preestablished organizational or individual performance criteria relating to a performance period of at least 12 consecutive months. 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. 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. In addition, except as provided in paragraph (e)(3) of this section, compensation is not performance-based compensation merely because the amount of such compensation is determined by reference to the value of the service recipient or the stock of the service recipient. Where a portion of an amount of compensation would qualify as performance-based compensation if the portion were the sole amount available under the plan, that portion of the award will not fail to qualify as performance-based compensation if that portion is designated separately or otherwise separately identifiable under the terms of the plan, and the amount of each portion is determined independently of the other. Compensation may be performance-based compensation where the amount will be paid regardless of satisfaction of the performance criteria due to the service provider's death, disability, or a change in control event (as defined in § 1.409A–3(i)(5)(i)), provided that a payment made under such circumstances without regard to the satisfaction of the performance criteria will not constitute performance-based compensation. For purposes of this paragraph (e)(1), a disability refers to any medically determinable physical or mental impairment resulting in the service provider's inability to perform the duties of his or her position or any substantially similar position, where such impairment can be expected to result in death or can be expected to last

for a continuous period of not less than six months.

(2) *Payments based upon subjective performance criteria.* The term *performance-based compensation* includes payments based upon subjective performance criteria, provided that—

(i) The subjective performance criteria are bona fide and 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 effective control of the participant service provider or such a family member, and no amount of the compensation of the person making such determination is effectively 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 a share of stock in the service recipient, after the date of a grant or award. However, compensation payable for a service period that is equal to the value of a predetermined number of shares of stock, and is variable only to the extent that the value of such shares appreciates or depreciates, generally will not be performance-based compensation. Notwithstanding the foregoing, the attainment of a prescribed value for the service recipient (or a portion thereof), or a share of stock in the service recipient, may be used as a preestablished organizational criterion for purposes of providing performance-based compensation, provided that the other requirements of paragraph (e)(1) of this section are satisfied. In addition, 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. A provision that allows a service provider to defer compensation that would be realized upon the exercise of a stock right generally constitutes an additional deferral feature 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 an individual, corporation, subchapter S corporation, partnership, personal service corporation (as defined in section 269A(b)(1)), noncorporate entity that would be a personal service corporation if it were a corporation, qualified personal service corporation (as defined in section 448(d)(2)), and noncorporate entity that would be a qualified personal service corporation if it were a corporation, for any taxable year in which such individual, corporation, subchapter S corporation, partnership, or other entity accounts for gross income from the performance of services under the cash receipts and disbursements method of accounting. The term *service provider generally* includes a person who has separated from service (a former service provider).

(2) *Independent contractors*—(i) *In general.* Except as otherwise provided in paragraph (f)(2)(iv) of this section, section 409A does not apply to an amount deferred under a plan between a service provider and service recipient with respect to a particular trade or business in which the service provider participates, including earnings credited to such deferred amount, 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 each of the following applies:

(A) The service provider is actively engaged in the trade or business of providing services, other than as an employee or as a member of the board of directors of a corporation (or similar position with respect to an entity that is not 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)(2)(ii) of this section).

(C) The service provider is not related to the service recipient, applying the definition of related person contained in paragraph (f)(2)(ii) of this section subject to the modification that the language ''20 percent'' is not used instead of ''50 percent'' each place ''50 percent'' appears in sections 267(b) and 707(b)(1).

(ii) *Related person.* For purposes of this paragraph (f)(2), 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)(2)(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. In addition, in the case of a service provider who has been providing services in a trade or business for a period of not less than three consecutive years, for purposes of paragraph (f)(2)(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 in each of the prior three taxable years the revenues generated from the services provided to any service recipient or group of related service recipients during such prior taxable years did not exceed 70 percent of the total revenue generated by the service provider from the trade or business of providing such services and, at the time an amount is deferred, the service provider does not know or have reason to anticipate that the revenues generated from the services provided to any service recipient or group of related service recipients during the current year will exceed 70 percent of the total revenue generated by the service provider from the trade or business of providing such services.

(iv) *Management services.* This paragraph (f)(2) does not apply to a service provider to the extent the service provider provides management services to a service recipient. For purposes of this paragraph (f)(2)(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 management or advisory services provided to a service recipient whose primary trade or business includes the investment of financial assets (including investments in real estate), such as a hedge fund or a real estate investment trust.

(v) *Services provided to related persons.* Section 409A does not apply to an amount deferred under a plan that is a bona fide agreement, method, program, or other arrangement between a service provider and a related service recipient arising in the ordinary course of a particular trade or business in which the service provider is engaged to the extent that—

(A) The service provider provides services to the service recipient as an independent contractor;

(B) During the service provider's taxable year in which the amount is deferred, the service provider qualifies for the safe harbor provided in paragraph (f)(2)(iii) of this section with respect to such trade or business; and

(C) Such agreement, method, program, or other arrangement and the practices thereunder (including billing and collection practices), are substantially similar to the agreements, methods, programs, or other arrangements and practices applicable to one or more unrelated service recipients to whom the service provider provides substantial services and that produce a majority of the total revenue that the service provider earns from the trade or business of providing such services during the taxable year.

(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, if the service provider is an employee, the service recipient generally is the employer (including all persons treated as a single employer under section 414(b) or (c)). Notwithstanding the foregoing, section 409A applies to a plan that provides for the deferral of compensation, even if 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 employer 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 if the period of such leave does not exceed six months, or if longer, so long as the individual retains a right to reemployment with the service recipient under an applicable statute or by contract. For purposes of this paragraph (h)(1), a leave of absence constitutes a bona fide leave of absence only if there is a reasonable expectation that the employee will return to perform services for the employer. If the period of leave exceeds six months and the individual does not retain a right to reemployment under an applicable statute or by contract, the employment relationship is deemed to terminate on the first date immediately following such six-month period. Notwithstanding the foregoing, where a leave of absence is due to 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 six months, where such impairment causes the employee to be unable to perform the duties of his or her position of employment or any substantially similar position of employment, a 29-month period of absence may be substituted for such six-month period.

(ii) *Termination of employment.* Whether a termination of employment has occurred is determined based on whether the facts and circumstances indicate that the employer and employee reasonably anticipated that no further services would be performed after a certain date or that the level of bona fide services the employee would perform after such date (whether as an employee or as an independent contractor) would permanently decrease to no more than 20 percent of the average level of bona fide services performed (whether as an employee or an independent contractor) over the immediately preceding 36-month period (or the full period of services to the employer if the employee has been providing services to the employer less than 36 months). Facts and circumstances to be considered in making this determination include, but are not limited to, whether the employee continues to be treated as an employee for other purposes (such as continuation of salary and participation in employee benefit programs), whether similarly situated service providers have been treated consistently, and whether the employee is permitted, and realistically available, to perform services for other service recipients in the same line of business. An employee is presumed to have separated from service where the level of bona fide services performed decreases to a level equal to 20 percent or less of the average level of services performed by the employee during the immediately preceding 36-month period. An employee will be presumed not to have separated from service where the level of bona fide services performed continues at a level that is 50 percent or more of the average level of service performed by the employee during the immediately preceding 36-month period. No presumption applies to a decrease in the level of bona fide services performed to a level that is more than 20 percent and less than 50 percent of the average level of bona fide services performed during the immediately preceding 36-month period. The presumption is rebuttable by demonstrating that the employer and the employee reasonably anticipated that as of a certain date the level of bona fide services would be reduced permanently to a level less than or equal to 20 percent of the average level of bona fide services provided during the immediately preceding 36-month period or full period of services provided to the employer if the employee has been providing services to the service recipient for a period of less than 36 months (or that the level of bona fide services would not be so reduced). For example, an employee may demonstrate that the employer and employee reasonably anticipated that the employee would cease providing services, but that, after the original cessation of services, business circumstances such as termination of the employee's replacement caused the employee to return to employment. Although the employee's return to employment may cause the employee to be presumed to have continued in employment because the employee is providing services at a rate equal to the rate at which the employee was providing services before the termination of employment, the facts and circumstances in this case would demonstrate that at the time the employee originally ceased to provide services, the employee and the service recipient reasonably anticipated that the employee would not provide services in

the future. Notwithstanding the foregoing provisions of this paragraph (h)(1)(ii), a plan may treat another level of reasonably anticipated permanent reduction in the level of bona fide services as a separation from service, provided that the level of reduction required must be designated in writing as a specific percentage, and the reasonably anticipated reduced level of bona fide services must be greater than 20 percent but less than 50 percent of the average level of bona fide services provided in the immediately preceding 12 months. The plan must specify the definition of separation from service on or before the date on which a separation from service is designated as a time of payment of the applicable amount deferred, and once designated, any change to the definition of separation from service with respect to such amount deferred will be subject to the rules regarding subsequent deferrals and the acceleration of payments. For purposes of this paragraph (h)(1)(ii), for periods during which an employee is on a paid bona fide leave of absence (as defined in paragraph (h)(1)(i) of this section) and has not otherwise terminated employment pursuant to paragraph (h)(1)(i) of this section, the employee is treated as providing bona fide services at a level equal to the level of services that the employee would have been required to perform to receive the compensation paid with respect to such leave of absence. Periods during which an employee is on an unpaid bona fide leave of absence (as defined in paragraph (h)(1)(i) of this section) and has not otherwise terminated employment pursuant to paragraph (h)(1)(i) of this section, are disregarded for purposes of this paragraph (h)(1)(ii) (including for purposes of determining the applicable 36-month (or shorter) period).

(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 (h)(2)(i) of this section, a plan is considered to satisfy the requirement described in § 1.409A–3(a)(1) with respect to an amount payable upon a separation from service if, with respect to amounts payable to a service provider who is an independent contractor, the plan provides that—

(A) No amount will be paid to the service provider before a date at least 12 months after the day on which the contract expires under which the service provider performs services for the service recipient (or, in the case of more than one contract, all such contracts expire); and

(B) No amount payable to the service provider on that date will be paid to the service provider if, after the expiration of the contract (or contracts) and before that date, the service provider performs services for the service recipient as an independent contractor or an employee.

(3) *Definition of service recipient and employer.* For purposes of this paragraph (h), the term *service recipient* or *employer* means the service recipient as defined in paragraph (g) of this section, provided 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), ''at least 50 percent'' is used instead of ''at least 80 percent'' each place it appears in § 1.414(c)–2. A plan may provide with respect to a deferral of compensation under the plan that in applying sections 1563(a)(1), (2), and (3) for purposes of determining a controlled group of corporations under section 414(b), another defined percentage greater than 50 percent, but not greater than 80 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), another defined percentage greater than 50 percent, but not greater than 80 percent, is used instead of ''at least 80 percent'' at each place it appears in § 1.414(c)–2. In addition, where the use of such definition of service recipient for purposes of determining a separation from service is based upon legitimate business criteria, the plan may provide that for purposes of a deferral of compensation under the plan 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'' or another defined percentage not less than 20 percent but not greater than 50 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'' or another defined percentage not less than 20 percent but not greater than 50 percent is used instead of ''at least 80 percent'' at each place it appears in § 1.414(c)–2. Where a definition of service recipient or employer other than the definition provided in the first sentence of this paragraph (h)(3) (the 50 percent standard) is used, the plan must designate in writing the alternate definition no later than the last date at which the time and form of payment of the applicable amount deferred must be elected in accordance with § 1.409A–2(a), and any change in the definition for such amounts deferred will constitute a change in the time and form of payment subject to the rules governing subsequent deferral elections under § 1.409A–2(b) and the acceleration of payments under § 1.409A–3(j).

(4) *Asset purchase transactions.* Where as part of a sale or other disposition of assets by one service recipient (seller) to an unrelated service recipient (buyer), a service provider of the seller would otherwise experience a separation from service with the seller, the seller and the buyer may retain the discretion to specify, and may specify, whether a service provider providing services to the seller immediately before the asset purchase transaction and providing services to the buyer after and in connection with the asset purchase transaction has experienced a separation from service for purposes of this

paragraph (h), provided that the asset purchase transaction results from bona fide, arm's length negotiations, all service providers providing services to the seller immediately before the asset purchase transaction and providing services to the buyer after and in connection with the asset purchase transaction are treated consistently (regardless of position at the seller) for purposes of applying the provisions of any nonqualified deferred compensation plan, and such treatment is specified in writing no later than the closing date of the asset purchase transaction. For purposes of this paragraph (h)(4), references to a sale or other disposition of assets, or an asset purchase transaction, refer only to a transfer of substantial assets, such as a plant or division or substantially all the assets of a trade or business. For purposes of this paragraph (h)(4), whether a service recipient is related to another service recipient is determined under the rules provided in paragraph (f)(2)(ii) of this section.

(5) *Dual status.* If a service provider provides services both as an employee of a service recipient and as an independent contractor of a service recipient, the service provider must separate from service both as an employee and as an independent contractor to be treated as having separated from service. If a service provider ceases providing services as an independent contractor and begins providing services as an employee, or ceases providing services as an employee and begins providing services as an independent contractor, the service provider will not be considered to have a separation from service until the service provider has ceased providing services in both capacities. Notwithstanding the foregoing, if a service provider provides services both as an employee of a service recipient and a member of the board of directors of a corporate service recipient (or an analogous position with respect to a non-corporate service recipient), the services provided as a director are not taken into account in determining whether the service provider has a separation from service as an employee for purposes of a nonqualified deferred compensation plan in which the service provider participates as an employee that is not aggregated with any plan in which the service provider participates as a director under paragraph (c)(2)(ii) of this section. In addition, if a service provider provides services both as an employee of a service recipient and a member of the board of directors of a corporate service recipient (or an analogous position with respect to a non-corporate service recipient), the services provided as an employee are not taken into account in determining whether the service provider has a separation from service as a director for purposes of a nonqualified deferred compensation plan in which the service provider participates as a director that is not aggregated with any plan in which the service provider participates as an employee under paragraph (c)(2)(ii) of this section.

(6) *Collectively bargained plans covering multiple employers.* Notwithstanding the foregoing provisions of this paragraph (h), to the extent a plan is established pursuant to a bona fide collective bargaining agreement covering services performed by employees for multiple employers, such plan may define a separation from service in a reasonable manner that treats the employee as not having separated from service during periods in which the employee is not providing services but is available to perform services covered by the collective bargaining agreement for one or more employers, provided that the definition also provides that the employee must be deemed to have separated from service at a specified date not later than the end of any period of at least 12 consecutive months during which the employee has not provided any services covered by the collective bargaining agreement to any participating employer. This paragraph (h)(6) applies only if the definition of separation from service provided by the collective bargaining agreement was the subject of arm's length negotiations between employee representatives and two or more employers, the agreement between employee representatives and such employers satisfies section 7701(a)(46), and the circumstances surrounding the agreement evidence good faith bargaining between adverse parties over such definition.

(i) *Specified employee*—(1) *In general.* The term *specified employee* means a service provider who, as of the date of the service provider's separation from service, is a key employee 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), a service provider is a key employee if the service provider 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 a specified employee identification date. If a service provider is a key employee as of a specified employee identification date, the service provider is treated as a key employee for purposes of this paragraph (i) for the entire 12-month period beginning on the specified employee effective date.

(2) *Definition of compensation.* For purposes of identifying a specified employee by applying the requirements of section 416(i)(1)(A)(i), (ii), and (iii), the definition of compensation under § 1.415(c)–2(a) is used, applied as if the service recipient were not using any safe harbor provided in § 1.415(c)–2(d), were not using any of the special timing rules provided in § 1.415(c)–2(e), and were not using any of the special rules provided in § 1.415(c)–2(g). Notwithstanding the foregoing, a service recipient may elect to use any available definition of compensation under section 415 and the regulations thereunder in accordance with the election requirements set forth in paragraph (i)(8) of this section, including any available safe harbor and any available election under the timing rules or special rules, provided that the definition is applied consistently to all employees of the service recipient for purposes of identifying specified employees. A service recipient may elect to use such an alternative definition regardless of whether another definition of compensation is being used for purposes of a qualified plan sponsored by the service recipient. However, once a list of specified employees has become effective, the service recipient cannot change the definition of compensation for purposes of identifying specified employees for the period with respect to which such list is effective.

(3) *Specified employee identification date.* Unless another date is designated in accordance with the requirements of this paragraph (i)(3) and paragraph (i)(8) of this section, the specified employee identification date is December 31. A service recipient may designate in accordance with the requirements of paragraph (i)(8) of this section any other date as the specified employee identification date, provided that a service recipient must use the same specified employee identification date with respect to all nonqualified deferred compensation plans, and any change to the specified employee identification date may not be effective for a period of at least 12 months. The service recipient may designate a specified employee identification date in each plan or in a separate document applicable to all plans, provided that the service recipient will not be treated as having designated a specified employee identification date before the

designation is legally binding on the service recipient and all affected service providers. Any designation of a specified employee identification date made on or before December 31, 2007, may be applied to any separation from service occurring on or after January 1, 2005, unless and until subsequently changed pursuant to this paragraph (i)(3).

(4) *Specified employee effective date.* Unless another date is designated in accordance with the requirements of this paragraph (i)(4) and paragraph (i)(8) of this section, the specified employee effective date is the first day of the fourth month following the specified employee identification date. A service recipient may designate in accordance with the requirements of paragraph (i)(8) of this section any date following the specified employee identification date as the specified employee effective date, provided that such date may not be later than the first day of the fourth month following the specified employee identification date, and provided further that a service recipient must use the same specified employee effective date with respect to all nonqualified deferred compensation plans, and any change to the specified employee effective date may not be effective for a period of at least 12 months. The service recipient may designate a specified employee effective date through inclusion in each plan document or through a separate document applicable to all plans, provided that the service recipient will not be treated as having designated a specified employee effective date on any date before the designation is legally binding on the service recipient and all affected service providers. Any designation of a specified employee effective date made on or before December 31, 2007, may be applied to any separation from service occurring on or after January 1, 2005, unless and until subsequently changed pursuant to this paragraph (i)(4).

(5) *Alternative methods of satisfying the six-month delay rule.* A plan may provide, in accordance with the requirements of paragraph (i)(8) of this section, for an alternative method to identify service providers who will be subject to the six-month delay rule provided in section 409A(a)(2)(B)(i), provided that the alternative method is reasonably designed to include all specified employees (determined without respect to any available service recipient elections), the alternative method is an objectively determinable standard providing no direct or indirect election to any service provider regarding its application, and the alternative method results in either all service providers or no more than 200 service providers being identified in the class as of any date. Use of such an alternative method will not be treated as a change in the time and form of payment for purposes of § 1.409A–2(b) (the subsequent deferral rules), even if the service provider is not a specified employee when the payment is delayed.

(6) *Corporate transactions*—(i) *Mergers and acquisitions of public service recipients.* If as a result of a corporate transaction, two or more separate service recipients, more than one of which has stock outstanding that is publicly traded on an established securities market or otherwise immediately before the transaction, become one service recipient, any stock of which is publicly traded on an established securities market or otherwise immediately after the transaction (resulting public service recipient), the resulting public service recipient's next specified employee identification date and specified employee effective date following the corporate transaction are the specified employee identification date and specified employee effective date that the acquiring service recipient would have been required to use absent such transaction. For this purpose, in the case of a corporate merger, the acquiring service recipient is the service recipient that included the surviving corporation in such merger, in the case of an acquisition by a corporation of the stock of another corporation, the acquiring service recipient is the service recipient that included the corporation that acquired such stock, and in all other cases, the surviving service recipient is determined on the basis of all of the facts and circumstances. For the period between the transaction and the next specified employee effective date, the list of specified employees of the resulting public service recipient is determined by combining the lists of specified employees of all service recipients participating in the transaction that were in effect at the date of the corporate transaction, ranking such specified employees in order of the amount of compensation used to determine each specified employee's status as a specified employee, and treating the top 50 of such specified employees, plus any employees described in section 416(i)(1)(ii) or section 416(i)(1)(iii) and the regulations thereunder (relating to 1-percent and 5-percent owners) who are not included in such top 50 specified employees, as specified employees for the period between the corporate transaction and the next specified employee effective date. Alternatively, the resulting service recipient may elect in accordance with the requirements of paragraph (i)(8) of this section to use any reasonable method to determine the specified employees of the resulting service recipient, including the use of an alternative method of compliance described in paragraph (i)(5) of this section, provided that such method is adopted no later than 90 days after the corporate transaction and applied prospectively from the date the method is adopted.

(ii) *Mergers and acquisitions of nonpublic service recipients.* If as part of a corporate transaction a service recipient that does not have outstanding stock that is publicly traded on an established securities market or otherwise immediately before the transaction (initial private service recipient), and a service recipient with stock outstanding that is publicly traded on an established securities market or otherwise immediately before the transaction (initial public service recipient), become a single service recipient having stock that is publicly traded on an established securities market or otherwise immediately after the transaction (resulting public service recipient), the resulting public service recipient's next specified employee identification date and specified employee effective date following the corporate transaction are the specified employee identification date and specified employee effective date that the initial public service recipient would have been required to use absent such transaction. For the period after the date of the corporate transaction and before the next specified employee effective date, the specified employees of the initial public service recipient immediately before the transaction continue to be the specified employees of the resulting public service recipient, and no service providers of the initial private service recipient are required to be treated as specified employees.

(iii) *Spinoffs.* If as part of a corporate transaction, a service recipient with stock outstanding that is publicly traded on an established securities market or otherwise immediately before the transaction (initial public service recipient), becomes two or more separate service recipients, each with stock outstanding that is publicly traded on an established securities market or otherwise immediately after the transaction (post-transaction public service recipients), the next specified employee identification date of each of the post-transaction public service recipients is the specified employee identification date that the initial public

service recipient would have been required to use absent such transaction. For the period after the date of the corporate transaction and before the next specified employee effective date, the specified employees of the initial public service recipient immediately before the transaction continue to be the specified employees of the post-transaction public service recipients.

(iv) *Public offerings and other corporate transactions.* If as part of an initial public offering or corporate transaction not described in paragraph (i)(6)(ii) or (iii) of this section, a service recipient with no outstanding stock that is publicly traded on an established securities market or otherwise immediately before such offering or other transaction (initial private service recipient), becomes one or more service recipients with stock outstanding that is publicly traded on an established securities market or otherwise immediately after such offering or other transaction (post-transaction public service recipient), each post-transaction public service recipient has a specified employee identification date of December 31 and a specified employee effective date of April 1, effective retroactively to the December 31 and April 1 next preceding the offering or other transaction for purposes of identifying the specified employees between the corporation transaction and the next December 31. Alternatively, a post-transaction public service recipient may elect in accordance with the requirements of paragraph (i)(8) of this section, a specified employee identification date and specified employee effective date on or before the date of the offering or other transaction. If a public service recipient makes such an election, for the period after the offering or other transaction and before the next specified employee effective date, the specified employees of the post-transaction public service recipient consist of the service providers that at the time of the offering or other transaction would have been classified as specified employees of the initial private service recipient, had the initial private service recipient elected the same specified employee identification date and specified employee effective date as selected by the post-transaction public service recipient, and had such initial private service recipient had stock publicly traded on an established securities market or otherwise as of the specified employee identification date preceding the transaction.

(v) *Alternative methods of compliance.* For purposes of this paragraph (i)(6), references to specified employees as of a corporate transaction or offering include any specified employees identified through the use of an alternative method described in paragraph (i)(5) of this section, where the use of such alternative method was established and effective at the time of the corporate transaction or offering.

(7) *Nonresident alien employees.* For purposes of determining whether an 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)), and therefore is a key employee, the incorporation of the rules of § 1.415(c)–2(g)(5) regarding the definition of compensation applies. Accordingly, the rule of § 1.415(c)–2(g)(5)(i), generally requiring the treatment as compensation of certain compensation excludible from an employee's gross income due to the location of the services or the identity of the employer, applies. In addition, a service recipient may elect in accordance with paragraph (i)(8) of this section to apply the rule of § 1.415(c)–2(g)(5)(ii) to not treat as compensation certain compensation excludible from an employee's gross income on account of the location of the services or the identity of the employer that is not effectively connected with the conduct of a trade or business within the United States. A service recipient may elect to apply the rule of § 1.415–2(g)(5)(ii) regardless of whether the service recipient has elected to apply the rule to a qualified plan sponsored by the service recipient; however, once a list of specified employees has become effective, any election of the rule for that period may not be changed. Notwithstanding the foregoing, any election of the rule made before January 1, 2008, may be effective with respect to any specified employee identification date on or before December 31, 2007.

(8) *Elections affecting the identification of specified employees.* The elections described in paragraphs (i)(2) through (7) of this section are effective only as of the date that all necessary corporate action has been taken to make such elections binding for purposes of all affected nonqualified deferred compensation plans in which the service providers of the service recipient that would become a specified employee due to the application of such election participate. Where a taxpayer attempts to make an election under paragraph (i)(2), (3), (4), (5), (6), or (7) of this section but such election is not binding on all the affected nonqualified deferred compensation plans and applied consistently to all such service providers, the election is not effective and the rule under paragraph (i)(2), (3), (4), (5), (6), or (7) of this section, as applicable, that would apply absent an election is applicable for identifying specified employees.

(j) *Nonresident alien.* (1) Except as provided in paragraph (j)(2) 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.* The term *established securities market* means an established securities market within the meaning of § 1.897–1(m).

(l) *Stock right.* 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 plan.* The term *separation pay plan* means any plan that provides separation pay or, where a plan provides both amounts that are separation pay and that are not separation pay, that portion of the plan that provides separation pay. The term *separation pay* means any deferral of compensation (before the application of the exclusions from the definition of a deferral of compensation set forth in paragraph (b)(9) of this section) that will not be paid under any circumstances unless the service provider has had a separation from service, whether voluntary or involuntary, including payments in the form of reimbursements of expenses incurred, and the provision of in-kind benefits. A deferral of compensation that the service provider may receive without a separation from service does not become separation pay merely because the service provider elects to receive or receives the payment after or upon a separation from service.

A deferral of compensation does not fail to be separation pay merely because the payment is conditioned upon the execution of a release of claims, noncompetition or nondisclosure provisions, or other similar requirements. 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 nonqualified deferred compensation plan constitutes a payment of compensation or deferral of compensation under such nonqualified deferred compensation plan.

(n) *Involuntary separation from service*—(1) *In general.* An involuntary separation from service means a separation from service due to the independent exercise of the unilateral authority of the service recipient to terminate the service provider's services, other than due to the service provider's implicit or explicit request, where the service provider was willing and able to continue performing services. An involuntary separation from service may include the service recipient's failure to renew a contract at the time such contract expires, provided that the service provider was willing and able to execute a new contract providing terms and conditions substantially similar to those in the expiring contract and to continue providing such services. The determination of whether a separation from service is involuntary is based on all the facts and circumstances. Any characterization of the separation from service as voluntary or involuntary by the service provider and the service recipient in the documentation of the separation from service is presumed to properly characterize the nature of the separation from service. However, the presumption may be rebutted where the facts and circumstances indicate otherwise. For example, if a separation from service is designated as a voluntary separation from service or resignation, but the facts and circumstances indicate that absent such voluntary separation from service the service recipient would have terminated the service provider's services, and that the service provider had knowledge that the service provider would be so terminated, the separation from service is involuntary.

(2) *Separations from service for good reason*—(i) *In general.* Notwithstanding paragraph (n)(1) of this section, a service provider's voluntary separation from service will be treated for purposes of this section and §§ 1.409A–2 through 1.409A–6 as an involuntary separation from service if the separation from service occurs under certain limited bona fide conditions, where the avoidance of the requirements of section 409A is not a purpose of the inclusion of these conditions in the plan or of the actions by the service recipient in connection with the satisfaction of these conditions, and a voluntary separation from service under such conditions effectively constitutes an involuntary separation from service. Generally such conditions will be prespecified under an agreement to provide compensation upon a separation from service for good reason. Such a good reason (or a similar condition) must be defined to require actions taken by the service recipient resulting in a material negative change to the service provider in the service relationship, such as the duties to be performed, the conditions under which such duties are to be performed, or the compensation to be received for performing such services. Other factors taken into account in determining whether a separation from service for good reason effectively constitutes an involuntary separation from service include the extent to which the payments upon a separation from service for good reason are in the same amount and are to be made at the same time and in the same form as payments available upon an actual involuntary separation from service, and whether the service provider is required to give the service recipient notice of the existence of the condition that would result in treatment as a separation from service for good reason and a reasonable opportunity to remedy the condition.

(ii) *Safe harbor.* For purposes of this section and §§ 1.409A–2 through 1.409A–6, if a plan provides that a voluntary separation from service will be treated as an involuntary separation from service if the separation from service occurs under certain express conditions, a separation from service satisfying the conditions set forth in the plan will be treated as an involuntary separation from the service if the necessary conditions (or set of conditions) require the following:

(A) The separation from service must occur during a pre-determined limited period of time not to exceed two years following the initial existence of one or more of the following conditions arising without the consent of the service provider:

(*1*) A material diminution in the service provider's base compensation.

(*2*) A material diminution in the service provider's authority, duties, or responsibilities.

(*3*) A material diminution in the authority, duties, or responsibilities of the supervisor to whom the service provider is required to report, including a requirement that a service provider report to a corporate officer or employee instead of reporting directly to the board of directors of a corporation (or similar governing body with respect to an entity other than a corporation).

(*4*) A material diminution in the budget over which the service provider retains authority.

(*5*) A material change in the geographic location at which the service provider must perform the services.

(*6*) Any other action or inaction that constitutes a material breach by the service recipient of the agreement under which the service provider provides services.

(B) The amount, time, and form of payment upon the separation from service must be substantially identical to the amount, time and form of payment payable due to an actual involuntary separation from service, to the extent such a right exists.

(C) The service provider must be required to provide notice to the service recipient of the existence of the condition described in paragraph (n)(2)(ii)(A) of this section within a period not to exceed 90 days of the initial existence of the condition, upon the notice of which the service recipient must be provided a period of at least 30 days during which it may remedy the condition and not be required to pay the amount.

(3) *Special rule for certain collectively bargained plans.* Notwithstanding the foregoing, for purposes of this paragraph (n), to the extent a plan is subject to a bona fide collective bargaining agreement covering services performed for multiple employers under which an employee must separate from service with all such employers in order to receive a payment, such plan may use any reasonable definition of involuntary separation from service, provided that such definition is consistent with any definition of a separation from service adopted under paragraph (h)(6) of this section, and provided further that the definition of an involuntary separation from service provided by the collective bargaining agreement was the subject of arm's length negotiations between employee representatives and two or more employers, the agreement between employee representatives and such employers satisfies section 7701(a)(46), and the circumstances surrounding the agreement evidence good faith bargaining between adverse parties over such definition.

(o) *Earnings.* Whether a deferred amount constitutes earnings on an amount deferred, or actual or notional income attributable to an amount deferred, is determined under the

principles defining income attributable to the amount taken into account under § 31.3121(v)(2)–1(d)(2) of this chapter. Accordingly, with respect to an account balance plan, earnings on an amount deferred generally include an amount credited on behalf of a service provider under the terms of the plan that reflects a rate of return that does not exceed either the rate of return on a predetermined actual investment or, if the income does not reflect the rate of return on a predetermined actual investment, a reasonable rate of interest. With respect to nonaccount balance plans, earnings on an amount deferred generally include an 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 amount deferred (determined as of the date such amount was deferred), but only if the amount deferred was determined using reasonable actuarial assumptions and methods. A right to earnings on an amount deferred generally is treated as a right to a deferral of compensation for purposes of this section and §§ 1.409A–2 through 1.409A–6. However, for purposes of any provision of this section and §§ 1.409A–2 through 1.409A–6 referring to earnings on deferred compensation (or similar terms), the use of an unreasonable rate of return, or unreasonable actuarial assumptions and methods, generally will result in the treatment of some or all of such a right to deferred compensation as a right only to deferred compensation, and not a right to earnings on deferred compensation, so that the provision will not be applicable. With respect to plans that are neither account balance plans nor nonaccount balance plans, these rules apply by analogy.

(p) *In-kind benefits.* The term *in-kind benefits* refers to services provided to or on behalf of a service provider, such as financial planning services, or tangible personal or real property made available for use by or on behalf of the service provider, such as the use of an aircraft or vehicle, and does not refer to a transfer of property within the meaning of section 83 and the regulations thereunder, or a promise to transfer, or an option to purchase or receive, property in the future.

(q) *Application of definitions and rules.* The definitions and rules set forth in paragraphs (a) through (p) of this section apply for purposes of section 409A, this section, and §§ 1.409A–2 through 1.409A–6.

**§ 1.409A–2 Deferral elections.**

(a) *Initial elections as to the time and form of payment*—(1) *In general.* A plan that is, or constitutes part of, a nonqualified deferred compensation plan meets the requirements of section 409A(a)(4)(B) only if under the terms of the plan, 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 latest date permitted in this paragraph (a). An election will not be considered to be revocable merely because the service provider or service recipient may make an election to change the time and form of payment pursuant to paragraph (b) of this section, or the service recipient may accelerate the time of payment pursuant to § 1.409A–3(j)(4) (exceptions to prohibition on accelerated payments). Whether a plan 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 expressly provided in this section, an election will not be considered made until such election becomes irrevocable under the terms of the applicable plan. Accordingly, a plan may provide that an election to defer may be changed at any time before the last permissible date for making such an election. Where a plan 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 a plan 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 in connection with 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. For purposes of this paragraph (a), the reference to a service period or a performance period refers to the period of service for which the right to the compensation arises, and may include periods before the grant of a legally binding right to the compensation. For example, where a service recipient grants a bonus based upon services performed in the calendar year 2010, but retains the discretion to rescind the bonus until 2011 such that the promise of the bonus is not a legally binding right, the period of service or performance period to which the compensation relates is the calendar year 2010.

(2) *Service recipient elections.* A plan 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 or form of payment of such compensation must designate the time and form of payment by no later than the later of the time the service provider first has a legally binding right to the compensation or, if later, the time the service provider would be required under this section to make such an election if the service provider were provided such an election. Such designation is treated as an initial deferral election for purposes of this section. Where a plan permits a service recipient to exercise discretion to disregard a service provider election as to the time or form of a payment, any service provider election that is subject to such discretion will be treated as revocable so long as such discretion may be exercised.

(3) *General rule.* A plan that is, or constitutes part of, a nonqualified deferred compensation plan meets the requirements of section 409A(a)(4)(B) if under the terms of the plan, 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.

(4) *Initial deferral election with respect to short-term deferrals.* If a service provider has a legally binding right to a payment of compensation in a subsequent taxable year that, absent a deferral election, would be treated as a short-term deferral within the meaning

of § 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(i)(5)) without regard to the five-year additional deferral requirement in paragraph (b) of this section.

(5) *Initial deferral election with respect to certain forfeitable rights.* If a service provider has a legally binding right to a payment in a subsequent year that is subject to a condition requiring the service provider to continue to provide services for a period of at least 12 months from the date the service provider obtains the legally binding right to avoid forfeiture of the payment, 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. For purposes of this paragraph (a)(5), a condition will not be treated as failing to require the service provider to continue to provide services for a period of at least 12 months from the date the service provider obtains the legally binding right merely because the condition immediately lapses upon the death or disability (as defined in § 1.409A–3(i)(4)) of the service provider, or upon a change in control event (as defined in § 1.409A–3(i)(5)), provided that if death, disability, or a change in control event occurs and the condition lapses before the end of such 12-month period, a deferral election may be given effect only if the deferral election is permitted under this section without regard to this paragraph (a)(5).

(6) *Initial deferral election with respect to fiscal year compensation.* In the case of a service recipient with a taxable year that is not the same as the taxable year of the service provider, 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 taxable year immediately preceding the first taxable year of the service recipient in which any services are performed for which such compensation is payable. For purposes of this paragraph (a)(6), the term *fiscal year compensation* means compensation relating to a period of service coextensive with one or more consecutive taxable years of the service recipient, of which no amount is paid or payable during the service recipient's taxable year or years constituting the period of service. For example, fiscal year compensation generally would include a bonus to an individual employee with a calendar year taxable year that is based on a service period consisting of the service recipient's two consecutive taxable years ending September 30, 2011, where the amount will be paid after the end of the second of such taxable years, but would not include either a bonus based on a service period consisting of one or more calendar years or salary that would otherwise be paid during such taxable years of the service recipient.

(7) *First year of eligibility*—(i) *In general.* In the case of the first year in which a service provider becomes eligible to participate in a plan, 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 after 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 first 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 performance period, the election must apply only to the compensation paid for services performed after the election. For this purpose, an election will be deemed to apply to compensation paid for services performed after the election if the election applies to no more than an amount equal to the total amount of the 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.

(ii) *Eligibility to participate.* For purposes of this paragraph (a)(7), a service provider is eligible to participate in a plan at any time during which, under the plan's terms and without further amendment or action by the service recipient, the service provider is eligible to accrue an amount of deferred compensation under the plan other than earnings on amounts previously deferred, even if the service provider has elected not to accrue (or has not elected to accrue) an amount of deferred compensation. Where a service provider has been paid all amounts deferred under a plan, and on and before the date of the last payment was not eligible to continue (or to elect to continue) to participate in the plan for periods after the last payment (other than through an election of a different time and form of payment with respect to the amounts paid), the service provider may be treated as initially eligible to participate in a plan as of the first date following such payment that the service provider becomes eligible to accrue an additional amount of deferred compensation. Where a service provider has ceased being eligible to participate in a plan (other than the accrual of earnings), regardless of whether all amounts deferred under the plan have been paid, and subsequently becomes eligible to participate in the plan again, the service provider may be treated as being initially eligible to participate in the plan if the service provider had not been eligible to participate in the plan (other than the accrual of earnings) at any time during the 24-month period ending on the date the service provider again becomes eligible to participate in the plan.

(iii) *Application to excess benefit plans.* For purposes of this paragraph (a)(7), a service provider is treated as initially eligible to participate in an excess benefit plan as of the first day of the service provider's taxable year immediately following the first year the service provider accrues a benefit under the excess benefit plan; and any election made within 30 days following such date is treated as applying to benefits accrued under such plan for services performed before the election. For purposes of this paragraph (a)(7), the term *excess benefit plan* means all nonqualified deferred compensation plans in which a service provider participates, to the extent such plans do not provide for an election between current compensation (including a short-term deferral) and deferred compensation and solely provide deferred compensation equal to the excess of the benefits the service provider would have accrued under a qualified employer plan (as defined in § 1.409A–1(a)(2)) in which the service provider also participates, in the absence of one or more of the limits incorporated into the plan to reflect one or more of the limits on contributions or benefits applicable to the qualified

employer plan under the Internal Revenue Code, over the benefits the service provider actually accrues under the qualified employer plan. For purposes of this paragraph (a)(7), once a service provider has accrued a benefit or deferred compensation under a plan in any year, the service provider will not become eligible for an initial deferral election based upon an accrual or deferral under an excess benefit plan in a subsequent year, even if the benefit or deferred compensation accrued in a previous year is forfeited or eliminated.

(8) *Initial deferral election with respect to performance-based compensation.* In the case of any performance-based compensation (as defined in § 1.409A–1(e)), an initial deferral election may be made with respect to such performance-based compensation on or before the date that is six months before the end of the performance period, provided that the service provider performs services continuously from the later of the beginning of the performance period or the date the performance criteria are established through the date an election is made under this paragraph (a)(8), and provided further that in no event may an election to defer performance-based compensation be made after such compensation has become readily ascertainable. For purposes of this paragraph (a)(8), if the performance-based compensation is a specified or calculable amount, the compensation is readily ascertainable if and when the amount is first substantially certain to be paid. If the performance-based compensation is not a specified or calculable amount because, for example, the amount may vary based upon the level of performance, the compensation, or any portion of the compensation, is readily ascertainable when the amount is first both calculable and substantially certain to be paid. For this purpose, the performance-based compensation is bifurcated between the portion that is readily ascertainable and the amount that is not readily ascertainable. Accordingly, in general any minimum amount that is both calculable and substantially certain to be paid will be treated as readily ascertainable.

(9) *Nonqualified deferred compensation plans linked to qualified employer plans or certain other arrangements.* If a nonqualified deferred compensation plan provides that the amount deferred under the plan is determined under the formula for determining benefits under a qualified employer plan (as defined in § 1.409A–1(a)(2)) or a broad-based foreign retirement plan (as defined in § 1.409A–1(a)(3)(v)) maintained by the service recipient but applied without regard to one or more limitations applicable to the qualified employer plan under the Internal Revenue Code or to the broad-based foreign retirement plan under other applicable law, or that the amount deferred under the nonqualified deferred compensation plan is determined as an amount offset by some or all of the benefits provided under the qualified employer plan or the broad-based foreign retirement plan, an increase in amounts deferred under the nonqualified deferred compensation plan that results directly from changes in benefit limitations applicable to the qualified employer plan or the broad-based foreign retirement plan under the Internal Revenue Code or other applicable law does not constitute a deferral election under the nonqualified deferred compensation plan, 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, and provided further that such change in the amounts deferred under the nonqualified deferred compensation plan does not exceed that change in the amounts deferred under the qualified employer plan or the broad-based foreign retirement plan, as applicable. In addition, with respect to such a nonqualified deferred compensation plan, the following actions or failures to act will not constitute a deferral election under the nonqualified deferred compensation plan even if in accordance with the terms of the nonqualified deferred compensation plan, the actions or inactions result in an increase in the amounts deferred under the plan, provided that such actions or inactions do not otherwise affect the time or form of payment under the nonqualified deferred compensation plan and provided further that with respect to actions or inactions described in paragraphs (a)(9)(i) or (ii), the change in the amount deferred under the nonqualified deferred compensation plan does not exceed the change in the amounts deferred under the qualified employer plan or the broad-based foreign retirement plan, as applicable:

(i) A service provider's action or inaction under the qualified employer plan or broad-based foreign retirement plan with respect to whether to elect to receive a subsidized benefit or an ancillary benefit under the qualified employer plan or broad-based foreign retirement plan.

(ii) The amendment of a qualified employer plan or broad-based foreign retirement 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 or freeze or limit future accruals of benefits or reduce existing benefits under the broad-based foreign retirement plan.

(iii) A service provider's action or inaction under a qualified employer plan with respect to elective deferrals and other employee pre-tax contributions subject to the contribution restrictions under section 401(a)(30) or section 402(g), including an adjustment to a deferral election under such qualified employer plan, provided that for any given taxable year, the service provider's action or inaction does not result in an increase in the amounts deferred under all nonqualified deferred compensation plans in which the service provider participates (other than amounts described in paragraph (a)(9)(iv) of this section) in excess of the limit with respect to elective deferrals under section 402(g)(1)(A), (B), and (C) 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 and other employee pre-tax contributions subject to the contribution restrictions under section 401(a)(30) or section 402(g), and after-tax contributions by the service provider to a qualified employer plan that provides for such contributions, that affects the amounts that are credited under one or more nonqualified deferred compensation plans as matching amounts or other similar amounts contingent on such elective deferrals, employee pre-tax contributions, or after-tax contributions, provided that the total of such matching or contingent amounts, as applicable, never exceeds 100 percent of the matching or contingent amounts that would be provided under the qualified employer plan absent any plan-based restrictions that reflect limits on qualified plan contributions under the Internal Revenue Code.

(10) *Changes in elections under a cafeteria plan.* A change in an election under a cafeteria plan does not constitute a deferral election with respect to an amount deferred under a nonqualified deferred compensation plan to the extent that the change in the amount deferred under the nonqualified deferred compensation plan results solely from the application of the change in amount eligible to be treated as compensation under the terms of the nonqualified deferred compensation plan resulting from the election change under the cafeteria plan, to a benefit formula under the nonqualified deferred compensation plan based upon the

service provider's eligible compensation, and only to the extent that such change applies in the same manner as any other increase or decrease in compensation would apply to such benefit formula.

(11) *Initial deferral election with respect to certain separation pay.* In the case of separation pay (as defined in § 1.409A–1(m)), where such separation pay is the subject of bona fide, arm's length negotiations at the time of the separation from service, an initial deferral election may be made at any time up to the time the service provider obtains a legally binding right to the payment. This paragraph (a)(11) does not apply to any separation pay to which the service provider obtained a legally binding right before the negotiations at the time of the separation from service, including a right to a payment subject to a condition such as that the service provider separate from service other than for cause. In the case of separation pay due to participation in a window program (as defined in § 1.409A–1(b)(9)(vi)), an initial deferral election may be made at any time before the time the election to participate in the window program becomes irrevocable.

(12) *Initial deferral election with respect to certain commissions*—(i) *Sales commission compensation.* For purposes of this paragraph (a), a service provider earning sales commission compensation is treated as providing the services to which such compensation relates only in the service provider's taxable year in which the customer remits payment to the service recipient or, if applied consistently to all similarly situated service providers, the service provider's taxable year in which the sale occurs. For purposes of this paragraph (a)(12), the term *sales 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 an unrelated 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 substantially all of which is calculated by reference to the volume of sales, and payment of the compensation is either contingent upon the service recipient receiving payment from an unrelated customer for the product or services or, if applied consistently to all similarly situated service providers, is contingent upon the closing of the sales transaction and such other requirements as may be specified by the service recipient before the closing of the sales transaction. 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)(2)(ii) or the person would be treated as providing management services to the other person under § 1.409A–1(f)(2)(iv).

(ii) *Investment commission compensation.* For purposes of this paragraph (a), a service provider earning investment commission compensation is treated as providing the services to which such compensation relates over the 12 months preceding the date as of which the overall value of the assets or asset accounts is determined for purposes of the calculation of the investment commission compensation. For purposes of this paragraph (a)(12), the term *investment commission compensation* means the compensation or the portion of compensation earned by a service provider if a substantial portion of the services provided by such service provider to a service recipient to which such compensation relates consists of sales of financial products or other direct customer services to an unrelated customer with respect to customer assets or customer asset accounts, the customer retains the right to terminate the customer relationship and may move or liquidate the assets or asset accounts without undue delay (which may be subject to a reasonable notice period), such compensation consists of a portion of the value of the overall assets or asset account balance, an amount substantially all of which is calculated by reference to the increase in the value of the overall assets or account balance during a specified period, or both, and the value of the overall assets or account balance and investment commission compensation is determined at least annually. 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)(2)(ii) or the person would be treated as providing management services to the other person under § 1.409A–1(f)(2)(iv).

(iii) *Commission compensation and related persons.* The rules of paragraphs (a)(12)(i) and (ii) of this section apply to sales commission compensation and investment commission compensation involving a related customer, provided that substantial sales from which commission compensation arises are made, or substantial services from which commission compensation arises are provided, to unrelated customers by the service recipient, the sales and service arrangement and the commission arrangement with respect to the related customer are bona fide, arise from the service recipient's ordinary course of business, and are substantially the same, both in terms and in practice, as the terms and practices applicable to unrelated customers (as defined in such paragraphs) to which individually or in the aggregate substantial sales are made or substantial services provided by the service recipient.

(13) *Initial deferral election with respect to compensation paid for final payroll period*—(i) *In general.* Unless a plan 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 in which the payment is made. 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 a plan after December 31, 2007, 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)(13), a plan that was adopted and effective before December 31, 2007, whether written or unwritten, will be treated as designating such compensation for services performed in the taxable year in which the payroll period ends, unless otherwise set forth in writing before December 31, 2007.

(14) *Elections to annualize recurring part-year compensation.* In the case of a service provider receiving recurring part-year compensation, an election to defer all or a portion of the recurring

part-year compensation to be earned during a particular service period is considered to meet the requirements of this paragraph (a) if the election is made before the services for which the recurring part-year compensation is paid begin, and the election does not defer payment of any of the recurring part-year compensation to a date beyond the last day of the 13th month following the first date of the service period. For purposes of this paragraph (a)(14), the term *recurring part-year compensation* means compensation paid for services rendered in a position that the service recipient and service provider reasonably anticipate will continue on similar terms and conditions in subsequent years, and will require services to be provided during successive service periods each of which comprises less than 12 months (for example, a teacher providing services during a school year comprised of 10 consecutive months), and each of which periods begins in one taxable year of the service provider and ends in the next such taxable year. The rules of this paragraph (a)(14) apply to a particular amount of compensation only once, so that an amount deferred under this rule may not again be treated as recurring part-year compensation for purposes of this paragraph and subject to a second deferral election under this paragraph (a)(14).

(15) *USERRA rights.* The requirements of this paragraph (a) are deemed satisfied to the extent an initial deferral election is provided to satisfy the requirements of the Uniformed Service Employment and Reemployment Rights Act of 1994, as amended, 38 U.S.C. 4301–4334.

(b) *Subsequent changes in time and form of payment*—(1) *In general.* A plan that permits under a subsequent election a delay in a payment or a change in the form of payment (a subsequent deferral election), including a subsequent deferral election made by a service provider or a service recipient, satisfies the requirements of section 409A(a)(4)(C) only if the conditions of this paragraph (b) are met. For purposes of this paragraph (b), except as otherwise expressly provided in this section, a subsequent deferral election is not considered made until such election becomes irrevocable under the terms of the plan. Accordingly, a plan may provide that a subsequent deferral election may be changed at any time before the last permissible date for making such a subsequent deferral election. Where a plan permits a subsequent deferral election, the requirements of this paragraph are satisfied only if the following conditions are met:

(i) The plan requires that such election 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 five 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, five 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) be made not less than 12 months before 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 before 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 under a nondiscretionary formula. 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, a fringe benefit excludible under section 119 or section 132, or any other benefit that is excludible from gross income. For additional rules relating to the application of this paragraph (b) to amounts payable at a fixed time or pursuant to a fixed schedule, see § 1.409A–3(i)(1).

(ii) *Life annuities*—(A) *In general.* The entitlement to a life annuity is treated as the entitlement to a single payment. Accordingly, an election to delay payment of a life annuity, or to change the form of payment of a life annuity, must be made at least 12 months before the scheduled commencement of the life annuity, and must defer the payment for a period of not less than five years from the originally scheduled commencement of the life annuity. For purposes of § 1.409A–1, this section, and §§ 1.409A–3 through 1.409A–6, 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 a series of substantially equal periodic payments, payable not less frequently than annually, for the life (or life expectancy) of the service provider, followed upon the death or end of the life expectancy of the service provider by a series of substantially equal periodic payments, payable not less frequently then annually, for the life (or life expectancy) of the service provider's designated beneficiary (if any). A change in designated beneficiary before any annuity payment has been made under the plan is not a change in the time or form of payment. A change in the form of a payment before any annuity payment has been made under the plan, from one type of life annuity to another type of life annuity with the same scheduled date for the first annuity payment, is not considered a change in the time and form of a payment, provided that the annuities are actuarially equivalent applying reasonable actuarial methods and assumptions. For purposes of this paragraph (b)(2)(ii), a requirement that a service provider obtain the consent of a spouse or other potential recipient of a survivor annuity to change a beneficiary or form of payment is disregarded, so that any annuity form that the service recipient could elect to receive with such consent is considered currently available.

(B) *Certain features disregarded.* Notwithstanding the foregoing provisions of this paragraph (b)(2)(ii), the following features are disregarded for purposes of determining whether a payment form is a life annuity within the meaning of this paragraph (b)(2)(ii), but are not disregarded for purposes of determining whether a life annuity is the actuarial equivalent of another life annuity except as otherwise provided in this paragraph (b)(2)(ii):

(*1*) Term certain features under which annuity payments continue for the longer of the life of the annuitant or a fixed period of time.

(*2*) Pop-up features under which payments increase upon the death of the

beneficiary or another event that eliminates the right to a survivor annuity.

(*3*) Cash refund features under which payment is provided upon the death of the last annuitant in an amount that is not greater than the excess of the present value of the annuity at the annuity starting date over the total of payments before the death of the last annuitant.

(*4*) Features under which an annuity form of payment provides higher periodic payments before the expected commencement of benefits under the Social Security Act (42 U.S.C. ch. 7) or the Railroad Retirement Act (45 U.S.C. 231 *et seq.*) and lower periodic payments after such expected commencement date, so that the combined periodic payments under the arrangement and the Social Security Act or the Railroad Retirement Act, as applicable, are approximately level before and after such expected commencement date (Social Security or Railroad Retirement leveling features).

(*5*) Features providing for an increase in the annuity payment in a manner described in § 1.401(a)(9)–6, Q&A–14(a)(1) or (2) (eligible cost-of-living adjustments).

(C) *Subsidized joint and survivor annuities.* For purposes of this paragraph (b)(2)(ii), a joint and survivor annuity will not fail to be treated as actuarially equivalent to a single life annuity due solely to the value of a subsidized survivor annuity benefit, provided that the annual lifetime annuity benefit available to the service provider under the joint and survivor annuity is not greater than the annual lifetime annuity benefit available to the service provider under the single life annuity alternative, and provided that the annual survivor annuity benefit is not greater than the annual lifetime annuity benefit available to the service provider under the joint and survivor annuity.

(D) *Actuarial assumptions and methods.* For purposes of this paragraph (b)(2)(ii), at any given time the same actuarial assumptions and methods must be used in valuing each annuity payment option, in determining whether the payments are actuarially equivalent and such assumptions must be reasonable. This requirement applies over the entire term of the service provider's participation in the plan, such that the annuity payment must be actuarially equivalent at all times for the annuity payment options to be treated as one time and form of payment. There is no requirement that the same actuarial methods and assumptions be used over the term of a service provider's participation in a plan. Accordingly, a plan may change the actuarial assumptions and methods used to determine the life annuity payments provided that all of the actuarial assumptions and methods are reasonable.

(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 plan 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 § 1.409A–1, this section, and §§ 1.409A–3 through 1.409A–6, 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 (or decrease) in the amount reflects reasonable earnings (or losses) through the date the amount is paid. For this purpose, a series of installment payments over a predetermined period and a series of installment payments over a shorter or longer period, or a series of installment payments over the same predetermined period but with a different commencement date, are different times and forms of payment. Accordingly, a change in the predetermined period or the commencement date is a change in the time and form of payment. Notwithstanding the foregoing, a schedule of payments does not fail to be an installment payment solely because such plan provides for an immediate payment of all remaining installments if the present value of the deferred amount to be paid in the remaining installment payments falls below a predetermined amount, and the immediate payment of such amount does not constitute an accelerated payment for purposes of § 1.409A–3(j), provided that such feature including the predetermined amount is established by no later than the time and form of payment is otherwise required to be established, and provided further that any change in such feature including the predetermined amount is a change in the time and form of payment.

(iv) *Transition rule.* For purposes of this section, a plan that was adopted and effective before December 31, 2007, 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, may make such designation on or before December 31, 2007, provided such designation is set forth in writing on or before December 31, 2007.

(3) *Beneficiaries.* The rules of this paragraph (b) governing changes in the time and form of payment apply to elections by beneficiaries with respect to the time and form of payment, as well as elections by service providers or service recipients with respect to the time and form of payment to beneficiaries. An election to change the identity of a beneficiary does not constitute a change in the time and form of payment merely because the election changes the identity of the recipient of the payment, if the time and form of the payment is not otherwise changed. In addition, an election to change the identity of a beneficiary before the initial payment of a life annuity does not constitute a change in the time and form of payment if the change in the time of payments stems solely from the different life expectancy of the new beneficiary, such as in the case of a joint and survivor annuity.

(4) *Domestic relations orders.* The rules of this paragraph (b) governing changes in the time and form of payment do not apply to elections by individuals other than a service provider, with respect to payments to a person other than the service provider, to the extent such elections are reflected in, or made in accordance with, the terms of a domestic relations order (as defined in section 414(p)(1)(B)).

(5) *Coordination with prohibition against acceleration of payments.* For purposes of applying the prohibition against the acceleration of payments in § 1.409A–3(j), the definition of payment is the same as the definition in paragraph (b)(2) of this section. Accordingly, a change in the form of a payment that results in a more rapid schedule for payments generally will not constitute an acceleration of a payment, if the change in the form of payment is made in compliance with the subsequent deferral rules. For example, 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 if the change in the form of the payment is made in compliance with the requirements of paragraph (b)(1) of this section, generally meaning that the election to change to a lump-sum payment must be made at least 12 months before the installment payments were scheduled to commence and the lump-sum payment could not be made until at least five years after the date the installment payments were scheduled to commence. See § 1.409A–3(j)(4)(i) with respect to situations in which the failure to accelerate a payment or the

modification of a plan term relating to certain accelerated payments will not be subject to the rules of this paragraph (b).

(6) *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 or deletion of a permissible payment event to a plan under which amounts were previously deferred is subject to the rules of this paragraph (b) where the addition or deletion 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(j).

(7) *Delay of payments under certain circumstances.* A payment may be delayed to a date after the designated payment date under any of the circumstances described in this paragraph (b)(7), 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, so long as the service recipient treats all payments to similarly situated service providers on a reasonably consistent basis.

(i) *Payments subject to section 162(m).* A payment may be delayed to the extent that the service recipient reasonably anticipates that if the payment were made as scheduled, the service recipient's deduction with respect to such payment would not be permitted due to the application of section 162(m), provided that the payment is made either during the service provider's first taxable year in which the service recipient reasonably anticipates, or should reasonably anticipate, that if the payment is made during such year, the deduction of such payment will not be barred by application of section 162(m) or during the period beginning with the date of the service provider's separation from service and ending on the later of the last day of the taxable year of the service recipient in which the service provider separates from service or the 15th day of the third month following the service provider's separation from service, and provided further that where any scheduled payment to a specific service provider in a service recipient's taxable year is delayed in accordance with this paragraph, the delay in payment will be treated as a subsequent deferral election unless all scheduled payments to that service provider that could be delayed in accordance with this paragraph are also delayed. Where the payment is delayed to a date on or after the service provider's separation from service, the payment will be considered a payment upon a separation from service for purposes of the rules under § 1.409A–3(i)(2) (payments to specified employees upon a separation from service) and, in the case of a specified employee, the date that is six months after a service provider's separation from service is substituted for any reference to a service provider's separation from service in the first sentence of this paragraph. No election may be provided to the service provider with respect to the timing of the payment under this paragraph (b)(7)(i).

(ii) *Payments that would violate Federal securities laws or other applicable law.* A payment may 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 payment is made at the earliest date at which the service recipient reasonably anticipates that the making of the payment will not cause such violation. 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.

(iii) *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 (see § 601.601(d)(2) of this chapter). For additional rules applicable to certain delayed payments pursuant to a change in control event, see § 1.409A–3(i)(5)(iv). For additional rules applicable to amounts payable because of an unforeseeable emergency, see § 1.409A–3(i)(3).

(8) *USERRA rights.* The requirements of this paragraph (b) are deemed met to the extent an election to change the time or form of a payment of deferred compensation is provided to satisfy the requirements of the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended, 38 U.S.C. 4301–4344.

(9) *Examples.* The following examples illustrate the application of the provisions of this section. For purposes of these examples, each employee is an individual with a calendar year taxable year, and is employed by the specified employer:

*Example 1. Initial election to defer salary.* Employer ZZ sponsors a plan under which Employee A may elect to defer a percentage of Employee A's salary. Employee A has participated in the plan 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.* Employer YY has a taxable year ending September 30. On July 1, 2008, Employer YY enters into a legally binding obligation to pay Employee B a $10,000 bonus. 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). Employer YY does not provide Employee B an election as to the time and form of payment. Unless the amount is to be paid in accordance with the short-term deferral rule of § 1.409A–1(b)(4), Employer YY must specify the time and form of payment on or before July 1, 2008, to satisfy the requirements of this section.

*Example 3. Initial election to defer bonus payable based on services during calendar year.* Employer XX has a taxable year ending September 30. Employee C participates in a bonus plan under which Employee C is entitled to a bonus for services performed during the calendar year that, absent an election by Employee C, 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 as described in § 1.409A–1(e). If Employee C elects to defer the payment of the bonus with respect to services rendered during calendar year 2008, Employee C must elect the time and form of payment not later than December 31, 2007, to satisfy the requirements of this section.

*Example 4. Initial election to defer bonus payable based on services during fiscal year other than calendar year.* Employer WW has a taxable year ending September 30. Employee D participates in a bonus plan under which Employee D is entitled to a bonus for services performed during Employer WW's fiscal year that, absent an election by Employee D, 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 D elects to defer the payment of the amount related to the fiscal year ending September 30, 2009, to satisfy the requirements of this section Employee D must elect the time and form of payment not later than September 30, 2008.

*Example 5. Initial election to defer bonus payable only if service provider completes at least 12 months of services after the election.* Employer VV has a calendar year taxable year. On March 1, 2008, Employer VV grants Employee E a $10,000 bonus, payable on

March 1, 2010 (with reasonable interest), provided that Employee E continues performing services as an employee of Employer VV through March 1, 2010. The amount does not qualify as performance-based compensation as described in § 1.409A–1(e), and Employee E already participates in another account balance nonqualified deferred compensation plan. Employee E may make an initial deferral election on or before March 31, 2008 (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 E does not make an initial deferral election on or before March 31, 2008. 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 E 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, 2010 (the first date the payment could become substantially vested). Accordingly, Employee E may make an election before March 1, 2009, provided that the election defers the payment to a date on or after March 1, 2015 (other than a payment due to death, disability, unforeseeable emergency, or a change in control event).

*Example 7. Initial election to defer sales commissions.* Employer UU has a calendar year taxable year. As part of Employee F's services for Employer UU, Employee F sells refrigerators to customers unrelated to Employee F or Employer UU. Under the employment arrangement, Employee F is entitled to 10% of the sales price of any refrigerator Employee F sells, payable only upon the receipt of payment from the customer who purchased the refrigerator. For purposes of the initial deferral rule, Employee F is treated as performing the services related to each refrigerator sale in the calendar year in which each customer pays for the refrigerator.

*Example 8. Initial election to defer renewal sales commissions.* The same facts as *Example 7*, except that Employee F 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 F's arrangement with Employer UU, Employee F is entitled to 10% 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 election rule, Employee F 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 investment commissions.* Employer TT is in the trade or business of managing financial assets for customer accounts. Customers who deposit funds in an account with Employer TT are entitled to remove the account balance of such account upon 60 days notice to Employer TT. Employee G sells financial products and provides continuing customer service to certain unrelated customers involving the deposit and maintenance of funds in customer accounts managed by Employer TT. Under the employment arrangement, Employee G is entitled to a set percentage of the aggregate value of the assets held in the accounts of customers to whom Employee G sold financial products and provides customer service. Under the arrangement, the aggregate value of the assets held in the accounts is determined as of June 30 of each year, and unless Employee G elects to defer the payment, the amount is payable to Employee G in a lump sum on December 31 of the year in which the valuation is made. Employee G has no control over the valuation of the assets held in the accounts, or the calculation of the amount due Employee G. For purposes of the initial deferral rule, Employee G is treated as providing the services to which a payment relates during the July 1 through June 30 period ending on the June 30 date as of which the assets held in the account are valued.

*Example 10. Initial election to defer part-year compensation.* Employee H provides services as a teacher to Employer SS, a school system. The period of services routinely begins on the second Monday of August of one year and ends on the first Friday of June of the subsequent year. Employer SS provides an election to Employee H to receive the compensation for the period of services ratably over the period beginning on the second Monday of August of one year and ending on the last day of August of the subsequent year. Because the compensation constitutes recurring part-year compensation, as defined in paragraph (a)(14) of this section, and because the schedule will provide that all of the recurring part-year compensation is paid no later than September 30 of the subsequent year, Employee H will be deemed to have made a timely deferral election with respect to such recurring part-year compensation if Employee H elects before the first day of the service period to have the recurring part-year compensation paid under such schedule.

*Example 11. Initial election to defer negotiated separation pay.* Employer RR decides to terminate Employee J's employment involuntarily. As part of the process of terminating Employee J, Employer RR enters into bona fide, arm's length negotiations with respect to the terms of Employee J's termination of employment. As part of the process, Employer RR offers Employee J an amount that is in addition to any amounts to which Employee J is otherwise entitled, payable either as a lump sum payment at the end of 3 years or in 3 annual payments starting at the date of termination of employment. The election of the time and form of payment by Employee J may be made at any time before Employee J accepts the offer and obtains a legally binding right to the additional amount. The election may not apply to any amount to which Employee J already had a legally binding right.

*Example 12. Election of time and form of payments under a window program.* Employer QQ establishes a window program, as defined in § 1.409A–1(b)(9)(vi). Individuals who elect to terminate employment under the window program are entitled to receive an amount equal to 2 weeks pay multiplied by every year of service with Employer QQ. 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 3 equal annual installments on each January 1 of the first 3 years following the election to participate in the window program. Employee K is eligible to participate in the window program. Employee K will be treated as making a timely deferral election if the election as to the time and form of payment is made on or before the date Employee K's election to participate in the window program becomes irrevocable.

*Example 13. Initial election to defer salary earned during final payroll period beginning in one calendar year and ending in the subsequent calendar year.* Employer PP pays the salary of its employees, including Employee L, on a bi-weekly basis. One bi-weekly payroll period runs from December 24, 2008, through January 6, 2009, with a scheduled payment date of January 13, 2009. Employer PP sponsors, and Employee L participates in, a nonqualified deferred compensation plan under which Employee L may defer a specified percentage of his annual salary. The plan 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 L is deemed to have performed the services for the payroll period December 24, 2008, through January 6, 2009, during the calendar year 2009.

*Example 14. Application of deferral election rules and anti-acceleration rules to a nonqualified deferred compensation plan linked to a qualified plan.* Employee M participates in a qualified retirement plan that is a defined benefit plan that offers a subsidized early retirement benefit to employees who have attained age 55 and completed 30 years of service. Employee M, who has attained age 55 and completed 30 years of service, also participates in a nonqualified deferred compensation plan, under which the benefit payable is calculated under a formula, with that benefit then reduced by any benefit that Employee M has accrued under the qualified retirement plan. In 2008, Employee M fails to elect the subsidized early retirement benefit under the qualified retirement plan, with the effect that the amounts payable under the nonqualified deferred compensation plan are increased by an amount equal to the reduction in the benefit payable under the qualified plan. In 2009, Employer NN amends the qualified retirement plan to increase benefits under the plan, resulting in a decrease in the amounts payable under the nonqualified deferred

compensation plan equal to the increase in the benefit payable under the qualified plan. Neither of these actions constitutes a deferral election or an acceleration of a payment under the nonqualified deferred compensation plan.

*Example 15. Subsequent deferral election.* Employee N participates in a nonqualified deferred compensation plan. Employee N elects to be paid in a lump sum payment at the earlier of age 65 or separation from service. Employee N anticipates that he will work after age 65, and wishes to defer payment to a later date. Provided that Employee N continues in employment and makes the election by his 64th birthday, Employee N may elect to receive a lump sum payment at the earlier of age 70 or separation from service.

*Example 16. Subsequent deferral election rule—change in form of payment from lump sum payment to life annuity.* Employee P participates in a nonqualified deferred compensation plan. Employee P elects to be paid in a lump sum payment at age 65. Employee P wishes to change the payment form to a life annuity. Provided that Employee P makes the election on or before his 64th birthday, Employee P 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 Q participates in a nonqualified deferred compensation plan. Employee Q elects to be paid in a life annuity at age 65. Employee Q wishes to change the payment form to a lump sum payment. Provided that Employee Q makes the election on or before his 64th birthday, Employee Q may elect to receive a lump sum payment at age 70.

*Example 18. Subsequent deferral election rule—installment payments designated as separate payments.* Employee R, whose taxable year is the calendar year, participates in a nonqualified deferred compensation plan 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, 2010. Provided that Employee R makes the election on or before January 1, 2009, Employee R may elect for the first payment scheduled to be made on January 1, 2010, to be made on January 1, 2015. If Employee R makes that election, but does not elect to defer the remaining payments, the remaining payments continue to be due upon January 1 of the 4 consecutive calendar years commencing on January 1, 2011.

*Example 19. Subsequent deferral election rule—change in form of payment from installment payments not designated as separate payments to lump sum payment.* Employee S participates in a nonqualified deferred compensation plan 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, 2010. Employee S wishes to receive the entire amount equal to the sum of all 5 of the amounts to be paid as a lump sum payment. Provided that Employee S makes the election on or before January 1, 2009, Employee S may elect to receive a lump sum payment on or after January 1, 2015.

*Example 20. Subsequent deferral election rule—change in form of payment from installment payments designated as separate payments to lump sum payment.* Employee T participates in a nonqualified deferred compensation plan that provides for payment in a series of 5 equal annual amounts each of which is designated as a separate payment. The first amount is scheduled to be paid on January 1, 2010. Employee T wishes to receive the entire amount equal to the sum of all 5 of the amounts in a single lump sum payment. Provided that Employee T makes the election on or before January 1, 2009, Employee T may elect to receive a lump sum payment on or after January 1, 2019.

*Example 21. Subsequent deferral election rule—change in form of payment from one life annuity form to another life annuity form.* Employee U participates in a nonqualified deferred compensation plan that permits Employee U to elect before Employee U's separation from service whether to be paid in the form of a single life annuity beginning on the first day of the month following Employee U's separation from service, or an annuity beginning on the first day of the month following Employee U's separation from service under which annuity payments continue for Employee U's lifetime but not less than 10 years. The two types of annuities are actuarially equivalent at all times applying reasonable actuarial methods and assumptions. For purposes of this section, the two types of annuities are treated as a single form of payment. Accordingly, the election provided under the plan is not treated as providing a subsequent deferral election or accelerated payment, and an election by Employee U under the plan between the two annuity options made before the first scheduled payment date for an annuity payment is not treated as a subsequent deferral election or an acceleration of a payment.

*Example 22. 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 V participates in a nonqualified deferred compensation plan that provides for a lump sum payment at age 65. Employee V wishes to modify the plan so that the deferred amount will be payable upon the later of Employee V's attainment of a specified age or separation from service. Provided that Employee V makes such election on or before his 64th birthday, Employee V may modify the plan so Employee V will receive a lump sum payment upon the later of age 70 or separation from service.

*Example 23. Subsequent deferral election rule—change in time of payment from payment at separation from service to payment at later of separation from service or specified age.* Employee W participates in a nonqualified deferred compensation plan that provides for a lump sum payment at separation from service. Employee W wishes to make the payment payable upon the later of separation from service or a predetermined age. Provided that Employee W makes such election on or before the date 1 year before a separation from service, Employee W may elect to receive a lump sum payment upon the later of the date 5 years following a separation from service or at a specified age.

*Example 24. Subsequent deferral election rule—change in time of payment from payment at separation from service to payment at a change in control event.* Employee X participates in a nonqualified deferred compensation plan that provides for a lump sum payment at separation from service. Employee X wishes to change the payment provision such that the payment is payable upon a change in control event. A change in the distribution provision to provide for a payment only upon a change in control event will violate the rules governing payment provisions, because the change could result in an acceleration if the change in control event occurs before Employee X separates from service, or a subsequent deferral if the change in control does not occur until after Employee X separates from service. However, provided that Employee X makes such election on or before the date 1 year before a separation from service, Employee X may elect to receive a payment upon the later of a change in control event or 5 years following a separation from service.

(c) *Special rules for certain resident aliens.* For the first taxable year of an individual in which such individual is a resident alien, a nonqualified deferred compensation plan is deemed to meet the requirements of paragraph (a) of this section if, with respect to compensation payable for services performed during that first taxable year or with respect to compensation the right to which is subject to a substantial risk of forfeiture as of the first day of that first taxable year, an initial deferral election is made by the end of such first taxable year, provided that the initial deferral election may not apply to amounts that have already been paid or made available to the service provider before the election is made. For any year after the first taxable year in which an individual is classified as a resident alien, this paragraph (c) does not apply, provided that a taxable year may again be treated as the first taxable year in which an individual is classified as a resident alien if such individual is classified as a resident alien in that taxable year and has not been classified as a resident alien for the three consecutive taxable years immediately preceding that taxable year.

**§ 1.409A–3 Permissible payments.**

(a) *In general.* The requirements of section 409A(a)(2)(A) are met only if the plan provides that an amount of deferred compensation under the plan may be paid only upon an event or at a time set forth in this paragraph (a):

(1) The service provider's separation from service (as defined in § 1.409A–1(h) and in accordance with paragraph (i)(2) of this section).

(2) The service provider becoming disabled (in accordance with paragraph (i)(4) of this section).

(3) The service provider's death.

(4) A time or a fixed schedule specified under the plan (in accordance with paragraph (i)(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 (i)(5) of this section).

(6) The occurrence of an unforeseeable emergency (in accordance with paragraph (i)(3) of this section).

(b) *Designation of payment upon a permissible payment event.* Except as otherwise specified in this section, a plan provides for the payment upon an event described in paragraph (a)(1), (2), (3), (5), or (6) of this section if the plan provides the date of the event is the payment date, or specifies another payment date that is objectively determinable and nondiscretionary at the time the event occurs. A plan 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 schedule that is objectively determinable and nondiscretionary based on the date the event occurs and that would qualify as a fixed schedule under paragraph (i)(1) of this section if the payment event were instead a fixed date, provided that the schedule must be fixed at the time the permissible payment event is designated. In addition, a plan may provide that a payment, including a payment that is part of a schedule, is to be made during a designated taxable year of the service provider that is objectively determinable and nondiscretionary at the time the payment event occurs such as, for example, a schedule of three substantially equal payments payable during the first three taxable years following the taxable year in which a separation from service occurs. A plan may also provide that a payment, including a payment that is part of a schedule, is to be made during a designated period objectively determinable and nondiscretionary at the time the payment event occurs, but only if the designated period both begins and ends within one taxable year of the service provider or the designated period is not more than 90 days and the service provider does not have a right to designate the taxable year of the payment (other than an election that complies with the subsequent deferral election rules of § 1.409A–2(b)). Where a plan provides for a period of more than one day following a payment event during which a payment may be made, such as within 90 days following the date of the event, the payment date for purposes of the subsequent deferral rules under § 1.409A–2(b) is treated as the first possible date upon which a payment could be made under the terms of the plan. A plan may provide for payment upon the earliest or latest of more than one event or time, provided that each event or time is described in paragraphs (a)(1) through (6) of this section. For examples illustrating the provisions of this paragraph, see paragraph (i)(1)(vi) of this section.

(c) *Designation of alternative specified dates or payment schedules based upon date of permissible event.* Except as otherwise provided in this paragraph (c), a plan may designate only one time and form of payment upon the occurrence of each event described in paragraph (a)(1), (2), (3), (5), or (6) of this section. For example, a plan does not satisfy the requirements of this paragraph (c) if it provides for one payment date or schedule of payments if a specified event occurs on a Monday, but another payment date or schedule of payments if the event occurs on any other day of the week. However, a plan that provides for a payment upon an event described in paragraph (a)(2), (3), (5), or (6) of this section may allow for an alternative payment schedule if the event occurs on or before one (but not more than one) specified date, provided that the addition or deletion of such a different time and form of payment applicable to an existing deferral is subject to § 1.409A–2(b) (subsequent deferral elections) and paragraph (j) of this section (accelerated payments). For example, a plan may provide that a service provider will receive a lump sum payment of the service provider's entire benefit under the plan on the first day of the month following a change in control event that occurs before the service provider attains age 55, but will receive 5 substantially equal annual payments commencing on the first day of the month following a change in control event that occurs on or after the service provider attains age 55. In the case of a plan that provides that a payment upon an event described in paragraph (a)(1) of this section (a payment upon a separation from service), a different time and form of payment may be designated with respect to a separation from service under each of the following conditions, provided that the addition or deletion of such a different time and form of payment applicable to an existing deferral is subject to § 1.409A–2(b) and paragraph (j) of this section:

(1) A separation from service during a limited period of time not to exceed two years following a change in control event (as defined in paragraph (i)(5) of this section).

(2) A separation from service before or after a specified date (for example, the attainment of a specified age), or a separation from service before or after a combination of a specified date, such as attaining a specified age, and a specified period of service determined under a predetermined, nondiscretionary, objective formula or pursuant to the method for crediting service under a qualified plan sponsored by the service recipient.

(3) A separation from service not described in paragraphs (c)(1) or (c)(2) of this section.

(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 plan (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 taxable year of the service provider or, if later, by the 15th day of the third calendar month following the date specified under the plan and the service provider is not permitted, directly or indirectly, to designate the taxable year of the payment. In addition, a payment is treated as made upon the date specified under the plan (including a date specified under paragraph (a)(4) of this section) and is not treated as an accelerated payment if the payment is made no earlier than 30 days before the designated payment date and the service provider is not permitted, directly or indirectly to designate the taxable year of the payment. For purposes of this paragraph, if the date specified is only a designated taxable year of the service provider, or a period of time during such a taxable year, the date specified under the plan is treated as the first day of such taxable year or the first day of the period of time during such taxable year, as applicable. The payment with respect to a stock right generally occurs upon the exercise of the stock right, so that where a stock right designates a fixed exercise date, the stock right will be deemed to have been paid at such date if the exercise and payment occur on such date or a later date within the same taxable year of the service provider or, if later, by the 15th day of the third calendar month following the exercise date specified under the plan. 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 beneficiary), the payment will be treated as made upon the date specified under the plan if the payment is made during the first taxable year of the service provider in which the calculation of the amount of the payment is administratively practicable. For purposes of this paragraph, the inability of a service recipient to calculate the amount or timing of a payment due to a failure of a service provider (or service provider's beneficiary) to provide reasonably available information necessary to make such calculation does not constitute an event beyond the control of the service provider. Similarly, if the making of the payment at the date specified under the plan would jeopardize the ability of the service recipient to continue as a going concern, the payment will be treated as made upon the date specified under the plan if the payment is made during the first taxable year of the service provider in which the making of the payment would not have such effect.

(e) *Designation of time and form of payment with respect to earnings.* A nonqualified deferred compensation plan that provides for actual or notional earnings to be credited on amounts of deferred compensation may specify, in accordance with the requirements of § 1.409A–2(a) (initial deferral elections), that such earnings are treated separately from the right to the other amounts deferred under the plan for purposes of designating the time and form of payments under such plan, provided that to satisfy the requirements of this paragraph (e), actual or notional earnings must be credited at least annually. For these purposes, a right to dividend equivalents may be treated analogously to a right to actual or notional earnings on an amount of deferred compensation. For purposes of this paragraph (e), the term *dividend equivalents* means the right to an amount equal to all or a specified portion of dividends declared and paid, if any, on a specified number of shares of stock.

(f) *Substitutions.* Except as otherwise provided under these regulations, the payment of an amount as a substitute for a payment of deferred compensation will be treated as a payment of the deferred compensation. A forfeiture or voluntary relinquishment of an amount of deferred compensation will not be treated as a payment of the compensation, but there is no forfeiture or voluntary relinquishment for this purpose if an amount is paid, or a legally binding right to a payment is created, that acts as a substitute for the forfeited or voluntarily relinquished amount. Whether a payment or a right to a payment acts as a substitute for a payment of deferred compensation is determined based on all the facts and circumstances. However, where the payment of an amount results in an actual or potential reduction of, or current or future offset to, an amount of deferred compensation, or if the service provider receives a loan the repayment of which is secured by or may be accomplished through an offset of or a reduction in an amount deferred under a nonqualified deferred compensation plan, the payment or loan is a substitute for the deferred compensation. In addition, where a service provider's right to deferred compensation is made subject to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, attachment, or garnishment by creditors of the service provider or the service provider's beneficiary, the deferred compensation is treated as having been paid. For the treatment of certain offsets, see paragraph (j)(4)(xiii) of this section. Even where there is no explicit reduction or offset, the payment of an amount or creation of a new right to a payment proximate to the purported forfeiture or voluntary relinquishment of a right to deferred compensation is presumed to be a substitute for the deferred compensation. The presumption is rebuttable by a showing that the compensation paid would have been received regardless of the forfeiture or voluntary relinquishment of the right to deferred compensation. Factors indicating that a payment would have been received regardless of such forfeiture or voluntarily relinquishment include that the amount paid is materially less than the forfeited or relinquished amount, or consists of a type of payment customarily made in the ordinary course of business of the service recipient to service providers who do not forfeit or relinquish deferred compensation (for example, a payment of accrued but unused leave or a payment for a release of actual or potential claims). See § 1.409A–1(b)(9)(i) with respect to certain separation pay plans.

(g) *Disputed payments and refusals to pay.* If a service recipient fails to make a payment in whole or in part as of the date specified under a plan, either intentionally or unintentionally, other than with the express or implied consent of the service provider, the payment will be treated as made upon the date specified under the plan 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 relinquishment of the claim to all or part of the remaining amount), makes prompt and reasonable, good faith efforts to collect the remaining portion of the payment, and any further payment (including payment of a lesser amount that satisfies the obligation to make the payment) is made no later than the end of the first taxable year of the service provider 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 (g), efforts to collect the payment will be presumed not to be prompt, reasonable, good faith efforts, unless the service provider provides notice to the service recipient within 90 days of the latest date upon which the payment could have been timely made in accordance with the terms of the plan and these regulations, and unless, if not paid, the service provider takes further enforcement measures within 180 days after such latest date. For purposes of this paragraph (g), a service recipient is not treated as having failed 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 (g), the service provider is deemed to have requested that a payment not be made, rather than the service recipient having failed 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.

(h) *Special rule for certain resident aliens.* An agreement, method, program, or other 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 taxable year of the service provider in which a service provider is a resident alien, and with respect to any

amount payable in a subsequent taxable year if no later than the last day of the first taxable year of the service provider in which the service provider is 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 after the first taxable year of an individual in which the individual is a resident alien, this paragraph (h) does not apply, provided that a taxable year may again be treated as the first taxable year in which an individual is a resident alien if such individual has not been a resident alien for at least three consecutive taxable years immediately preceding the taxable year in which the service provider is again a resident alien.

(i) *Definitions and special rules*—(1) *Specified time or fixed schedule*—(i) *In general.* 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 nondiscretionary and 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 at the time payment is due pursuant to an objective, nondiscretionary formula specified at the time the amount is deferred (for example, 50 percent of a specified account balance). Except as otherwise provided in paragraph (i)(1) of this section, an amount is not objectively determinable if the amount of the payment is based all or in part upon the occurrence of an event, including the consummation of a transaction by, or a payment of an amount to, a service recipient. If an amount is payable in a service provider's taxable year (or pursuant to a fixed schedule of taxable years of the service provider) that is designated at the time the amount is deferred and that is objectively determinable, the amount is treated as payable at a specified time (or pursuant to a fixed schedule), 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 the first day of the relevant taxable year or years. A specified time or fixed schedule also includes the designation at the time the amount is deferred of a defined period or periods within the service provider's taxable year or taxable years that are objectively determinable, provided that no such defined period may begin within one taxable year and end within another taxable year, and provided further 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 the first day of the relevant period in which the payment will be made. A plan 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 discretionary acceleration of the lapse of the substantial risk of forfeiture), provided that the schedule must be fixed on the date 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, a plan that provides for a bonus payment subject to the condition that the service provider complete three years of service, and subject to the further condition that such requirement of continued services will lapse upon the occurrence of an initial public offering, which condition if applied alone would constitute 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).

(ii) *Payment schedules with formula and fixed limitations*—(A) *Individual limitations.* A schedule of payments does not fail to be a fixed schedule of payments where the amount of a payment or payments that may be paid at a specified time or during a specified period is limited by an objective nondiscretionary formula or a specified amount that is not under the effective control of the service provider and is not subject to the exercise of discretion by the service recipient, where such limitation is established on or before the date the time and form of payment is otherwise required to be set under these regulations, and the plan specifies the time and form of any payment that will be made or completed after its original payment date due to the application of the limitation. A change in the limitation or a change in the time and form of any payment that exceeds the limitation is subject to the requirements of § 1.409A–2(b) (subsequent deferral elections) and paragraph (j) of this section (accelerated payments). For purposes of this paragraph, a plan provision that reduces a schedule of periodic payments on a dollar-for-dollar basis by the amount of Social Security payments received or receivable may be treated as a nondiscretionary, objective formula limitation, if such reduction does not otherwise affect the time of payment of the deferred compensation (other than a forfeiture due to the reduction), including changes based on the service provider's eligibility or elections related to Social Security benefits. Similarly, a plan provision that reduces a schedule of periodic payments on a dollar-for-dollar basis by the amount of bona fide disability pay (within the meaning of § 1.409A–1(a)(5)) received or receivable may be treated as a nondiscretionary, objective formula limitation, if the disability payments are made pursuant to a plan sponsored by the service recipient that covers a substantial number of service providers and was established before the service provider became disabled, and if such reduction does not otherwise affect the time of payment of the deferred compensation (other than a forfeiture due to the reduction). Whether an amendment to, or other change in the benefit payable under, such bona fide disability plan results in an acceleration of a payment for purposes of paragraph (j) of this section or a subsequent election to delay the time or change the form of payment for purposes of § 1.409A–2(b) is determined based on all of the relevant facts and circumstances.

(B) *Limitations on aggregate payments to all participants in substantially identical plans.* A schedule of payments does not fail to be a fixed schedule of payments where the amount of the aggregate payments that will be made during a specified period of time to all participants in substantially identical plans is limited by an objective nondiscretionary formula or specified amount that is not under the effective control of the service provider and is not subject to the exercise of discretion by the service recipient, where the limit is established on or before the date the time and form of payment of the amount deferred is otherwise required to be set under these regulations, the method of allocating payments among the participants where there is an overall limitation on the aggregate amount that may be paid to a group of service providers during a specified period is an objective nondiscretionary allocation method that is not under the effective control of the service provider and is not subject to the exercise of discretion by the service recipient, the method is established on or before the date the time and form of payment of the amount deferred is otherwise required to be set,

and the plan specifies the time and form of any payment of any amount that will be paid after its original payment date due to the application of the limitation. A change in the limitation or a change in the time and form of payment of any payment that is not otherwise made at the scheduled payment date due to application of the formula limitation is subject the requirements of § 1.409A–2(b) (subsequent deferral elections) and paragraph (j) of this section (accelerated payments).

(iii) *Payment schedules determined by timing of payments received by the service recipient.* A payment schedule determined by reference to the timing of payments received by the service recipient (not including payments from one entity to another entity where both entities are treated as part of a single service recipient), meets the requirements of a specified date or fixed schedule of payments if the following conditions are met:

(A) The payments due to the service recipient arise from bona fide and routine transactions in the ordinary course of business of the service recipient.

(B) The service provider does not have effective control of the service recipient, the person from whom such amounts are due, or the collection of any of the amounts due to the service recipient.

(C) The payment schedule provides an objective, nondiscretionary method of identification of the payments to the service recipient from which the amount of the payment from the service recipient to the service provider is determined.

(D) The payment schedule provides an objective, nondiscretionary schedule under which the payments will be made to the service provider.

(E) The payments to the service recipient from which the amount of the payments from service recipient to the service provider are determined result from sales of a type that the service recipient is in the trade or business of making and makes frequently, and either all such sales by the service recipient are taken into account for purposes of determining the payment to the service provider, or there is a legitimate, non-tax business reason for identifying the specific sales taken into account.

(iv) *Reimbursement or in-kind benefit plans*—(A) *General rule.* A plan that provides for reimbursements of expenses incurred by a service provider, or in-kind benefits, meets the requirements of a specified date or fixed schedule of payments with respect to such reimbursements or benefits if the following conditions are met:

(*1*) The plan provides an objectively determinable nondiscretionary definition of the expenses eligible for reimbursement or of the in-kind benefits to be provided.

(*2*) The plan provides for the reimbursement of expenses incurred or for the provision of the in-kind benefits during an objectively and specifically prescribed period (including the lifetime of the service provider).

(*3*) The plan provides that the amount of expenses eligible for reimbursement, or in-kind benefits provided, during a service provider's taxable year may not affect the expenses eligible for reimbursement, or in-kind benefits to be provided, in any other taxable year.

(*4*) The reimbursement of an eligible expense is made on or before the last day of the service provider's taxable year following the taxable year in which the expense was incurred.

(*5*) The right to reimbursement or in-kind benefits is not subject to liquidation or exchange for another benefit.

(B) *Medical reimbursement arrangements.* Notwithstanding the foregoing, an arrangement providing for the reimbursement of expenses referred to in section 105(b) will not be deemed to fail to meet the requirements of paragraph (i)(1)(iv)(A)(*3*) of this section solely because the arrangement provides for a limit on the amount of expenses that may be reimbursed under such arrangement over some or all of the period in which the reimbursement arrangement remains in effect.

(v) *Tax gross-up payments.* A plan providing a right to a tax gross-up payment will be treated as providing for payment at a specified time or on a fixed schedule of payments if the plan provides that payment will be made, and the payment is made, by the end of the service provider's taxable year next following the service provider's taxable year in which the service provider remits the related taxes. For purposes of this paragraph (i)(1)(v), the term *tax gross-up payment* refers to a payment to reimburse the service provider in an amount equal to all or a designated portion of the Federal, state, local, or foreign taxes imposed upon the service provider as a result of compensation paid or made available to the service provider by the service recipient, including the amount of additional taxes imposed upon the service provider due to the service recipient's payment of the initial taxes on such compensation. In addition, a right to the reimbursement of expenses incurred due to a tax audit or litigation addressing the existence or amount of a tax liability, whether Federal, state, local, or foreign, satisfies the requirement of a fixed time and form of payment if the right to the reimbursement provides that payment will be made, and the payment is made, by the end of the service provider's taxable year following the service provider's taxable year in which the taxes that are the subject of the audit or litigation are remitted to the taxing authority, or where as a result of such audit or litigation no taxes are remitted, the end of the service provider's taxable year following the service provider's taxable year in which the audit is completed or there is a final and nonappealable settlement or other resolution of the litigation. Nothing in this paragraph (i)(1)(v) otherwise alters the application of section 409A to the underlying compensation arrangement or other arrangement that results in the taxes subject to the right to the tax gross-up payment.

(vi) *Examples.* The following examples (in which each employee is an individual whose taxable year is the calendar year) illustrate the principles of paragraphs (a), (b), (c), (d), and (i)(1) of this section:

*Example 1.* Employee A provides services as an employee of Employer Z, but is not a specified employee. Employee A participates in a nonqualified deferred compensation plan providing for a lump sum payment payable on or before December 31 of the calendar year in which Employee A separates from service. The plan provides for a payment upon a separation from service in compliance with this section.

*Example 2.* Employee B provides services as an employee of Employer Y, but is not a specified employee. Employee B participates in a nonqualified deferred compensation plan providing for a lump sum payment payable on or before the 90th day immediately following the date upon which Employee B separates from service. Employer Y retains the sole discretion to determine when during the 90-day period the payment will be made. Although the plan does not specify a period during one calendar year in which the payment will be made, the plan provides for a payment upon a separation from service in compliance with this section because the period over which the payment may be made is not longer than 90 days.

*Example 3.* Employee C provides services as an employee of Employer X, but is not a specified employee. Employee C participates in a nonqualified deferred compensation plan providing for a lump sum payment payable on or before the 180th day following the date upon which Employee C separates from service. Employer X retains the sole discretion to determine when during the 180-day period the payment will be made. Because the plan does not specify a period during one calendar year in which the payment will be made, and because the

period over which the payment may be made is longer than 90 days, the plan does not provide for a payment upon a separation from service that complies with this section.

*Example 4.* Employee D provides services as an employee of Employer W, but is not a specified employee. Employee D participates in a nonqualified deferred compensation plan providing for 10 installment payments payable on the first 10 anniversaries of the date Employee D separates from service, provided that no installment payment in any year may be more than 1% of Employer W's net income for the previous calendar year, and provided further that the excess over such limit that would otherwise be payable but is not paid due to application of the limit will become payable as of the first installment payment date at which time such amount, in combination with any installment payment otherwise due Employee D, does not exceed 1% of Employer W's net income for the previous calendar year. Provided that Employee D does not retain effective control of the calculation of Employer W's net income or the amount that Employee D will not be paid due to application of the limit, the plan provides for a schedule of payments upon a separation from service that complies with this section.

*Example 5.* Employee E and Employee F provide services as employees of Employer V, but neither is a specified employee. Employee E and Employee F both participate in substantially identical nonqualified deferred compensation plans providing for 10 installment payments payable on the first 10 anniversaries of the date the respective employee separates from service, provided that the total amount of installment payments in any year may not be more than 1% of Employer V's net income for the previous year, that where any payments are not made due to application of the limit the determination of the amount not paid to a particular employee will be made by applying the overall limit proportionately based upon the installment payment due the employee that year, and that the excess over such limit that would otherwise be payable but is not paid due to application of the limit will become payable as of the first installment payment date at which time such amount, in combination with any installment payments otherwise due the participants, does not exceed 1% of Employer V's net income for the previous calendar year. Provided that neither Employee E nor Employee F retains effective control of the calculation of Employer V's net income or the amount that the respective employee will not be paid due to application of the limit, the plan provides for a schedule of payments upon a separation from service that complies with this section.

*Example 6.* Employee G provides services as an employee of Employer U, but is not a specified employee. As a bona fide part of this employment relationship, Employee G provides professional services to clients of Employer U as part of the bona fide, ordinary course of Employer U's trade or business. Under an arrangement between Employee G and Employer U, Employer U agrees to pay Employee G upon Employee G's separation from service an amount equal to 5% of any amount collected from Company T, a client of Employer U for which Employee G performed services during his employment with Employer U, during the 36 months following Employee G's separation from service. Under the arrangement, the amounts due to Employee G based upon payments received by Employer U during any calendar year are payable to Employee G on April 1 of the subsequent calendar year. Provided that Employee G does not have effective control of Employer U, Company T, or the collection of any amounts due Employer Y from Company T, the arrangement provides for a schedule of payments upon a separation from service that complies with this section.

*Example 7.* Employee H provides services as an employee of Employer S, but is not a specified employee. Under a plan sponsored by Employer S, Employee H has a legally binding right upon a separation from service to the reimbursement of country club dues paid in the calendar year of the separation from service and each of the next 3 calendar years following the separation from service in an amount not to exceed $30,000 in any calendar year, provided that the amount of dues paid in any calendar year that are eligible for reimbursement equals only the amount actually expended during such calendar year, and the maximum amount available for reimbursement in any calendar year will not be increased or decreased to reflect the amount expended or reimbursed in a prior or subsequent calendar year. The plan further provides that any reimbursement must be paid to Employee H by December 31 of the calendar year following the year in which Employee H pays the country club dues. The reimbursement plan provides for a schedule of payments upon a separation from service that complies with this section.

*Example 8.* Employee J provides services as an employee of Employer Q, but is not a specified employee. Under a plan sponsored by Employer Q, Employee J has a legally binding right upon a separation from service to the reimbursement of country club dues paid during the calendar year in which the separation from service occurs and the next 3 calendar years in a total amount not to exceed $90,000. The plan further provides that any reimbursement must be paid to Employee J by December 31 of the calendar year following the year in which Employee J pays the country club dues. Because the reimbursement of a payment of country club dues in one calendar year may affect the amount of country club dues available for reimbursement in another calendar year, the plan does not provide for a schedule of payments upon a separation from service that complies with this section.

(2) *Separation from service—required delay in payment to a specified employee pursuant to a separation from service*—(i) *In general.* In the case of any service provider who is a specified employee (as defined in § 1.409A–1(i)) as of the date of a separation from service, 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 than the end of the six-month period, the date of death of the specified employee). For this purpose, a service provider who is not a specified employee as of the date of a separation from service will not be treated as subject to this requirement even if the service provider would have become a specified employee if the service provider had continued to provide services through the next specified employee effective date. Similarly, a service provider who is treated as a specified employee as of the date of a separation from service will be subject to this requirement even if the service provider would not have been treated as a specified employee after the next specified employee effective date had the specified employee continued providing services through the next specified employee effective date. Notwithstanding the foregoing, this paragraph (i)(2)(i) does not apply to a payment made under the circumstances described in paragraph (j)(4)(ii) (domestic relations order), (j)(4)(iii) (conflicts of interest), or (j)(4)(vi) (payment of employment taxes) of this section.

(ii) *Application of payment rules to delayed payments.* The required delay in payment is met if 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 on the first day of the seventh month following the date of separation from service, or if each payment to which a specified employee is otherwise entitled upon a separation from service is delayed by six months. A service recipient may retain discretion to choose which method will be implemented, provided that no direct or indirect election as to the method may be provided to the service provider. For an affected specified employee, a date upon which the plan or the service recipient designates that the payment will be made after the six-month delay is treated as a fixed payment date for purposes of paragraph (d) of this section once the separation from service has occurred.

(3) *Unforeseeable emergency*—(i) *Definition.* For purposes of §§ 1.409A–1 and 1.409A–2, this section, and §§ 1.409A–4 through 1.409A–6, an *unforeseeable emergency* is a severe financial hardship to the service provider resulting from an illness or accident of the service provider, the service provider's spouse, the service provider's beneficiary, or the service provider's dependent (as defined in section 152, without regard to section 152(b)(1), (b)(2), and (d)(1)(B)); loss of

the service provider'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. For example, the imminent foreclosure of or eviction from the service provider'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, a beneficiary, or a dependent (as defined in section 152, without regard to section 152(b)(1), (b)(2), and (d)(1)(B)) may also constitute an unforeseeable emergency. Except as otherwise provided in this paragraph (i)(3)(i), the purchase of a home and the payment of college tuition are not unforeseeable emergencies. Whether a service provider is faced with an unforeseeable emergency permitting a distribution under this paragraph (i)(3)(i) 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 plan. A plan may provide for a payment upon a specific type or types of unforeseeable emergency, without providing for 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, local, or foreign 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 (j)(4)(viii) of this section. However, the determination of amounts reasonably necessary to satisfy the emergency need is not required to take into account any additional compensation that due to the unforeseeable emergency is available under another nonqualified deferred compensation plan but has not actually been paid, or that is available due to the unforeseeable emergency under another plan that would provide for deferred compensation except due to the application of the effective date provisions under § 1.409A–6. The payment may be made from any plan in which the service provider participates that provides for payment upon an unforeseeable emergency, provided that the plan under which the payment was made must be designated at the time of payment.

(iii) *Payments due to an unforeseeable emergency.* A service provider may retain discretion with respect to whether to apply for a payment upon an unforeseeable emergency, and a service recipient may retain discretion with respect to whether to make a payment available under the plan due to an unforeseeable emergency. A service provider who has experienced an unforeseeable emergency will not be treated as making a subsequent deferral election under § 1.409A–2(b) (subsequent deferral election rules) if the service provider does not apply for or elect to receive a payment available under the plan. A service recipient will not be treated as making a subsequent deferral election under § 1.409A–2(b) (subsequent deferral election rules) if the service recipient exercises its discretion not to make a payment otherwise available due to an unforeseeable emergency.

(4) *Disability*—(i) *In general.* For purposes of §§ 1.409A–1 and 1.409A–2, this section, and §§ 1.409A–4 through 1.409A–6, except as otherwise specifically provided, 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 expected 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 three months under an accident and health plan covering employees of the service provider's employer.

(ii) *Limited plan definition of disability.* A plan 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 plan complies with the provisions of this paragraph (i)(4).

(iii) *Determination of disability.* A plan may provide that a service provider will be deemed disabled if determined to be totally disabled by the Social Security Administration or Railroad Retirement Board. A plan 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 (i)(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), a plan may permit a payment upon the occurrence of a change in the ownership of the corporation (as defined in paragraph (i)(5)(v) of this section), a change in effective control of the corporation (as defined in paragraph (i)(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 (i)(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 or group, such as a plan administrator or compensation committee, certify the occurrence of a change in control event must be strictly ministerial and not involve any discretionary authority. The plan may provide for a payment on a particular type or types of change in control events, 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 plan and pay amounts of deferred compensation upon a change in control event, see paragraph (j)(4)(ix)(B) of this section.

(ii) *Identification of relevant corporation*—(A) *In general.* To constitute a change in control event with respect 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) but only if either the deferred compensation is attributable to the performance of service by the service provider for such corporation (or corporations) or there is a bona fide business purpose for such corporation or corporations to be liable for such payment and, in either case, no significant purpose of making such corporation or corporations liable for such payment is the avoidance of Federal income tax; or

(*3*) A corporation that is a majority shareholder of a corporation identified in paragraph (i)(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 (i)(5)(ii)(A)(*1*) or (*2*) of this section.

(B) *Majority shareholder.* For purposes of this paragraph (i)(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 (i)(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 unless the sale constitutes a change in the ownership of a substantial portion of Corporation A's assets (see paragraph (i)(5)(vii) of this section).

(iii) *Attribution of stock ownership.* For purposes of paragraph (i)(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 rules for certain delayed payments pursuant to a change in control event*—(A) *Certain transaction-based compensation.* Payments of compensation related to a change in control event described in paragraph (i)(5)(v) of this section (change in the ownership of a corporation) or paragraph (i)(5)(vii) of this section (change in the ownership of a substantial portion of a corporation's assets), that occur because a service recipient purchases its stock held by the service provider or because the service recipient or a third party purchases a stock right held by a service provider, or that are calculated by reference to the value of stock of the service recipient (collectively, transaction-based compensation), may be treated as paid at a designated date or pursuant to a payment schedule that complies with the requirements of section 409A if the transaction-based compensation is paid on the same schedule and under the same terms and conditions as apply to payments to shareholders generally with respect to stock of the service recipient pursuant to a change in control event described in paragraph (i)(5)(v) of this section (change in the ownership of a corporation) or as apply to payments to the service recipient pursuant to a change in control event described in paragraph (i)(5)(vii) of this section (change in the ownership of a substantial portion of a corporation's assets), and to the extent that the transaction-based compensation is paid not later than five years after the change in control event, the payment of such compensation will not violate the initial or subsequent deferral election rules set out in § 1.409A–2(a) and (b) solely as a result of such transaction-based compensation being paid pursuant to such schedule and terms and conditions. If before and in connection with a change in control event described in paragraph (i)(5)(v) or (i)(5)(vii) of this section, transaction-based compensation that would otherwise be payable as a result of such event is made subject to a condition on payment that constitutes a substantial risk of forfeiture (as defined in § 1.409A–1(d), without regard to the provisions of that section under which additions or extensions of forfeiture conditions are disregarded) and the transaction-based compensation is payable under the same terms and conditions as apply to payments made to shareholders generally with respect to stock of the service recipient pursuant to a change in control event described in paragraph (i)(5)(v) of this section or to payments to the service recipient pursuant to a change in control event described in paragraph (i)(5)(vii) of this section, for purposes of determining whether such transaction-based compensation is a short-term deferral the requirements of § 1.409A–1(b)(4) are applied as if the legally binding right to such transaction-based compensation arose on the date that it became subject to such substantial risk of forfeiture.

(B) *Certain nonvested compensation.* Notwithstanding the provisions of § 1.409A–1(d) (definition of a substantial risk of forfeiture) that disregard the extension or modification of a condition for purposes of determining whether a condition on payment constitutes a substantial risk of forfeiture, a condition that is a substantial risk of forfeiture that otherwise would lapse as a result of a change in control event described in paragraph (i)(5)(v) or (i)(5)(vii) of this section may be extended or modified before and in connection with such event to provide for a condition on payment that will not lapse as a result of such change in control event, and such extended or modified condition will be treated as continuing to subject the amount to a substantial risk of forfeiture, provided that the transaction constituting the change in control event is a bona fide arm's length transaction between the service recipient or its shareholders and one or more parties who are unrelated to the service recipient and service provider (applying the rules of § 1.409A–1(f)(2)(ii)) and the modified or extended condition to which the payment is subject would otherwise be treated as a substantial risk of forfeiture under § 1.409A–1(d) (without regard to the provisions disregarding additions or extensions of forfeiture conditions). In such a case, the continued application of a fixed schedule of payments based upon the lapse of the substantial risk of forfeiture, so that payments commence upon the lapse of the modified or extended condition on payment, will not be treated as a change in the fixed schedule of payments for purposes of § 1.409A–2(b) (subsequent deferral elections) or paragraph (j) of this section (prohibition on the acceleration of payments).

(v) *Change in the ownership of a corporation*—(A) *In general.* Except as provided in paragraph (i)(5)(vi)(C) of this section, 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 (i)(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. A nonqualified deferred compensation plan may provide that amounts payable upon a change in the ownership of a corporation will be paid only if the conditions in the preceding sentence are satisfied but substituting a percentage specified in the plan that is higher than 50 percent for the words ''50 percent'' in the preceding sentence, but only if the provision is set forth in the plan no later than the date by which the time and form of payment must be established under § 1.409A–2. 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 (or such higher percentage specified in accordance with the preceding sentence), 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 (i)(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 (i)(5)(vii) of this section for rules regarding the transfer of assets of a corporation). See § 1.280G–1, Q&A–27(d), *Example 1*, *Example 2*, *Example 5*, and *Example 6*.

(B) *Persons acting as a group.* For purposes of paragraph (i)(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 only with respect to the ownership in that corporation before 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 3* and *Example 4.*

(vi) *Change in the effective control of a corporation*—(A) *In general.* Notwithstanding that a corporation has not undergone a change in ownership under paragraph (i)(5)(v) of this section, a change in the effective control of the corporation occurs only on either of the following dates:

(*1*) The date any one person, or more than one person acting as a group (as determined under paragraph (i)(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 30 percent or more of the total voting power of the stock of such corporation. A nonqualified deferred compensation plan may provide that amounts payable upon an effective change in control of a corporation will be paid only if the conditions in the preceding sentence are satisfied but substituting a percentage specified in the plan that is higher than 30 percent for the word ''30 percent'' in the preceding sentence, but only if the percentage is set forth in the plan no later than the date by which the time and form of payment must be established under § 1.409A–2).

(*2*) The date 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 before the date of the appointment or election, provided that for purposes of this paragraph (i)(5)(vi)(A) the term *corporation* refers solely to the relevant corporation identified in paragraph (i)(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 (i)(5)(vi)(A)(*2*) would refer solely to Corporation A. A nonqualified deferred compensation plan may provide that amounts payable upon a change in the effective control of a corporation will be paid only if the conditions in the first sentence of this paragraph are satisfied substituting a portion of the members of the corporation's board of directors that is higher than the words ''a majority of the members of the corporation's board of directors'' in the first sentence of this paragraph, but only if the higher portion is set forth in the plan no later than the date by which the time and form of payment must be established under § 1.409A–2(a)).

(B) *Multiple change in control events.* A change in effective control may occur in a transaction in which one of the two corporations involved in the transaction has a change in control event under paragraph (i)(5)(v) or (i)(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 (i)(5)(vii) of this section and O has a change in effective control under this paragraph (i)(5)(vi).

(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 (i)(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 (i)(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 before 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.* 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 (i)(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 before such acquisition or acquisitions (or such higher amount specified by the plan no later than the date by which the time and form of payment must be established under § 1.409A–2). 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 (i)(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 (i)(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 (i)(5)(vii)(B)(*1*)(*iii*) of this section.

(*2*) For purposes of this paragraph (i)(5)(vii)(B) and except as otherwise provided in this paragraph (i), 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 that 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 before 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.* This paragraph (i)(6) applies where a service provider is providing services to a service recipient (the intermediate service recipient), who in turn is providing services to another service recipient (the ultimate service recipient), the services provided by the service provider to the intermediate service recipient are closely related to the services provided by the intermediate service recipient to the ultimate service recipient, there is a nonqualified deferred compensation plan providing for payments by the ultimate service recipient to the intermediate service recipient (the ultimate service recipient plan), there is a nonqualified deferred compensation plan or other agreement, method, program, or other arrangement providing for payments of compensation by the intermediate service recipient to the service provider (the intermediate service recipient plan), and the intermediate service recipient plan provides for a payment upon the occurrence of an event described in paragraph (a)(1), (2), (3), (5), or (6) of this section. In such a case, notwithstanding the generally applicable limits on payments in paragraph (a) of this section, the ultimate service recipient plan may provide for a payment to the intermediate service recipient upon the occurrence of a payment event under the intermediate service recipient plan described in paragraph (a)(1), (2), (3), (5), or (6) of this section if the time and form of payment is defined as the same time and form of payment provided under the intermediate service recipient plan, the amount of the payment under the ultimate service recipient plan does not exceed the amount of the payment under the intermediate service recipient plan, and the ultimate service recipient plan and the intermediate service recipient plan otherwise satisfy the requirements of section 409A (regardless of whether such plan is subject to section 409A).

(ii) *Example.* The provisions of paragraph (i)(6)(i) of this section are illustrated by the following example:

*Example.* Company B (intermediate service recipient) provides services to Company C (ultimate service recipient). Employee A (service provider) provides services to Company B that are closely related to the services Company B provides to Company C. 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 with Company B (the intermediate service recipient plan). Under an arrangement between Company B and Company C (the ultimate service recipient plan), Company C agrees to pay an amount of deferred compensation to Company B upon Employee A's separation from service with Company B, in accordance with the time, form and amount of payment provided in the intermediate service recipient plan. Provided that the intermediate service recipient plan and the ultimate service recipient plan otherwise comply with the requirements of section 409A (regardless of whether such arrangements are subject to section 409A), Company C's payment to Company B of the amount due under the ultimate service recipient plan 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.

(j) *Prohibition on acceleration of payments*—(1) *In general.* Except as provided in paragraph (j)(4) of this section, 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 the terms of the plan, and no such accelerated payment may be made whether or not provided for under the terms of such plan. For purposes of determining whether a payment of deferred compensation has been made, the rules of paragraph (f) of this section (substituted payments) apply. For purposes of this paragraph (j), 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 plan 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 five 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. However, if the plan in this example had provided for a payment at a fixed date, rather than at separation from service, the date of payment could not be accelerated due to the accelerated vesting. For the definition of a payment for purposes of this paragraph (j), see § 1.409A–2(b)(5) (coordination of the subsequent deferral election rules with the prohibition on acceleration of payments). For other permissible payments, see § 1.409A–2(b)(2)(iii) (certain immediate payments of remaining installments) and paragraph (d) of this section (certain payments made no more than 30 days before the designated payment date).

(2) *Application to multiple payment events.* Generally, the addition of a permissible payment event, the deletion of a permissible payment event, or the substitution of one permissible payment event for another permissible payment event, results in an acceleration of a payment if the addition, deletion, or substitution could result in the payment being made at an earlier date than such payment would have been made absent such addition, deletion, or substitution. Notwithstanding the previous sentence, the addition of death, disability (as defined in paragraph (i)(4) of this section), or an unforeseeable emergency (as defined in paragraph (i)(3) of this section), as a potentially earlier alternative payment event to an amount previously deferred will not be treated as resulting in an acceleration of a payment, even if such addition results in the payment being paid at an earlier time than such payment would have been made absent the addition of the payment event. However, the addition of such a payment event as a potentially later alternative payment event generally is subject to the rules governing changes in the time and form of payment (see § 1.409A–2(b)).

(3) *Beneficiaries.* The rules of this paragraph (j) apply to elections by beneficiaries with respect to the time and form of payment, as well as elections by service providers or service recipients with respect to the time and form of payment to beneficiaries. An election to change the identity of a beneficiary does not constitute an acceleration of a payment merely because the election changes the identity of the recipient of the payment, if the time and form of the payment is not otherwise changed. In addition, an election before the commencement of a life annuity to change the identity of a beneficiary does not constitute an acceleration of a payment if the change in the time of payments stems solely from the different life expectancy of the new beneficiary, such as in the case of a joint and survivor annuity, and does not change the commencement date of the life annuity.

(4) *Exceptions*—(i) *In general.* Except as otherwise expressly provided, a plan may provide for the acceleration of a payment in accordance with paragraphs (j)(4)(ii) through (xiv) of this section, or may provide a service recipient discretion to accelerate payments in accordance with the provisions of paragraphs (j)(4)(ii) through (xiv) of this section. A plan may not provide a service provider discretion with respect to whether a payment will be accelerated, and a service recipient may not provide a service provider a direct or indirect election as to whether the service recipient's discretion to accelerate a payment will be exercised, even if such acceleration would be permitted under paragraphs (j)(4)(ii) through (xiv) of this section. Whether a service recipient has provided a service provider an election as to whether the service recipient's discretion to accelerate a payment will be exercised is determined based on all the facts and circumstances, including whether similarly situated service providers have been treated differently. Except as otherwise provided in paragraphs (j)(4)(ii) through (xiv) of this section, the plan need not set forth the exception in writing, and provided all other requirements of this section are met, the making of such a payment or the addition of a plan term permitting the making of such a payment will not constitute the acceleration of a payment, and the failure to make such a payment or the deletion or modification of a plan term permitting the making of such a payment will not be subject to the rules regarding a change in the time and form of payment under § 1.409A–2(b).

(ii) *Domestic relations order.* A plan may provide for acceleration of the time or schedule of a payment under the plan to an individual other than the service provider, or a payment under such plan may be made to an individual other than the service provider, to the extent necessary to fulfill a domestic relations order (as defined in section 414(p)(1)(B)).

(iii) *Conflicts of interest*—(A) *Compliance with ethics agreements with the Federal government.* A plan may provide for acceleration of the time or schedule of a payment under the plan, or a payment may be made under a plan, to the extent necessary for any Federal officer or employee in the executive branch to comply with an ethics agreement with the Federal government.

(B) *Compliance with ethics laws or conflicts of interest laws.* A plan may provide for acceleration of the time or schedule of a payment under the plan, or a payment may be made under a plan, to the extent reasonably necessary to avoid the violation of an applicable Federal, state, local, or foreign ethics law or conflicts of interest law (including where such payment is reasonably necessary to permit the service provider to participate in activities in the normal course of his or her position in which the service provider would otherwise not be able to participate under an applicable rule). A payment is reasonably necessary to avoid the violation of a Federal, state, local, or foreign ethics law or conflicts of interest law if the payment is a necessary part of a course of action that results in compliance with a Federal, state, local, or foreign ethics law or conflicts of interest law that would be violated absent such course of action, regardless of whether other actions would also result in compliance with the Federal, state, local, or foreign ethics law or conflicts of interest law. For this purpose, a provision of foreign law is considered applicable only to foreign earned income (as defined under section 911(b)(1) without regard to section 911(b)(1)(B)(iv) and without regard to the requirement that the income be attributable to services performed during the period described in section 911(d)(1)(A) or (B)) from sources within the foreign country that promulgated such law.

(iv) *Section 457 plans.* A plan subject to section 457(f) may provide for an acceleration of the time or schedule of a payment to a service provider, or a payment may be made under such a plan, 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.

(v) *Limited cashouts.* A plan may require or provide a service recipient discretion to require (or be amended to require or to provide a service recipient discretion to require), a mandatory lump sum payment of amounts deferred under the plan that do not exceed a specified amount, provided that such plan term or amendment is executed and effective, and any required exercise of service recipient discretion is evidenced in writing, no later than the date of such payment, and provided that—

(A) The payment results in the termination and liquidation of the entirety of the service provider's interest under the plan, including all agreements, methods, programs, or other arrangements with respect to which deferrals of compensation are treated as having been deferred under a single nonqualified deferred compensation plan under § 1.409A–1(c)(2); and

(B) The payment is not greater than the applicable dollar amount under section 402(g)(1)(B).

(vi) *Payment of employment taxes.* A plan may provide for the acceleration of the time or schedule of a payment, or a payment may be made under the plan, to pay the Federal Insurance Contributions Act (FICA) tax imposed under section 3101, section 3121(a), and section 3121(v)(2), or the Railroad Retirement Act tax imposed under section 3201, section 3211, section 3231(e)(1), and section 3231(e)(8), where applicable, on compensation deferred under the plan (the FICA or RRTA amount). Additionally, a plan may provide for the acceleration of the time or schedule of a payment, or a payment may be made under the plan, 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 or RRTA 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 or RRTA Amount, and the income tax withholding related to such FICA or RRTA amount.

(vii) *Payment upon income inclusion under section 409A.* A plan may provide for the acceleration of the time or schedule of a payment, or a payment under such plan may be made, at any time the plan 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 these regulations.

(viii) *Cancellation of deferrals following an unforeseeable emergency or hardship distribution.* A plan may provide for a cancellation of a service provider's deferral election, or such a cancellation may be made, due to an unforeseeable emergency or a hardship distribution pursuant to § 1.401(k)–1(d)(3). The deferral election must be cancelled, not merely postponed or otherwise delayed. Accordingly, any later deferral election will be subject to the provisions governing initial deferral elections. See § 1.409A–2(a).

(ix) *Plan terminations and liquidations.* A plan may provide for the acceleration of the time and form of a payment, or a payment under such plan may be made, where the acceleration of the payment is made pursuant to a termination and liquidation of the plan in accordance with one of the following:

(A) The service recipient's termination and liquidation of the plan 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 the following years (or, if earlier, the taxable year in which the amount is actually or constructively received).

(*1*) The calendar year in which the plan termination and liquidation occurs.

(*2*) The first calendar year in which the amount is no longer subject to a substantial risk of forfeiture.

(*3*) The first calendar year in which the payment is administratively practicable.

(B) The service recipient's termination and liquidation of the plan pursuant to irrevocable action taken by the service recipient within the 30 days preceding or the 12 months following a change in control event (as defined in paragraph (i)(5) of this section), provided that this paragraph will only apply to a payment under a plan if all agreements, methods, programs, and other arrangements sponsored by the service recipient immediately after the time of the change in control event with respect to which deferrals of compensation are treated as having been deferred under a single plan under § 1.409A–1(c)(2) are terminated and liquidated with respect to each participant that experienced the change in control event, so that under the terms of the termination and liquidation all such participants are required to receive all amounts of compensation deferred under the terminated agreements, methods, programs, and other arrangements within 12 months of the date the service recipient irrevocably takes all necessary action to terminate and liquidate the agreements, methods, programs, and other arrangements. Solely for purposes of this paragraph (j)(4)(ix)(B), where the change in control event results from an asset purchase transaction, the applicable service recipient with the discretion to liquidate and terminate the agreements, methods, programs, and other arrangements is the service recipient that is primarily liable immediately after the transaction for the payment of the deferred compensation.

(C) The service recipient's termination and liquidation of the plan, provided that—

(*1*) The termination and liquidation does not occur proximate to a downturn in the financial health of the service recipient;

(*2*) The service recipient terminates and liquidates all agreements, methods, programs, and other arrangements sponsored by the service recipient that would be aggregated with any terminated and liquidated agreements, methods, programs, and other arrangements under § 1.409A–1(c) if the same service provider had deferrals of compensation under all of the agreements, methods, programs, and other arrangements that are terminated and liquidated;

(*3*) No payments in liquidation of the plan are made within 12 months of the date the service recipient takes all necessary action to irrevocably terminate and liquidate the plan other than payments that would be payable under the terms of the plan if the action to terminate and liquidate the plan had not occurred;

(*4*) All payments are made within 24 months of the date the service recipient takes all necessary action to irrevocably terminate and liquidate the plan; and

(*5*) The service recipient does not adopt a new plan that would be aggregated with any terminated and liquidated plan under § 1.409A–1(c) if the same service provider participated

in both plans, at any time within three years following the date the service recipient takes all necessary action to irrevocably terminate and liquidate the plan.

(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).

(x) *Certain distributions to avoid a nonallocation year under section 409(p).* A plan may provide for an acceleration of the time and form of a payment, or a payment may be made under such plan, to prevent the occurrence of a nonallocation year (within the meaning of section 409(p)(3)) in the plan year of an employee stock ownership plan next following the plan year in which such payment is made, 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 (j)(4)(x), synthetic equity (within the meaning of section 409(p)(6)(C) and § 1.409(p)–1(f)) granted during the plan year of the employee stock ownership plan in which such payment is made is disregarded for purposes of determining whether the subsequent plan year would result in a nonallocation year.

(xi) *Payment of state, local, or foreign taxes.* A plan may provide for an acceleration of the time and form of a payment, or a payment may be made under such plan, to reflect payment of state, local, or foreign tax obligations arising from participation in the plan that apply to an amount deferred under the plan before the amount is paid or made available to the participant (the state, local, or foreign tax amount). Such payment may not exceed the amount of such taxes due as a result of participation in the plan. Such payment may be made by distributions to the participant in the form of withholding pursuant to provisions of applicable state, local, or foreign law or by distribution directly to the participant. Additionally, an arrangement may provide for the acceleration of the time or schedule of payment, or a payment may be made under such arrangement, to pay the income tax at source on wages imposed under section 3401 as a result of such payment and to pay the additional income tax at source on wages imposed under section 3401 attributable to such additional section 3401 wages and taxes. However, the total payment under this acceleration provision must not exceed the aggregate of the state, local, and foreign tax amount, and the income tax withholding related to such state, local, and foreign tax amount.

(xii) *Cancellation of deferral elections due to disability.* A plan may provide for a cancellation of a service provider's deferral election, or a cancellation of such election may be made, where such cancellation occurs by the later of the end of the taxable year of the service provider or the 15th day of the third month following the date the service provider incurs a disability. For purposes of this paragraph, a disability refers to any medically determinable physical or mental impairment resulting in the service provider's inability to perform the duties of his or her position or any substantially similar position, where such impairment can be expected to result in death or can be expected to last for a continuous period of not less than six months.

(xiii) *Certain offsets.* A plan may provide for the acceleration of the time or schedule of a payment, or a payment may be made under such plan, as satisfaction of a debt of the service provider to the service recipient, where such debt is incurred in the ordinary course of the service relationship between the service recipient and the service provider, the entire amount of reduction in any of the service recipient's taxable years does not exceed $5,000, and the reduction is made at the same time and in the same amount as the debt otherwise would have been due and collected from the service provider.

(xiv) *Bona fide disputes as to a right to a payment.* A plan may provide for the acceleration of the time or schedule of one or more payments, or a payment may be made under such plan, where such payments occur as part of a settlement between the service provider and the service recipient of an arm's length, bona fide dispute as to the service provider's right to the deferred amount. Discretion to accelerate payments, other than due to an arm's length settlement of a bona fide dispute as to the service provider's right to the deferred amount, is not permitted under this paragraph (j)(4)(xiv). Whether a payment qualifies for the exception under this paragraph is based on all relevant facts and circumstances. A payment will be presumed not to meet this exception unless the payment is subject to a substantial reduction in the value of the payment made in relation to the amount that would have been payable had there been no dispute as to the service provider's right to the payment. For this purpose, a reduction that is less than 25 percent of the present value of the deferred amount in dispute generally is not a substantial reduction. In addition, a payment will be presumed not to meet this exception if the payment is made proximate to a downturn in the financial health of the service recipient.

(5) *Nonqualified deferred compensation plans linked to qualified employer plans or certain other arrangements.* If a nonqualified deferred compensation plan provides that 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)), or a broad-based foreign retirement plan (as defined in § 1.409A–1(a)(3)(v)) maintained by the service recipient but applied without regard to one or more limitations applicable to the qualified employer plan under the Internal Revenue Code or to the broad-based foreign retirement plan under other applicable law, or that the amount deferred under the nonqualified deferred compensation plan is determined as an amount offset by some or all of the benefits provided under the qualified employer plan or broad-based foreign retirement plan, a decrease in amounts deferred under the nonqualified deferred compensation plan that results directly from changes in benefit limitations applicable to the qualified employer plan or the broad-based foreign retirement plan under the Internal Revenue Code or other applicable law does not constitute an acceleration of a payment under the nonqualified deferred compensation plan, 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, and provided further that the change in the amounts deferred under the nonqualified deferred compensation plan does not exceed such change in the amounts deferred under the qualified employer plan or the broad-based foreign retirement plan, as applicable. In addition, with respect to such a nonqualified deferred compensation plan, the following actions or failures to act will not constitute an acceleration of a payment under the nonqualified deferred compensation plan even if in accordance with the terms of the nonqualified deferred compensation plan, the actions or inactions result in a decrease in the amounts deferred under the plan, provided that such actions or inactions do not otherwise affect the time or form of payment under the nonqualified deferred compensation plan, and provided further that with respect to actions or inactions described in paragraphs (j)(5)(i) and (ii) of this section, the change in the amount

deferred under the nonqualified deferred compensation plan does not exceed the change in the amounts deferred under the qualified employer plan or the broad-based foreign retirement plan, as applicable:

(i) A service provider's action or inaction under the qualified employer plan or broad-based foreign retirement plan with respect to whether to elect to receive a subsidized benefit or an ancillary benefit under the qualified employer plan or broad-based foreign retirement plan.

(ii) The amendment of a qualified employer plan or broad-based foreign retirement plan to increase benefits provided under such plan, or to add or remove a subsidized benefit or an ancillary benefit.

(iii) A service provider's action or inaction under a qualified employer plan with respect to elective deferrals and other employee pre-tax contributions subject to the contribution restrictions under section 401(a)(30) or section 402(g), including an adjustment to a deferral election under such qualified employer plan, provided that for any given taxable year, the service provider's action or inaction does not result in a decrease in the amounts deferred under all nonqualified deferred compensation plans in which the service provider participates (other than amounts described in paragraph (j)(5)(iv) of this section) in excess of the limit with respect to elective deferrals under section 402(g)(1)(A), (B), and (C) 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 and other employee pre-tax contributions subject to the contributions restrictions under section 401(a)(30) or section 402(g), and after-tax contributions by the service provider to a qualified employer plan that provides for such contributions that affects the amounts that are credited under one or more nonqualified deferred compensation plans as matching amounts or other similar amounts contingent on such elective deferrals, pre-tax contributions, or after-tax contributions, provided that the total of such matching or contingent amounts, as applicable, never exceeds 100 percent of the matching or contingent amounts that would be provided under the qualified employer plan absent any plan-based restrictions that reflect limits on qualified plan contributions under the Internal Revenue Code.

(6) *Changes in elections under a cafeteria plan.* A change in an election under a cafeteria plan (as defined in section 125(d)) does not result in an accelerated payment of an amount deferred under a nonqualified deferred compensation plan to the extent that the change in the amount deferred under the nonqualified deferred compensation plan results solely from the application of the change in amount eligible to be treated as compensation under the terms of the nonqualified deferred compensation plan resulting from the election change under the cafeteria plan, to a benefit formula under the nonqualified deferred compensation plan based upon the service provider's eligible compensation, and only to the extent that such change applies in the same manner as any other increase or decrease in compensation would apply to such benefit formula.

**§ 1.409A–4 Calculation of income inclusion [Reserved]**

**§ 1.409A–5 Funding [Reserved]**

**§ 1.409A–6 Application of section 409A and effective dates.**

(a) *Statutory application and effective dates*—(1) *Application to amounts deferred*—(i) *In general.* Except as otherwise provided in this section, section 409A applies with respect to amounts deferred in taxable years beginning after December 31, 2004, and with respect to 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. For amounts deferred in taxable years beginning before January 1, 2005, under a plan that is materially modified after October 3, 2004, whether the plan complies with the requirements of section 409A and these regulations is determined by reference to the terms of the plan in effect as of, and any actions taken under the plan on or after, the date of the material modification. Section 409A is applicable with respect to earnings on amounts deferred only to the extent that section 409A is applicable with respect to the amounts deferred. Accordingly, section 409A does not apply with respect to earnings on amounts deferred before January 1, 2005, unless section 409A applies with respect to the amounts deferred. For this purpose, a right to earnings that is subject to a substantial risk of forfeiture (as defined in § 1.83–3(c)) or a requirement to perform further services, on an amount deferred that is not subject to a substantial risk of forfeiture (as defined in § 1.83–3(c)) or a requirement to perform further services, is not treated as earnings on the amount deferred, but a separate right to compensation. Except as otherwise provided in applicable guidance (see § 601.601(d)(2) of this chapter), the provisions of §§ 1.409A–1 through 1.409A–5 and this section provide the exclusive means of identifying agreements, methods, programs, or other arrangements subject to section 409A, and the exclusive means of satisfying the requirements of section 409A with respect to such agreements, methods, programs, or other arrangements.

(ii) *Collectively bargained plans.* Section 409A does not apply with respect to amounts deferred under a plan maintained pursuant to one or more bona fide collective bargaining agreements in effect on October 3, 2004, for the period ending on the earlier of the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof after October 3, 2004) or December 31, 2009.

(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 § 1.409A–1(c)(2)(i)(C)), equals the present value of the amount to which the service provider would have been entitled under the plan if the service provider voluntarily terminated services without cause on December 31, 2004, and received a payment of the benefits available from the plan on the earliest possible date allowed under the plan to receive a payment of benefits following the termination of services, and receive the benefits in the form with the maximum value. Notwithstanding the foregoing, for any subsequent taxable year of the service provider, the grandfathered amount may increase to equal the present value of the benefit the service provider actually becomes entitled to, in the form and at the time actually paid, 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). For purposes of calculating the present value of a benefit under this paragraph (c)(3)(i), reasonable actuarial assumptions and methods must be used. Whether assumptions and methods are reasonable for this purpose is determined as of each date the benefit is valued for purposes of determining the grandfathered benefit, provided that any reasonable actuarial assumptions and methods that were used by the service recipient with respect to such benefit as of December 31, 2004, will continue to be treated as reasonable assumptions and methods for purposes of calculating the grandfathered benefit. Actuarial assumptions and methods will be presumed reasonable if they are the same as those used to value benefits under a qualified plan sponsored by the service recipient the benefits under which are part of the benefit formula under, or otherwise impact the amount of benefits under, the nonaccount balance nonqualified deferred compensation plan.

(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 § 1.409A–1(c)(2)(i)(A)), 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, plus any future contributions to the account, the right to which was earned and vested (as defined in paragraph (a)(2) of this section) as of December 31, 2004, to the extent such contributions are actually made.

(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 to 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 paragraphs (a)(1), (2), and (3) of this section, the term ''plan'' has the meaning provided in § 1.409A–1(c), except that the plan aggregation rules do not apply for purposes of the actuarial assumptions and methods used in paragraph (a)(3)(i) of this section. Accordingly, different reasonable actuarial assumptions and methods may be used to calculate the amounts deferred by a service provider in two different agreements, methods, programs, or other 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 to 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 following modifications also are not material modifications for purposes of this paragraph (a)(4)(i):

(A) 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.

(B) The modification of a provision requiring the immediate cancellation of a current deferral election, to require the cancellation of deferrals for the same length of time beginning with the first date at which the application of such cancellation would not violate section 409A (for example, the first date of the service provider's first taxable year following the cancellation).

(C) Compliance with a domestic relations order (as defined in § 1.409A–3(j)(4)(ii)) with respect to payments to an individual other than the service provider, or an amendment to a plan to require compliance with a domestic relations order with respect to payments to an individual other than the service provider.

(D) The modification of a plan providing a life annuity form of payment to permit an election between the existing life annuity form of payment and other forms of annuity payments that would be treated as a single form of payment with the existing life annuity form of payment under § 1.409A–2(b)(2)(ii).

(E) The modification of a grandfathered plan to add a limited cashout feature consistent with § 1.409A–3(j)(4)(v) (exception to prohibition on accelerated payments).

(ii) *Adoptions of new plans.* It is presumed that the adoption of a new plan or the grant of an additional benefit under an existing plan 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 plan or grant of the additional benefit was 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) of this section and this paragraph (a)(4)(ii), the grant of an additional benefit under an existing plan 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 plan 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 plan 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 a plan to provide participants an election whether to terminate participation in a plan generally 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 § 1.409A–1(c)(2)(i)(A)), it is not a material modification to change a notional investment measure, or to add to an existing investment measure, to 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 taxable 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) *Stock rights.* The modification, extension, or renewal of a stock right will not constitute a material modification of the stock right, if the modification, extension, or renewal would not be treated as the grant of a new stock right under § 1.409A–1(b)(5)(v)(A), and would not result in the stock right being treated as having had a deferral feature from the date of grant pursuant to § 1.409A–1(b)(5)(v)(C).

(vi) *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 taxable year of the service provider during which such change occurred. Thus, for example, if a service recipient modifies the terms of a plan on March 1 to allow an individual employee to elect 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.

(vii) *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 plan aggregation rules of § 1.409A–1(c)(2) do not apply.

(b) *Regulatory applicability date.* § 1.409A–1, § 1.409A–2, § 1.409A–3 and this section are applicable for taxable years beginning on or after January 1, 2008.

**Kevin M. Brown,**

*Deputy Commissioner for Services and Enforcement.*

Approved: March 20, 2007.

**Eric Solomon,**

*Assistant Secretary of the Treasury.*

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# Part III

# Department of Labor

## Wage and Hour Division

**29 CFR Part 570**

**Child Labor Regulations, Orders and Statements of Interpretation; Proposed Rules**

**DEPARTMENT OF LABOR**

**Wage and Hour Division**

**29 CFR Part 570**

**RIN 1215–AB44**

## Child Labor Regulations, Orders and Statements of Interpretation

**AGENCY:** Wage and Hour Division, Employment Standards Administration, Labor.

**ACTION:** Advance notice of proposed rulemaking and request for comments.

**SUMMARY:** The Department of Labor (Department or DOL) is considering proposing revisions to the child labor regulations issued pursuant to the Fair Labor Standards Act (FLSA), 29 CFR part 570, which set forth the criteria for the permissible employment of minors under 18 years of age. In particular, subpart E of these regulations is under review. Subpart E identifies occupations deemed particularly hazardous for or detrimental to the health or well-being of employees under 18 years of age. This advance notice of proposed rulemaking seeks the views of the public on the need for changes to these regulations.

**DATES:** Comments must be received on or before July 16, 2007.

**ADDRESSES:** You may submit comments, identified by RIN 1215–AB44, by either one of the following methods:

- *Electronic comments, through the Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210.

*Instructions:* Please submit one copy of your comments by only one method. All submissions received must include the agency name and Regulatory Information Number (RIN) identified above for this advance notice of proposed rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* or to submit them by mail early. For additional information on submitting comments and the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* For access to the docket to read background documents or comments received, go to the Federal eRulemaking Portal at *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Arthur M. Kerschner, Jr., Office of Enforcement Policy, Child Labor and Special Employment Team, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3510, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–0072 (this is not a toll free number). Copies of this advance notice of proposed rulemaking may be obtained in alternative formats (Large Print, Braille, Audio Tape, or Disc), upon request, by calling (202) 693–0023. TTY/TDD callers may dial toll-free (877) 889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of regulations issued by this agency or referenced in this notice may be directed to the nearest Wage and Hour Division District Office. Locate the nearest office by calling the Wage and Hour Division's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto the Wage and Hour Division's website for a nationwide listing of Wage and Hour District and Area Offices at: *http://www.dol.gov/esa/contacts/whd/america2.htm*.

**SUPPLEMENTARY INFORMATION:**

### I. Electronic Access and Filing Comments

*Public Participation:* This advance notice of proposed rulemaking is available through the **Federal Register** and the *http://www.regulations.gov* Web site. You may also access this document via the WHD home page at *http://www.wagehour.dol.gov*. To comment electronically on federal rulemakings, go to the Federal eRulemaking Portal at *http://www.regulations.gov,* which will allow you to find, review, and submit comments on federal documents that are open for comment and published in the **Federal Register**. Please identify all comments submitted in electronic form by the RIN docket number (1215–AB44). Because of delays in receiving mail in the Washington, DC area, commenters should transmit their comments electronically via the Federal eRulemaking Portal at *http://www.regulations.gov,* or submit them by mail early to ensure timely receipt prior to the close of the comment period. Submit one copy of your comments by only one method.

### II. Background

The child labor provisions of the Fair Labor Standards Act (FLSA) establish a minimum age of 16 years for employment in nonagricultural occupations, but the Secretary of Labor is authorized to provide by regulation for 14- and 15-year-olds to work in suitable occupations other than manufacturing or mining, and during periods and under conditions that will not interfere with their schooling or health and well-being. The FLSA provisions permit 16- and 17-year-olds to work in the nonagricultural sector without hours or time limitations, except in certain occupations found and declared by the Secretary to be particularly hazardous, or detrimental to the health or well-being of such workers.

The regulations for 14- and 15-year-olds are known as Child Labor Regulation No. 3 (Reg. 3) and are contained in subpart C of part 570 (29 CFR 570.31–.38). Reg. 3 limits the hours and times of day that such minors may work and identifies occupations that are either permitted or prohibited for such minors. Under Reg. 3, 14- and 15-year-olds may work in certain occupations in retail, food service, and gasoline service establishments, but are not permitted to work in certain other occupations (including all occupations found by the Secretary to be particularly hazardous for 16- and 17-year-olds). Reg. 3, originally promulgated in 1939, was revised to reflect the 1961 amendments to the FLSA, which extended the Act's coverage to include enterprises engaged in commerce or the production of goods for commerce. Because of the statutory amendments, the FLSA's child labor protections became applicable to additional areas of employment for young workers in retail, food service, and gasoline service establishments.

The regulations concerning nonagricultural hazardous occupations are contained in subpart E of 29 CFR part 570 (29 CFR 570.50–.68). These Hazardous Occupations Orders (HOs) apply on either an industry basis, specifying the occupations in a particular industry that are prohibited, or an occupational basis, irrespective of the industry in which the work is performed. The seventeen HOs were adopted individually during the period of 1939 through 1963. Some of the HOs, specifically HOs 5, 8, 10, 12, 14, 16, and 17, contain limited exemptions that permit the employment of 16- and 17-year-old apprentices and student-learners under particular conditions to perform work otherwise prohibited to that age group. The terms and

conditions for employing such apprentices and student-learners are detailed in § 570.50(b) and (c).

Because of changes in the workplace, the introduction of new processes and technologies, the emergence of new types of businesses where young workers may find employment opportunities, the existence of differing federal and state standards, and divergent views on how best to correlate school and work experiences, the Department has long been reviewing the criteria for permissible child labor employment. In this review, the Department published a Notice of Proposed Rulemaking (NPRM) in 1982, a Final Rule in 1991, both an Advance Notice of Proposed Rulemaking (ANPRM) and an NPRM in 1994, a Final Rule in 1995, an NPRM in 1999, and a Final Rule in 2004.

On July 16, 1982, an NPRM was published in the **Federal Register** (47 FR 31254) which proposed to revise several elements of Reg. 3, including the permissible hours and times of employment for 14- and 15-year-olds and the types of cooking operations those minors would be permitted to perform. The NPRM generated considerable public interest, mostly relating to the expansion of the hours and times of work for this age group. The Department subsequently suspended the proposal from further consideration and no final rule was implemented.

The Department continued to receive suggestions from the public that certain changes should be made to the child labor regulations on a number of issues. In 1987, the Department established a Child Labor Advisory Committee (CLAC) composed of 21 members representing employers, education, labor, child guidance professionals, civic groups, child advocacy groups, state officials, and safety groups. The mission of the CLAC was to give advice and guidance in developing possible proposals to change existing standards. After reviewing a number of issues, the CLAC proposed making certain changes to the child labor regulations. The Department considered the CLAC's suggestions, as well as suggestions received from the public as noted above, and published an NPRM in October 1990, proposing changes to three HOs (55 FR 42612). In December 1991, the Department promulgated a Final Rule that revised the three HOs (56 FR 58626).

The Department continued to review the child labor regulations and on May 13, 1994, in an effort to accumulate data concerning all aspects of the provisions, published both an NPRM (59 FR 25164) and an ANPRM (59 FR 25167). The NPRM proposed to exempt 14- and 15-year-olds from Reg. 3 hours standards when employed under certain restrictions as sports attendants for professional sports teams, to standardize the Reg. 3 process for issuing occupational variances for Work Experience and Career Exploration Program (WECEP) participants, to remove an outdated exemption for enrollees in certain work training programs, and to revise the process by which HOs are promulgated. A Final Rule on these issues was published April 17, 1995 (60 FR 19336).

The 1994 ANPRM requested public comment on several specific topics as well as all aspects of the child labor provisions. Several individuals and organizations submitted comments. The National Institute for Occupational Safety and Health (NIOSH) provided the Department with epidemiological data on a number of issues related to both Reg. 3 and the HOs. NIOSH also provided the Department with statistics regarding occupational injuries and made several recommendations. A number of child guidance professionals, educators, unions, employer associations, and child labor advocates also commented and made various recommendations.

Congress has amended the child labor provisions of the FLSA three times since 1996. The Compactors and Balers Safety Standards Modernization Act, Pub. L. 104–174 (Compactor and Baler Act), was signed into law on August 6, 1996. This legislation added section 13(c)(5) to the FLSA, permitting minors 16 and 17 years of age to load, but not operate or unload, certain scrap paper balers and paper box compactors when certain requirements are met. The Drive for Teen Employment Act, Pub. L. 105–334, was signed into law on October 31, 1998. This legislation added section 13(c)(6) to the FLSA, prohibiting minors under 17 years of age from driving automobiles and trucks on public roadways on-the-job and establishing the conditions and criteria for 17-year-olds to drive automobiles and trucks on public roadways on-the-job. The Department of Labor Appropriations Act, 2004, Pub. L. 108–199, amended the FLSA by creating a limited exemption from the youth employment provisions for minors 14 to 18 years of age who are excused from compulsory school attendance beyond the eighth grade. The exemption, contained in section 13(c)(7) of the FLSA, allows eligible youth, under specific conditions, to be employed inside and outside of places of business that use machinery to process wood products, but does not allow such youth to operate or assist in operating power-driven woodworking machines. This exemption overrides the FLSA's formerly complete prohibition on the employment of 14- and 15-year-olds in manufacturing occupations contained in section 3(l).

The Department published an NPRM in the **Federal Register** on November 30, 1999 (64 FR 67130), inviting comments on revisions of regulations to implement the 1996 and 1998 amendments and to update certain regulatory standards. The Compactor and Baler Act affected the HO 12 standards (Occupations involved in the operation of paper-products machines) (29 CFR 570.63) and certain other related regulations; amendments of those regulations were proposed. The Drive for Teen Employment Act affected the HO 2 standards (Occupations of motor-vehicle driver and outside helper) (29 CFR 570.52); an amendment of that regulation was proposed. As a result of its ongoing review of the child labor provisions, the Department also proposed changes to HO 1 (Occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components) (29 CFR 570.51), HO 16 (Occupations in roofing operations) (29 CFR 570.67), the Reg. 3 limitations on cooking (29 CFR 570.34), and 29 CFR 570.6(b)(1) which deals with the disposition of a Certificate of Age when the named individual's employment ends. A Final Rule, addressing the above issues and implementing procedural changes dealing with administrative hearings and appeals of child labor civil money penalties, was issued on December 16, 2004 (69 FR 75382).

In 1998, the Department provided funds to NIOSH to conduct a comprehensive review of the scientific literature and available data in order to assess current workplace hazards and the adequacy of the current youth employment HOs to address them. This study was commissioned to provide the Secretary with another tool to use in her ongoing review of the youth employment provisions, and of the hazardous occupations orders in particular. The report, entitled *National Institute for Occupational Safety and Health Recommendations to the U.S. Department of Labor for Changes to Hazardous Orders* (hereinafter referred to as the NIOSH Report or the Report), was issued in July of 2002. The Report, which makes 35 recommendations concerning the existing nonagricultural HOs and recommends the creation of 17 new HOs, also incorporated the comments NIOSH submitted in

response to the 1999 NPRM. The report is available for review on the Department's YouthRules! Web site at *http://www.youthrules.dol.gov/resources.htm*.

The Department recognizes NIOSH's extensive research efforts in compiling and reviewing this data. However, it has cautioned readers about reaching conclusions and expecting revisions to the existing HOs based solely on the information in the Report. In the Report, NIOSH itself recognized the confines of its methodology and included appropriate caveats about limitations in available data and gaps in research. Of those limitations, the following are worth noting. The NIOSH Report recommendations are driven by information on high-risk activities for all workers, not just patterns of fatalities and serious injuries among young workers. There is little occupational injury, illness, and fatality data available regarding minors less than 16 years of age. In addition, such data for youth 16 and 17 years of age tend to be mixed with that of older workers whose employment is not subject to the youth employment provisions of the FLSA. Also, available occupational injury, illness, fatality, and employment data on the specific operations in the specific industries covered by the NIOSH Report recommendations tend to be combined with data on other operations and/or industries. In some cases, this may result in a diminution of the risk by including less risky operations and industries in the employment estimates. In other cases, the risk may be exaggerated by including more dangerous operations/industries in the injury, illness, or fatality estimates.

In addition, as NIOSH was tasked with examining issues within the framework of the current HOs only, the Report did not consider the extent to which fatalities occur despite existing HOs, Occupational Safety and Health Administration (OSHA) standards, or state laws prohibiting the activity. If fatalities result from recognized illegal activities, such as working with fireworks or a power-driven circular saw, the best strategy for preventing future injuries may not be to revise the regulations but to increase compliance with existing laws through public awareness initiatives, targeted compliance assistance efforts, and stepped-up enforcement activities. The Report also did not consider potential approaches for decreasing workplace injuries that provide an alternative to a complete ban on employment, such as safety training, increased supervision, the use of effective personal protective equipment, and strict adherence to recognized safe working practices.

Though cognizant of the limitations of the Report, the Department places great value on the information provided by NIOSH. Since receiving the Report, the Department has conducted a detailed review and has met with various stakeholders to evaluate and prioritize each recommendation for possible regulatory action consistent with the established national policy of balancing the benefits of employment opportunities for youth with the necessary and appropriate safety protections. The 2004 Final Rule addressed six of the recommendations.

As an adjunct to its review of these issues the Department contracted with a private consulting firm, SiloSmashers, Inc., to construct a model that, using quantitative analysis, would help determine the costs and benefits associated with implementing, or not implementing, each of the Report's recommendations. The SiloSmashers report, *Determination of the Costs and Benefits of Implementing NIOSH Recommendations Relating to Child Labor Hazardous Orders,* was completed in November 2004 and covers 34 of the NIOSH HO recommendations in agricultural and nonagricultural occupations, as well as several occupations or activities not presently addressed by an existing HO.

The methodology used by SiloSmashers was to compare the direct costs and benefits of implementing or revising an HO, as recommended by NIOSH, with the costs and benefits of not implementing or revising the HO based on the NIOSH recommendations. Each SiloSmashers analysis was conducted on a mutually exclusive basis to yield a net present value (NPV). SiloSmashers defines NPV as ''the discounted dollar value of an investment across the expected planning horizon. As a dollar figure, NPV is presented at the full value level for each implementation approach (implementing versus not implementing) as well as at the incremental approach (the difference between implementing versus not implementing). As a comparison tool and under the incremental approach, the higher the NPV, the higher the expected value of implementation.'' The NPVs reported by SiloSmashers for each of the NIOSH recommendations addressing the current nonagricultural HOs range from a negative $9,537,000 to a positive $113,556,000.

Although the SiloSmashers report includes both a quantitative analysis and a qualitative analysis of each NIOSH recommendation, the Department is concerned that some readers might try to rank each recommendation solely on the basis of the quantitative results (i.e., on the basis of the NPVs) listed in the HO Comprehensive Summary. This simplistic ranking would not be appropriate due to several constraints inherent in the methodology adopted by SiloSmashers, especially the lack of reliable and pertinent data.

In addition, not only was the methodology used by SiloSmashers to generate the NPVs subject to the same data limitations faced by NIOSH regarding the employment, fatality, and injury rates of young workers, but it also raises additional concerns. First, if SiloSmashers were unable to identify any minors who were fatally injured while performing work that was the subject of the NIOSH recommendation being examined, even if many adult workers were killed while performing that exact same work, the analysis would reflect that implementation of the recommendation would have no benefit in reducing occupational hazards to youth. Such an assumption is contrary to the Department's long-held position that work which is dangerous for adults is inherently dangerous for youth. For example, because SiloSmashers found no deaths of youth resulting from the operation of chainsaws, it concluded that implementation of the NIOSH recommendation to expand HO 14 to prohibit the operation of chainsaws on all materials, and not just on wood and wood products as currently prohibited by HOs 4 and 5, would have no impact on the number of occupational fatalities suffered by 16- and 17-year-olds. The Department strongly disagrees with this conclusion. NIOSH based its recommendation on data that demonstrate that chainsaws continue to be the source of substantial numbers of fatalities as well as nonfatal injuries which may be unusually severe. Accordingly, the Department believes that the operation of chainsaws is inherently dangerous for young workers, regardless of the lack of youth-specific injury and fatality data. The Department agrees with NIOSH that the prudent course of action is to prohibit the use of chainsaws by all workers under the age of 18.

Secondly, when youth fatalities were identified, the values the SiloSmashers report placed on the lives saved and injuries prevented under the various NIOSH Report recommendations are based on estimates published in economic literature that are based on adult populations. Applying those estimates to children may result in an underestimate of the risk to children

because the susceptibility of a developing child's body to illness, injury, or death will most likely differ from that of the fully developed body of an adult. These differences are important in any such analysis, as society tends to place a higher value on the lives of children compared to adults. By their very nature, child labor laws are intended to protect children from situations that are permissible for adults. Thus, even without some of the other data limitations discussed above, the estimates presented in the SiloSmashers report consistently understate the benefits of implementing the NIOSH recommendations. Because of the data limitations and flaws in methodology, the Department does not consider the individual analysis prepared by SiloSmashers to be influential for rulemaking purposes.

It was the Department's intention that the SiloSmashers analysis would help in identifying and defining the scope of each recommendation and provide additional information to consider after the decision was made to implement or not to implement a particular recommendation. This is in keeping with the ultimate recommendation made in the SiloSmashers report that the Department consider both quantitative and qualitative factors, as well as other internal and external factors-such as budget constraints, priorities established by the Department or Administration, additional stakeholder input, etc.-when determining which NIOSH Report recommendations to implement. The entire report provided to the Department by SiloSmashers can be viewed on the Internet at *http://www.youthrules.dol.gov/clri/Final_Report.pdf*.

As mentioned, the NIOSH Report made 35 recommendations concerning the existing nonagricultural HOs. The Department addressed six of those recommendations in the 2004 Final Rule. The Department has decided that, in an NPRM being published concurrently with this ANPRM, it will address 25 of the remaining 29 Report recommendations dealing with existing nonagricultural hazardous occupations orders. The Department believes there is sufficient data to support implementing its proposals. In an attempt to acquire additional data in order to address the remaining nonagricultural NIOSH recommendations, as well as pursue items not explored in the NIOSH Report, the Department is publishing this ANPRM.

The NIOSH Report also makes 11 recommendations that impact the current agricultural HOs as well as 17 recommendations that urge the creation of new HOs. The Department, in this ANPRM, is requesting public comment on the feasibility of one of those recommendations regarding the creation of an HO that would prohibit the employment of youth in construction occupations. The Department is continuing to review the remaining recommendations, but for administrative reasons excluded them from its consideration of the NIOSH proposals covered in this phase to keep the size and scope manageable. Their absence from this current round of rulemaking is not an indication that the Department believes them to be of less importance or that they will not be given the same level of consideration as the recommendations addressing the current nonagricultural HOs.

## III. Topics Upon Which Information Is Being Sought

The Department is publishing this ANPRM to obtain information, data, and feedback from the public with respect to the matters set out below.

### *A. Student-Learner and Apprentice Exemptions to the Hazardous Occupations Orders*

Seven of the 17 current nonagricultural HOs contain exemptions permitting the employment of 16- and 17-year-old student-learners and apprentices in otherwise prohibited work under specific conditions. The HOs that permit such employment are HO 5 (Occupations involved in the operation of power-driven woodworking machines, § 570.55), HO 8 (Occupations involved in the operations of power-driven metal forming, punching, and shearing machines, § 570.59), HO 10 (Occupations in the operation of power-driven meat processing machines and occupations involving slaughtering, meat packing or processing, or rendering, § 570.61), HO 12 (Occupations involved in the operation of paper-products machines, scrap paper balers, and paper box compactors, § 570.63), HO 14 (Occupations involved in the operations of circular saws, band saws, and guillotine shears, § 570.65), HO 16 (Occupations in roofing operations and on or about a roof, § 570.67), and HO 17 (Occupations in excavation operations, § 570.68).

Discussions on whether to allow exemptions from certain HOs for apprenticeships began in the early 1940s after the enactment of the first five HOs. It was agreed that a blanket exemption for apprentices—one that would apply to every HO—was not appropriate. Representatives of the Children's Bureau, which at that time was the agency responsible for the promulgation of the HOs, postulated that if the basic characteristics of a particular occupation were hazardous, and the work of a hazardous nature was relatively continuous, such work would remain hazardous for youth even if enrolled in an apprenticeship program. On the other hand, if the craft for which the apprentice is being trained is basically nonhazardous, but requires the occasional performance of hazardous work to complete the training, an exemption for apprentices might be feasible under certain circumstances. No guidelines were provided regarding just how much hazardous work should be allowed before the occupation became too hazardous to warrant an exemption for apprentices. However, the Children's Bureau did note that circumstances that would allow the creation of such an exemption would include the adoption of safeguards guaranteeing proper supervision of the work of the apprentice by an instructor or other qualified person. Similar discussions concerning the appropriateness of exemptions for student-learners soon followed. HO 5 was amended on November 13, 1941 to include an exemption for apprentices and again amended on September 26, 1947, to accommodate student-learners. The remaining HOs that currently contain similar exemptions, starting with HO 8 issued on January 12, 1950, contained these exemptions as of the dates of their promulgation. The committees that were convened by the Department to study whether to create HOs for particular industries or occupations, pursuant to the provisions of former subpart D of 29 CFR part 570, made their own determinations regarding the inclusion or omission of student-learner and apprentice exemptions. It is not evident that these committees followed the general guidance provided by the Children's Bureau when considering student-learner and apprenticeship exemptions. Subpart D was deleted in 1995 as the procedural requirements for creating and amending the HOs (rulemaking) were largely superseded by the Administrative Procedure Act (see 60 FR 19336).

Although the actual exemptions for student-learners and apprentices are contained within each specific HO, the definitions and general requirements relating to these exemptions are detailed in § 570.50. Section 570.50(b) states that an apprentice exemption from an HO shall apply only when (1) the apprentice is employed in a craft recognized as an apprenticable trade; (2) the work of the apprentice in the occupations declared

particularly hazardous is incidental to his or her training; (3) such work is intermittent and for short periods of time and is under the direct and close supervision of a journeyman as a necessary part of such apprentice training; and (4) the apprentice is registered by the Bureau of Apprenticeship and Training of the United States Department of Labor as employed in accordance with the standards established by that Bureau, or is registered by a state agency as employed in accordance with the standards of the state apprenticeship agency recognized by the Bureau of Apprenticeship and Training, or is employed under a written apprenticeship agreement and conditions which are found by the Secretary of Labor to conform substantially with such federal or state standards.

Section 570.50(c) states that student-learner exemptions shall apply when: (1) The student-learner is enrolled in a course of study and training in a cooperative vocational training program under a recognized state or local educational authority or in a course of study in a substantially similar program conducted by a private school; and (2) such student-learner is employed under a written agreement that provides (i) that the work of the student-learner in the occupations declared particularly hazardous shall be incidental to his or her training; (ii) that such work shall be intermittent and for short periods of time, and under the direct and close supervision of a qualified and experienced person; (iii) that safety instructions shall be given by the school and correlated by the employer with on-the-job training; and (iv) that a schedule of organized and progressive work processes to be performed on the job shall have been prepared. Each such written agreement shall contain the name of the student-learner, and shall be signed by the employer and the school coordinator or principal.

Although the regulations do not provide definitions of the terms *intermittent* and *short periods of time,* the Department interprets those terms to mean that the duties assigned the minor may not be such that he or she is constantly operating the prohibited machinery during the work shift, but only doing so as part of the training experience. Therefore, an apprentice or student-learner may not be the principal operator of prohibited machinery (see Child Labor Bulletin 101, *Youth Employment Provisions for Nonagricultural Occupations under the Fair Labor Standards Act*). He or she must work under the close supervision of a fully qualified and experienced adult, such as a journey-level worker. Further, this would preclude an apprentice or student-learner from being a production worker, responsible for spending a significant portion of the workday operating prohibited machinery or performing prohibited tasks. The Department considers the continuous performance of otherwise prohibited work that exceeds one hour a day to be more than intermittent and more than for short periods of time. The Department also considers the performance of otherwise prohibited work that totals more than 20% of the student-learner's work shift to be more than for short periods of time.

The regulations do not define the term *direct and close supervision.* The Department's interpretation of *direct and close supervision* as it applies to apprentices and student-learners is based on guidance originally provided by the Bureau of Apprenticeship and Training (BAT) within the Department of Labor's Employment and Training Administration's Office of Apprenticeship and Training, Employer and Labor Services. BAT establishes ratios governing the number of journeymen and apprentices that may be employed on the job site in order to ensure worker safety and that the apprentices receive both proper training and supervision. BAT has advised that the most widely used ratio is one apprentice for the first journey-level worker on-site and one apprentice for every three additional journey-level workers thereafter. The Department considers the requirement of direct and close supervision to be met when there is one journey-level worker or experienced adult working with the first apprentice/student-learner on-site, and at least three journey-level workers or experienced adults working alongside each additional apprentice/student-learner. More information about this issue is included in the Department's publication *Youth Employment Provisions for Non-Agricultural Occupations under the Fair Labor Standards Act, CL Bulletin 101.* Of course, the requirement for direct and close supervision applies only during the periods when the apprentice/student-learner is actually performing work that would otherwise be prohibited by the HO.

The NIOSH Report made several recommendations concerning the application of the student-learner and apprentice exemptions to specific HOs. The Report recommended that the Department retain the exemptions in HO 5 (Occupations involved in the operation of power-driven woodworking machines), HO 8 (Occupations involved in the operations of power-driven metal forming, punching, and shearing machines), and HO 12 (Occupations involved in the operation of paper-products machines, scrap paper balers, and paper box compactors). The Report recommended that the Department revise the exemptions for student-learners and apprentices in HO 10 (Occupations in the operation of power-driven meat-processing machines and occupations involving slaughtering, meat packing or processing, or rendering) so that they would apply only to the operation of power-driven meat-processing machines in retail, wholesale, and service industries-not in meat products manufacturing industries. Finally, the Report recommended that the Department remove the student-learner and apprentice exemptions contained in HO 16 (Work in roofing occupations and on or about a roof) and HO 17 (Occupations in excavating operations).

The Department does not believe the Report provided sufficient rationales for these individual recommendations to warrant implementation and is seeking additional information from the public. In order to address the recommendations made by the Report, and to provide guidance for considering student-learner and apprentice exemptions for any future HOs that may be proposed, the Department is seeking public comment on establishing criteria as to when an exemption for student-learners and apprentices is appropriate. Such criteria, of course, must be consistent with the established national policy of balancing the benefits of employment opportunities for youth with the necessary and appropriate safety protections. Information is also being sought regarding whether the current limitations on the amount of hazardous work that may be performed by an apprentice or student-learner, as well as the degree of required supervision, adequately protect, over-protect, or insufficiently protect the health and safety of young workers. The Department is also especially interested in receiving information about the roles apprenticeship and student-learner programs play in helping youth (1) acquire and practice good occupational safety and health work practices, (2) properly assess workplace risks, and (3) reduce occupational injuries and deaths. Finally, the Department is questioning whether it should retain the provision in § 570.50(b)(4) that extends this limited exemption to apprenticeship programs that, although not registered with the BAT or a state agency

recognized by BAT, conform substantially with the federal or state standards.

*B. Power-Driven Woodworking Machines, Power-Driven Metal Processing Machines and Power-Driven Paper Processing Machines*

The Department is seeking information from the public regarding the scope of several HOs that deal with the operation of power-driven machinery by youth in the workplace. As previously mentioned, the HOs were promulgated independently of one another at various times between 1939 and 1963. Several of the HOs apply to entire industries or processes, e.g., HO 3 bans most work in coal mining, HO 4 bans most work in logging and sawmilling, and HO 17 bans most work in excavation operations. Other HOs prohibit youth from operating certain equipment regardless of the industry in which the youth may be employed. For example, HO 5 (Occupations involved in the operation of power-driven woodworking machines) prohibits the covered employment of 16- and 17-year-olds in the operation of power-driven wood-working machines wherever located. The term *power-driven wood-working machines* is defined in § 570.55(b)(1) as meaning all fixed or portable machines or tools driven by power and used or designed for cutting, shaping, forming, surfacing, nailing, stapling, wire stitching, fastening, or otherwise assembling, pressing, or printing wood or veneer. This definition does not list or name specific types of machines, but encompasses any machine-past, current, or future-that is designed to perform or actually performs the functions of cutting, shaping, forming, surfacing, nailing, stapling, wire stitching, fastening, or otherwise assembling, pressing, or printing wood or veneer. Under this definition, a band saw designed by the manufacturer to cut wood or veneer, but never used to cut wood or veneer, would still be prohibited under HO 5. This is true even if the machine were used to cut paper, metal, foam rubber, or bakery products such as sheet cake. Likewise, HO 5 would prohibit a band saw designed to cut metal and equipped with a blade designed exclusively for use on metal when used to cut wood or veneer.

Another example would be that the definition of prohibited machinery contained in HO 8 (Occupations involved in the operations of power-driven metal forming, punching, and shearing machines) is quite different from that contained in HO 5, largely because of the limited scope of HO 8. HO 8 prohibits 16- and 17-year-olds from being employed in the occupations of operator or helper on power-driven metal forming, punching, and shearing machines. Section 570.59(a)(1) states that prohibited machines are: (1) All rolling machines, such as beading, straightening, corrugating, flanging, or bending rolls, and hot or cold rolling mills; (2) all pressing or punching machines, such as punch presses except those provided with full automatic feed and ejection and with a fixed barrier guard to prevent the hands or fingers of the operator from entering the area between the dies; power presses; and plate punches; (3) all bending machines, such as apron brakes and press brakes; (4) all hammering machines, such as drop hammers and power hammers; and (5) all shearing machines, such as guillotine or squaring shears, alligator shears, and rotary shears.

Section 570.59(b)(3) defines the term *forming, punching, and shearing machines* to mean power-driven metal-working machines, other than machine tools, that change the shape of or cut metal by means of tools, such as dies, rolls, or knives that are mounted on rams, plungers, or other moving parts. This exclusion from HO 8 of machine tools used on metal permits 16- and 17-year-olds to operate a large number of machines that HO 5 would prohibit if the same machines were used on wood or veneer, or were designed to be used on wood or veneer. The Department excluded machine tools from the prohibitions of HO 8 because the frequency of injuries due to machine tools was low compared to the frequency of injuries due to forming, punching, and shearing machines, even though the total number of injuries due to machine tools was still quite large due to the number of machine tools in use. In a 1951 publication entitled *Machine Tools and their Hazards, Bulletin Number 129*, the Department also noted that the severity of injuries due to machine tools was also lower than the severity of injuries due to forming, punching, and shearing machines.

The NIOSH Report reflects that occupational fatality and injury data regarding the operation of machine tools has changed since the Department promulgated HO 8. NIOSH notes that the Census of Fatal Occupational Injuries (CFOI) identified 31 fatalities between 1992 and 1997 associated with metal forming, punching, and shearing machine operations-machines prohibited by HO 8. There were an additional 58 fatalities during the same period associated with the operation of machine tools, including presses, metalworking lathes, and machines used for grinding and polishing. In addition NIOSH notes that injuries requiring at least 1 day away from work have also been associated with machine tools: 1,733 injuries with 7 median days away from work for bending, rolling, and shaping machines; 2,322 injuries with 4 median days away from work for grinding and polishing machines; and 4,183 injuries with 7 median days away from work for presses.

In 1951, the Department, in a publication entitled *Machine Tools and Their Hazards*, cited the following definition of machine tools provided by the National Machine Tool Builders' Association: ''Machine tools are power-driven complete metal-working machines, not portable by hand, having one or more tool- or work-holding devices, and used for progressively removing metal in the form of chips.'' Grinding, honing, and lapping machines are included in this classification, although the chips removed can be seen only under the microscope. Machine tools can range in size from small bench machines, such as a jeweler's lathe, to huge machines weighing 50 tons or more. The regulations do not provide a list of permitted machine tools, but the Department has for many years published the following list of common machine tools in its Child Labor Bulletin 101 (*Youth Employment Provisions for Nonagricultural Occupations under the Fair Labor Standards Act*): (1) Milling Function Machines: horizontal milling machines, vertical milling machines, universal milling machines, planer-type milling machines, gear hobbing machines, profilers, and routers; (2) Turning Function Machines: engine lathes, turret lathes, hollow spindle lathes, automatic lathes, and automatic screw machines; (3) Planing Function Machines: planers, shapers, slotters, broaches, keycasters, and hack saws; (4) Grinding Function Machines: grinders, abrasive wheels, abrasive belts, abrasive disks, abrasive points, polishing wheels, buffing wheels, stroppers, and lapping machines; and (5) Boring Function Machines: vertical boring mills, horizontal boring mills, jig borers, pedestal drills, radial drills, gang drills, upright drills, drill presses, centering machines, reamers, and honers.

As a different example, unlike HOs 5 and 8, HO 14 (Occupations involved in the operations of circular saws, band saws, and guillotine shears), specifically names three types of machines and then prohibits their operation by workers under 18 years of age regardless of the materials being processed. Section 570.65(b)(4) defines a circular saw to

mean a machine equipped with a thin steel disc having a continuous serious of notches or teeth on the periphery, mounted on shafting, and used for sawing materials. Section 570.65(b)(5) defines a *band saw* to mean a machine equipped with an endless steel band having a continuous series of notches or teeth, running over wheels or pulleys, and used for sawing materials. Section 570.65(b)(6) defines a *guillotine shear* to mean a machine equipped with a moveable blade operated vertically and used to shear materials. Because these definitions use the all-encompassing term ''materials,'' the application of HO 14 is not limited by the nature of the items being sawed or sheared. Therefore, a band saw used for sawing beef bones or meat and prohibited by HO 10 (Occupations in the operation of power-driven meat-processing machines and occupations involving slaughtering, meat packing or processing, or rendering), a band saw used for sawing cake and prohibited by HO 11 (Occupations involved in the operation of bakery machines), and a band saw used for sawing paper and prohibited by HO 12 (Occupations involved in the operation of paper-products machines, scrap paper balers, and paper box compactors) would all be concurrently prohibited by HO 14. The Department, in an NPRM being published in conjunction with and on the same day as this ANPRM, is proposing to expand the prohibitions of HO 14 to include the operation of power-driven chain saws, wood chippers, and reciprocating saws.

In its Report, NIOSH makes several recommendations concerning HOs that involve power-driven machines. The Report recommends that the Department expand HO 5 to include similar power-driven machines used to operate on materials other than wood and expand HO 8 to include the several types of machine tools that are not currently prohibited. Alternatively, the Report recommends that the Department revise HOs 5, 8, and 12 by merging them into a single or multiple HOs that address the function of the machine (i.e., cutting, shaping, forming, grinding, etc.) rather than the material being processed. The rationale for these recommendations is that metal, woodworking, and special material machinery are associated with substantial numbers of worker deaths and injuries. In addition, many of the hazards inherent in woodworking machines are found in machines that process other materials.

The Department is seeking information about the appropriateness and feasibility of adopting the Report recommendations detailed above concerning the expansion of HO 5 and HO 8. Information concerning whether 16- and 17-year-olds can safely operate metal-working machine tools—which are currently permitted by HO 8—is of particular interest. In addition, the Department is requesting comments on whether consideration should be given to the recommendation to ban certain power-driven machines based on their functions rather than the materials they are used to process. Could such a recommendation be implemented without encompassing in its blanket prohibitions equipment that 16- and 17-year-old workers could, under proper circumstances, safely operate? Such equipment might include, for example, power-driven countertop bagel slicers that meet the current definition of circular saws under HO 14, power-driven trimmers and shears used in landscaping, and computer-controlled lasers that are used to cut, with exacting precision, everything from textiles and metal to decorative mats used in the framing of artwork.

*C. Occupational Radiation Exposures*

HO 6 (Exposure to radioactive substances and to ionizing radiations) prohibits the employment of workers between the ages of 16 and 18 to perform any work in any workroom in which (1) radium is stored or used in the manufacture of self-luminous compound; (2) self-luminous compound is made, processed, or packaged; (3) self-luminous compound is stored, used, or worked upon; (4) incandescent mantles are made from fabric and solutions containing thorium salts, or are processed or packaged; and (5) other radioactive substances are present in the air in average concentrations exceeding 10 percent of the maximum permissible concentrations in the air recommended for occupational exposure by the National Committee on Radiation Protection, as set forth in the 40-hour week column of table one of the National Bureau of Standards Handbook No. 69 entitled ''Maximum Permissible Body Burdens and Maximum Permissible Concentrations of Radionuclides in Air and in Water for Occupational Exposure'' issued June 5, 1959. In addition, HO 6 prohibits the employment of such minors in any other work that involves exposure to ionizing radiations in excess of 0.5 rem per year.

HO 6 became effective on May 1, 1942 and was amended in 1949, 1957, and 1961. The study leading to the HO was initiated because a number of cases of radium poisoning, most of which resulted in death, were reported after the First World War. Many of these poisonings were of young women, and in a number of instances exposure began before the age of 18 years. The study reported that there were four principal industrial processes in which radioactive substances were found at that time: (1) The self-luminous dial-painting industry, which included the manufacture of self-luminous compound (containing radium or other radioactive material), and its application to watch, clock, and instrument dials and hands, and to other objects such as buttons or electric light fixtures; (2) the incandescent-mantel industry, which involved the impregnation of rayon with solutions of thorium nitrate and subsequent processing in the course of which radioactive emanation escaped into the air (incandescent mantles are mantles for gas, gasoline, or kerosene lamps that provide a brilliant white light because of the property of incandescence upon heating); (3) industrial radiography, in which radium was used for the production of radiographs by means of which imperfections in heavy castings could be detected; and (4) the refining of radium and mesothorium from radioactive ores and sands.

Although the original investigation did not cover the use of radium for medical purposes, HO 6 was amended in 1957 to include a prohibition regarding exposure to ionizing radiation and radiations emitted from sealed sources of radioactive materials such as reactors, accelerators, and X-ray machines, and to set permissible limits for exposure to radioactivity for minors under age 18. HO 6 defines *ionizing radiation* to mean alpha and beta particles, electrons, protons, neutrons, gamma and X-ray, and all other radiations that produce ionizations directly or indirectly, but does not include electromagnetic radiations other than gamma and X-ray.

HO 6 was amended in 1961 to bring the standards in line with changes reflected in Handbook No. 69 of the Bureau of Standards and with recommendations from the Federal Radiation Council. Although the provisions of the 1961 amendment are still contained in HO 6, many things have changed. In 1988, the National Bureau of Standards became the National Institute of Standards and Technology. Handbook 69, published by the National Bureau of Standards, was withdrawn and superseded by Report No. 022—*Maximum Permissible Body Burdens and Maximum Permissible Concentrations of Radionuclides in Air and in Water for Occupational Exposure* published by the National Council on Radiation Protection and Measurements

(NCRP). The NCRP, conceived in 1929 as The Advisory Committee on X-Ray and Radium Protection, was chartered by Congress in 1964. The mission of the NCRP includes the collection, analysis, development, and dissemination in the public interest of information and recommendations about protection against radiation and about radiation measurements.

NIOSH recommends in its Report that HO 6 be revised to reflect current risks to youth for occupational radiation exposures. Although employment opportunities in the self-luminous compound industries have mostly disappeared for all workers, NIOSH notes that youth are increasingly working in such settings as medical or veterinary offices where they may be exposed to ionizing radiation while assisting in diagnostic radiologic procedures. Equipment emitting ionizing radiation is also used in the security screening industry at such locations as airports, train and bus depots, and cargo loading docks. This industry has received widespread attention and has grown rapidly both in size as well as in technological innovation following the events of September 11, 2001.

NIOSH reports that ''risks of occupational exposures to ionizing radiation in youth stem from concerns about increased susceptibility for cell damage associated with adolescent growth and development, as well as concern about increased likelihood for disease development with exposures at an earlier age.'' The Report also notes that evidence for increased susceptibility of youth to ionizing radiation has prompted the OSHA and the U.S. Nuclear Regulatory Commission to set the maximum permissible exposure for youth at 10% of the permissible level for adults (0.5 rem per year and 0.3 rem per quarter).

The Report recommends that the prohibitions of HO 6 be revised to include the following wording: ''Working with any machine that generates ionizing radiation, including assisting in diagnostic or therapeutic radiology procedures involving radiation.'' The Report recommends that no apprentice or student-learner exemption be created because of the increased risk for youth and research showing that radiographic equipment and procedures frequently do not meet national standards.

The Department is seeking information from the public regarding the feasibility of adopting the NIOSH recommendation. Should a prohibition be adopted that does not specify a maximum permissible annual exposure such as the 0.5 rem per year currently contained in the HO? If a maximum permissible exposure should be specified for young workers, what level of exposure is appropriate? In addition, the Department is interested in documenting the existence of safeguards employers and employees can utilize to ensure exposures to ionizing radiation are kept to permissible levels.

*D. Petroleum and Natural Gas Extraction*

HO 9 (Occupations in connection with mining, other than coal) generally prohibits the employment of 16- and 17-year-olds in occupations in connection with mining, other than coal mining. HO 3 specifically bans the employment of such minors in coal mining occupations.

Section 570.60(b) defines the term *all occupations in connection with mining, other than coal*, to mean all work performed underground in mines and quarries; on the surface at underground mines and underground quarries; in or about open-cut mines, open quarries, clay pits, and sand and gravel operations; at or about placer mining operations; at or about dredging operations for clay, sand or gravel; at or about bore-hole mining operations; in or about all metal mills, washer plants, or grinding mills reducing the bulk of the extracted minerals; and at or about any other crushing, grinding, screening, sizing, washing or cleaning operations performed upon the extracted minerals except where such operations are performed as a part of a manufacturing process. The term does not include work performed in subsequent manufacturing or processing operations, such as work performed in smelters, electro-metallurgical plants, refineries, reduction plants, cement mills, plants where quarried stone is cut, sanded and further processed, or plants manufacturing clay glass or ceramic products. Nor does the term include work performed in connection with coal mining, in petroleum production, in natural-gas production, or in dredging operations that are not part of a mining operation, such as dredging for construction or navigation purposes.

The NIOSH Report recommends that the Department expand the prohibitions of HO 9 to include all work performed in connection with petroleum and natural gas extraction because that industry suffers a high rate of occupational fatalities and large numbers of serious injuries. NIOSH reports that the 1992–1997 fatality rate for oil and gas extraction—25.8 per 100,000 workers—was nearly five times the fatality rate among workers in all industries. Between 1980 and 1989, the National Traumatic Occupational Fatality Surveillance System identified 10 fatalities of workers under age 18 in the oil and gas extraction sector, although no additional fatalities were reported through the date of the Report. In addition, the Survey of Occupational Injuries and Illnesses reflects that in 1997, the median number of days away from work due to injury or illness in this sector was 13, almost three times the median number of days reported for all workers.

The Department is seeking information from the public regarding the feasibility of implementing the Report's recommendation to expand the prohibitions of HO 9 to include all work in connection with petroleum and natural gas extraction. Are minors currently employed in this industry and, if so, what occupations do they perform? If the recommendation were adopted, how extensive should the prohibition be? Should the prohibition be industry-wide and cover the refining of petroleum and the processing of natural gas? Are there some activities within the industry that 16- and 17-year-olds may safely perform? If so, what are they? In keeping with the information discussed in Item A of this ANPRM, if HO 9 were expanded to prohibit work in petroleum and natural gas extraction would an exemption for student-learners and apprentices be appropriate for such work?

*E. Occupations in Construction*

Although Reg. 3 bans the employment of 14- and 15-year-olds in almost all construction occupations and does not permit such youth to work on construction sites, there is no such blanket prohibition regarding the employment of 16- and 17-year-olds. Several HOs, however, contain prohibitions that limit the tasks and types of work that minors may perform in the construction industry.

HO 1 (Occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive compounds), among other things, generally prohibits the employment of 16- and 17-year-olds in occupations in or about any non-retail establishment where explosives or materials containing explosive compounds are stored. This same HO also prohibits the employment of such minors in all occupations involved in the manufacturing, transporting, or handling of primers and all occupations involved in the loading, inspecting, packing, shipping, and storage of blasting caps. HO 5 (Occupations involved in the operation of power-

driven woodworking machines) prohibits 16- and 17-year-olds from operating, including setting up, adjusting, repairing, oiling, and cleaning, all fixed or portable power-driven machines or tools used or designed for cutting, shaping, forming, surfacing, nailing, stapling, wire stitching, fastening, or otherwise assembling, pressing, or printing wood or veneer. HO 7 (Occupations involved in the operation of power-driven hoisting apparatus) generally prevents these same minors from being employed to operate elevators, cranes, derricks, hoists, and high-lift trucks, including forklifts and bobcat loaders. HO 7 also prohibits such minors from assisting in the operation of cranes, derricks, or hoists performed by crane hookers, crane chasers, hookers-on, riggers, riggers helpers, and similar occupations. The use and operation of elevators, which are often used in the construction of high-rise structures, are also prohibited by HO 7. HO 8 (Occupations involved in the operation of power-driven metal forming, punching, and shearing machines) prohibits the employment of 16- and 17-year-olds in occupations involving the operation or the assisting in the operation of power-driven metal rolling, pressing, punching, bending, hammering, and shearing machines. HO 14 (Occupations involved in the operations of circular saws, band saws, and guillotine shears) prohibits the employment of 16- and 17-year-olds as operators or helpers on circular saws, band saws, and guillotine shears. The prohibitions of this HO apply regardless of the material being processed (wood, metal, plastic, foam rubber, etc.) and extend to the tasks of setting up, adjusting, repairing, oiling, and cleaning the named equipment.

HO 15 (Occupations involved in wrecking, demolition, and shipbreaking operations) prohibits 16- and 17-year-olds from performing all work, including clean-up and salvage work, performed at the site of the total or partial razing, demolishing, or dismantling of a building, bridge, steeple, tower, chimney, other structure, ship, or other vessel. HO 16 (Occupations in roofing operations and on or about a roof) prohibits the employment of 16- and 17-year-olds in all roofing operations. Roofing operations, as defined in § 570.67(b), means all work performed in connection with the installation of roofs, including metal work such as flashing, and applying weatherproofing materials and substances to roofs of buildings or other structures. The term also includes all jobs on the ground related to roofing operations such as roofing laborer, roofing helper, materials handler, and tending a tar heater. HO 16 was revised in 2004 (69 FR 57404) to also prohibit 16- and 17-year-olds from performing any work on or about a roof. The term *on or about a roof* includes all work performed upon or in close proximity to a roof, including carpentry and metal work, alterations, additions, maintenance and repair, including painting and coating of existing roofs; the construction of the sheathing or base of roofs (wood or metal), including roof trusses or joists; gutter and downspout work; the installation and servicing of television and communication equipment such as cable and satellite dishes; installing and servicing heating, ventilation, and air conditioning equipment or similar appliances attached to roofs; and any similar work that is required to be performed on or about roofs. HO 17 (Occupations in excavation operations) generally prohibits the employment of 16- and 17-year-olds in excavating, working in, or backfilling trenches; excavating for buildings or other structures; working within tunnels prior to the completion of all driving and shoring operations; and working within shafts prior to the completion of all sinking and shoring operations.

HOs 5, 8, 14, 16, and 17 contain exemptions that, under specified terms and conditions, permit bona-fide student-learners and apprentices to perform otherwise prohibited tasks. In addition, HO 4 (Logging occupations and occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage stock mill), which generally prohibits the employment of 16- and 17-year-olds in any occupations within the logging and sawmill industries, does permit such youth to work in the construction, operation, repair, or maintenance of living and administrative quarters of logging camps. This same HO permits 16- and 17-year-olds to work in the repair or maintenance of roads, railroads, and flumes-work that could possibly fall within a definition of construction. In addition, HO 9 (Occupations in connection with mining, other than coal), which generally prohibits the employment of 16- and 17-year-olds in mining operations, does permit such youth to work in repair maintenance shops not located underground, maintain living quarters, repair and maintain roads, and build and maintain sections of railroad tracks under specified conditions. The construction activities permitted by HO 4 and HO 9 may be performed by 16- and 17-year-olds only when the tasks do not violate the provisions of any other HO. For example, although HO 4 would allow a 16-year-old to be employed to construct the living quarters of a logging camp, such a minor could not operate a power-driven circular saw to cut lumber because such work is prohibited by both HO 5 and HO 14. That same youth could not help with the installation or repair of the roof of such living quarters because such work is prohibited by HO 16.

NIOSH recommends that the Department establish a new HO prohibiting the employment of 16- and 17-year-olds in all work in construction occupations as defined by Bureau of Census occupations codes 553–599, 866, and 869 as those codes existed prior to 2000. NIOSH recommends that a student-learner and apprentice exemption not be incorporated into the new HO.

The occupations that NIOSH recommends be prohibited by the new HO are brickmasons; stonemasons; tile setters (hard and soft); carpet installers; carpenters; drywall installers; electricians; electrical power installers and repairers; painters (construction and maintenance); paperhangers; plasterers; plumbers; pipefitters; steamfitters; concrete and terrazzo finishers; glaziers; insulation workers; paving, surfacing and tamping equipment operators; roofers; sheetmetal duct installers; structural metal workers; construction workers not elsewhere classified; helpers, construction trades; and construction laborers. NIOSH also recommends that supervisors and apprentices associated with the occupations listed above be included within the scope of the new HO's prohibitions. The NIOSH Report makes additional recommendations regarding the creation of other new HOs that would affect youth employment in construction. These include HOs that would prohibit the employment of 16- and 17-year-olds to work at heights of more than six feet; operate heavy machinery including earthmoving equipment used in excavation, landscaping operations, and road construction and maintenance; welding; and work requiring the use of respiratory protection.

The rationale for creating a new HO that would prohibit the employment of 16- and 17-year-olds in construction operations is that workers in many of the construction trades have extremely high rates of occupational injury fatalities and sustain large numbers of nonfatal injuries, many of a severe nature. NIOSH notes that despite a number of existing HOs that address

specific types of hazardous construction, as discussed above, construction work accounts for a substantial number of young worker deaths. In addition, the Report states that construction work is also associated with adverse health effects from exposure to hazardous substances and from musculoskeletal disorders. According to NIOSH, some construction occupations that have relatively low fatal injury rates are associated with exposure to other agents that may have long-term health effects. Examples provided include the exposure to asbestos among insulation workers, the exposure to lead and solvents among painters, and the exposure to silica among plasterers and drywall installers. NIOSH also states that because construction sites frequently include hazards outside the control of individual workers or contractors, an apprentice and student-learner exemption is not recommended.

The Department is aware that the construction industry has for many years provided both temporary and career exploration employment opportunities for many youth. The Department's Bureau of Labor Statistics (BLS) reports that in 2004 there were approximately 286,000 youth between the ages of 16 and 19 employed in the construction industry. In addition, the construction industry has traditionally been one of the higher-paying industries in the U.S., with average hourly earnings of $20.40 reported by BLS in October 2006.

The construction industry has many components, including residential, building (non-residential), highway, and heavy sectors. In addition, demolition, maintenance, repair, and redecorating work often fall within the general classification of construction. Before the Department can address the Report recommendations concerning construction occupations, it is requesting information from the public regarding the appropriateness and feasibility of implementing such a comprehensive and industry-wide prohibition. Can 16- and 17-year-olds, under specific conditions, be safely employed in certain sectors of the construction industry? If so, under what conditions?

The Department is also interested in obtaining information about existing strategies that make certain construction jobs safe for minors to perform. Can apprenticeship and student-learner programs be designed and delivered to better protect young workers and keep them safe on the job? If so, should the written standards or requirements of student-learner and apprenticeship programs addressing construction occupations have a greater emphasis on safety training than similar programs covering other industries?

*F. Hydraulic Grease Racks*

HO 7 (Occupations involved in the operation of power-driven hoisting apparatus) generally prohibits 16- and 17-year-olds from employment in occupations that involve the work of: (1) Operating an elevator, crane, derrick, hoist, or high-lift truck, except that such youth may operate unattended automatic operation passenger elevators and electric or air operated hoists not exceeding one ton capacity; (2) riding on a manlift or on a freight elevator, except a freight elevator operated by an assigned operator; and (3) assisting in the operation of a crane, derrick, or hoist performed by crane hookers, crane chasers, hookers-on, riggers, rigger helpers, and like occupations.

Over the years, the Department has received inquiries as to whether HO 7 would permit the employment of 16- and 17-year-olds to operate hydraulic grease racks—apparatus usually found in gasoline service stations and automobile repair shops and used to raise and to lower vehicles from ground level for servicing the vehicles. The Department has been consistent in its response to such inquires; because the original study that led to the promulgation of HO 7 did not include the operation of such grease racks, HO 7 does not prohibit the operation of such equipment. Although correct, this position does not take into consideration whether such grease racks can be safely operated by 16- and 17-year-olds. Reg. 3, which details the occupations 14- and 15-year-olds may and may not perform, specifically prohibits such youth from the operation or tending of any hoisting apparatus (see § 570.33(b)).

Accordingly, the Department is seeking information from the public as to whether such grease racks can be safely operated by 16- and 17-year-olds. Is the safe operation of such equipment affected by the size and lifting capacities of such equipment? In keeping with Item A of this ANPRM, if the operation of such grease racks should be prohibited, would a student-learner or apprenticeship exemption be warranted?

*G. General*

In soliciting comments on the above aspects of the child labor regulations, the Department is specifically interested in data, reports, cost-benefit analyses, studies, and other documentation addressing the positions taken or otherwise relating to the Department's objective to develop updated, realistic health and safety standards for today's young workers that are consistent with the established national policy of balancing the benefits of employment opportunities for youth with the necessary and appropriate safety protections.

This document was prepared under the direction and control of Paul DeCamp, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

**List of Subjects in 29 CFR Part 570**

Child labor, Child labor occupations, Employment, Government, Intergovernmental relations, Investigations, Labor, Law enforcement, Minimum age.

Signed at Washington, DC, on this 10th day of April, 2007.

**Victoria A. Lipnic,**

*Assistant Secretary, Employment Standards Administration.*

**Paul DeCamp,**

*Administrator, Wage and Hour Division.*

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## DEPARTMENT OF LABOR

### Wage and Hour Division

### 29 CFR Part 570

**RIN 1215–AB57**

## Child Labor Regulations, Orders and Statements of Interpretation

**AGENCY:** Wage and Hour Division, Employment Standards Administration, Labor.

**ACTION:** Notice of proposed rulemaking and request for comments.

**SUMMARY:** The Department of Labor (Department or DOL) is proposing to revise the child labor regulations in order to implement an amendment to the Fair Labor Standards Act's child labor provisions, contained in the Department of Labor Appropriations Act, 2004 (Pub. L. 108–199), which authorizes under specified conditions the employment of certain youth between the ages of 14 and 18 years inside and outside of places of business that use machinery to process wood products.

The Department is proposing to revise Child Labor Regulation No. 3, subpart C of 29 CFR part 570, which governs the employment of 14- and 15-year-olds in nonagricultural occupations by revising the lists of occupations and industries

in which such youth may and may not be employed. The Department is also proposing to clarify, but not change, the standards addressing the permitted periods and conditions under which such youth may be employed and to create a limited exemption from those standards for certain academically motivated youth enrolled in work-study programs.

The Department is also proposing to revise several of the nonagricultural Hazardous Occupations Orders (HOs) to implement specific recommendations made by the National Institute for Occupational Safety and Health in its 2002 report entitled National Institute for Occupational Safety and Health (NIOSH) Recommendations to the U.S. Department of Labor for Changes to Hazardous Orders. The HOs affected by this proposal concern occupations involved with logging and sawmilling; meat processing; and the operation of power-driven hoisting equipment, bakery equipment, compacting and baling equipment, and certain cutting, shearing, and guillotining equipment.

In addition, the Department is proposing to provide clarity by incorporating into the regulations three long-standing enforcement positions regarding the cleaning of power-driven meat processing equipment, the operation of certain power-driven pizza-dough rollers, and the definition of high-lift trucks. The Department is also proposing to expand the HO that prohibits youth from operating power-driven circular saws, band saws, and guillotine shears to include prohibitions concerning the operation of power-driven chain saws, wood chippers, and reciprocating saws.

Finally, the Department proposes to revise subpart G of the child labor regulations, which is entitled General Statements of Interpretation of the Child Labor Provisions of the Fair Labor Standards Act of 1938, as Amended. The proposal would incorporate into this subpart all the regulatory changes made since this subpart was last revised in 1971.

**DATES:** Comments are due on or before July 16, 2007.

**ADDRESSES:** You may submit comments, identified by RIN 1215–AB57, by either one of the following methods:

- *Electronic comments, through the Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210.

*Instructions:* Please submit one copy of your comments by only one method. All submissions received must include the agency name and Regulatory Information Number (RIN) identified above for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* or to submit them by mail early. For additional information on submitting comments and the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* For access to the docket to read background documents or comments received, go to the Federal eRulemaking Portal at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Arthur M. Kerschner, Jr., Office of Enforcement Policy, Child Labor and Special Employment Team, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3510, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–0072 (this is not a toll free number). Copies of this notice of proposed rulemaking may be obtained in alternative formats (Large Print, Braille, Audio Tape, or Disc), upon request, by calling (202) 693–0023. TTY/TDD callers may dial toll-free (877) 889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of regulations issued by this agency or referenced in this notice may be directed to the nearest Wage and Hour Division District Office. Locate the nearest office by calling the Wage and Hour Division's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto the Wage and Hour Division's Web site for a nationwide listing of Wage and Hour District and Area Offices at: *http://www.dol.gov/esa/contacts/whd/america2.htm.*

**SUPPLEMENTARY INFORMATION:**

## I. Electronic Access and Filing Comments

*Public Participation:* This notice of proposed rulemaking is available through the **Federal Register** and the *http://www.regulations.gov* Web site. You may also access this document via the WHD home page at *http://www.wagehour.dol.gov.* To comment electronically on federal rulemakings, go to the Federal eRulemaking Portal at *http://www.regulations.gov,* which will allow you to find, review, and submit comments on federal documents that are open for comment and published in the **Federal Register**. Please identify all comments submitted in electronic form by the RIN docket number (1215–AB57). Because of delays in receiving mail in the Washington, DC area, commenters should transmit their comments electronically via the Federal eRulemaking Portal at *http://www.regulations.gov,* or submit them by mail early to ensure timely receipt prior to the close of the comment period. Submit one copy of your comments by only one method.

## II. Background

The child labor provisions of the Fair Labor Standards Act (FLSA) establish a minimum age of 16 years for employment in nonagricultural occupations, but the Secretary of Labor is authorized to provide by regulation for 14- and 15-year-olds to work in suitable occupations other than manufacturing or mining, and during periods and under conditions that will not interfere with their schooling or health and well-being. The FLSA provisions permit 16- and 17-year-olds to work in the nonagricultural sector without hours or time limitations, except in certain occupations found and declared by the Secretary to be particularly hazardous, or detrimental to the health or well-being of such workers.

The regulations for 14- and 15-year-olds are known as Child Labor Regulation No. 3 (Reg. 3) and are contained in subpart C of part 570 (29 CFR 570.31–.38). Reg. 3 limits the hours and times of day that such minors may work and identifies occupations that are either permitted or prohibited for such minors. Under Reg. 3, 14- and 15-year-olds may work in certain occupations in retail, food service, and gasoline service establishments, but are not permitted to work in certain other occupations (including all occupations found by the Secretary to be particularly hazardous for 16- and 17-year-olds). Reg. 3, originally promulgated in 1939, was revised to reflect the 1961 amendments to the FLSA, which extended the Act's coverage to include enterprises engaged in commerce or the production of goods for commerce. Because of the statutory amendments, the FLSA's child labor protections became applicable to additional areas of employment for

young workers in retail, food service, and gasoline service establishments.

The regulations concerning nonagricultural hazardous occupations are contained in subpart E of 29 CFR part 570 (29 CFR 570.50–.68). These Hazardous Occupations Orders (HOs) apply on either an industry basis, specifying the occupations in a particular industry that are prohibited, or an occupational basis, irrespective of the industry in which the work is performed. The seventeen HOs were adopted individually during the period of 1939 through 1963. Some of the HOs, specifically HOs 5, 8, 10, 12, 14, 16, and 17, contain limited exemptions that permit the employment of 16- and 17-year-old apprentices and student-learners under particular conditions to perform work otherwise prohibited to that age group. The terms and conditions for employing such apprentices and student-learners are detailed in § 570.50(b) and (c).

Because of changes in the workplace, the introduction of new processes and technologies, the emergence of new types of businesses where young workers may find employment opportunities, the existence of differing federal and state standards, and divergent views on how best to balance scholastic requirements and work experiences, the Department has long been reviewing the criteria for permissible child labor employment. In this review, the Department published a Notice of Proposed Rulemaking (NPRM) in 1982, an NPRM in 1990, a Final Rule in 1991, both an Advance Notice of Proposed Rulemaking (ANPRM) and an NPRM in 1994, a Final Rule in 1995, an NPRM in 1999, and a Final Rule in 2004.

On July 16, 1982, an NPRM was published in the **Federal Register** (47 FR 31254) which proposed to revise several elements of Reg. 3, including the permissible hours and times of employment for 14- and 15-year-olds and the types of cooking operations those minors would be permitted to perform. The NPRM generated considerable public interest, mostly relating to the expansion of the hours and times of work for this age group. The Department subsequently suspended the proposal from further consideration and no final rule was implemented.

The Department continued to receive suggestions from the public that certain changes should be made to the child labor regulations on a number of issues. In 1987, the Department established a Child Labor Advisory Committee (CLAC) composed of 21 members representing employers, education, labor, child guidance professionals, civic groups, child advocacy groups, state officials, and safety groups. The mission of the CLAC was to give advice and guidance in developing possible proposals to change existing standards. After reviewing a number of issues, the CLAC proposed making certain changes to the child labor regulations. The Department considered the CLAC's suggestions, as well as suggestions received from the public as noted above, and published an NPRM in October 1990, proposing changes to three HOs (55 FR 42612). In December 1991, the Department promulgated a Final Rule which revised the three HOs (56 FR 58626).

The Department continued to review the child labor regulations and on May 13, 1994, in an effort to accumulate data concerning all aspects of the provisions, published both an NPRM (59 FR 25164) and an ANPRM (59 FR 25167). The NPRM proposed to exempt 14- and 15-year-olds from Reg. 3 hours standards when employed under certain restrictions as sports attendants for professional sports teams, to standardize the Reg. 3 process for issuing occupational variances for Work Experience and Career Exploration Program (WECEP) participants, to remove an outdated exemption for enrollees in certain work training programs, and to revise the process by which HOs are promulgated. A Final Rule on these issues was published April 17, 1995 (60 FR 19336).

The 1994 ANPRM requested public comment on several specific topics as well as all aspects of the child labor provisions. Several individuals and organizations submitted comments. The National Institute for Occupational Safety and Health (NIOSH) provided the Department with epidemiological data on a number of issues related to both Reg. 3 and the HOs. NIOSH also provided the Department with statistics regarding occupational injuries and made several recommendations. A number of child guidance professionals, educators, unions, employer associations, and child labor advocates also commented and made various recommendations.

Congress has amended the child labor provisions of the FLSA three times since 1996. The Compactors and Balers Safety Standards Modernization Act, Pub. L. 104–174 (Compactor and Baler Act), was signed into law on August 6, 1996. This legislation added section 13(c)(5) to the FLSA, permitting minors 16 and 17 years of age to load, but not operate or unload, certain scrap paper balers and paper box compactors when certain requirements are met. The Drive for Teen Employment Act, Pub. L. 105–334, was signed into law on October 31, 1998. This legislation added section 13(c)(6) to the FLSA, prohibiting minors under 17 years of age from driving automobiles and trucks on public roadways on-the-job and establishing the conditions and criteria for 17-year-olds to drive automobiles and trucks on public roadways on-the-job. The Department of Labor Appropriations Act, 2004, Pub. L. 108–199, amended the FLSA by creating a limited exemption from the youth employment provisions for minors 14 to 18 years of age who are excused from compulsory school attendance beyond the eighth grade. The exemption, contained in section 13(c)(7) of the FLSA, allows eligible youth, under specific conditions, to be employed inside and outside of places of business that use machinery to process wood products, but does not allow such youth to operate or assist in operating power-driven woodworking machines. This exemption overrides the FLSA's formerly complete prohibition on the employment of 14- and 15-year-olds in manufacturing occupations contained in section 3(l).

The Department published an NPRM in the **Federal Register** on November 30, 1999 (64 FR 67130), inviting comments on revisions of regulations to implement the 1996 and 1998 amendments and to update certain regulatory standards. The Compactor and Baler Act affected the HO 12 standards (Occupations involved in the operation of paper-products machines) (29 CFR 570.63) and certain other related regulations; amendments of those regulations were proposed. The Drive for Teen Employment Act affected the HO 2 standards (Occupations of motor-vehicle driver and outside helper) (29 CFR 570.52); an amendment of that regulation was proposed. As a result of its ongoing review of the child labor provisions, the Department also proposed changes to HO 1 (Occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components) (29 CFR 570.51), HO 16 (Occupations in roofing operations) (29 CFR 570.67), the Reg. 3 limitations on cooking (29 CFR 570.34), and 29 CFR 570.6(b)(1) which deals with the disposition of a Certificate of Age when the named individual's employment ends. A Final Rule, addressing the above issues and implementing procedural changes dealing with administrative hearings and appeals of child labor civil money penalties, was issued on December 16, 2004 (69 FR 75382).

In 1998, the Department provided funds to NIOSH to conduct a comprehensive review of scientific literature and available data in order to assess current workplace hazards and the adequacy of the current youth employment HOs to address them. This study was commissioned to provide the Secretary with another tool to use in her ongoing review of the youth employment provisions, and of the hazardous occupations orders in particular. The report, entitled National Institute for Occupational Safety and Health Recommendations to the U.S. Department of Labor for Changes to Hazardous Orders (hereinafter referred to as the NIOSH Report or the Report), was issued in July of 2002. The Report, which makes 35 recommendations concerning the existing nonagricultural HOs and recommends the creation of 17 new HOs, also incorporated the comments NIOSH submitted in response to the 1999 NPRM. The report is available for review on the Department's YouthRules! Web site at *http://www.youthrules.dol.gov/resources.htm.*

The Department recognizes NIOSH's extensive research efforts in compiling and reviewing this data. However, it has cautioned readers about reaching conclusions and expecting revisions to the existing HOs based solely on the information in the Report. In the Report, NIOSH itself recognized the confines of its methodology and included appropriate caveats about limitations in available data and gaps in research. Of those limitations, the following are worth noting. The NIOSH Report recommendations are driven by information on high-risk activities for all workers, not just patterns of fatalities and serious injuries among young workers. There is little occupational injury, illness, and fatality data available regarding minors less than 16 years of age. In addition, such data for youth 16 and 17 years of age tend to be mixed with that of older workers whose employment is not subject to the youth employment provisions of the FLSA. Also, available occupational injury, illness, fatality, and employment data on the specific operations in the specific industries covered by the NIOSH Report recommendations tend to be combined with data on other operations and/or industries. In some cases, this may result in a diminution of the risk by including less risky operations and industries in the employment estimates. In other cases, the risk may be exaggerated by including more dangerous operations/industries in the injury, illness, or fatality estimates.

In addition, as NIOSH was tasked with examining issues within the framework of the current HOs only, the Report did not consider the extent to which fatalities occur despite existing HOs, Occupational Safety and Health Administration (OSHA) standards, or state laws prohibiting the activity. If fatalities result from recognized illegal activities, such as working with fireworks or a power-driven circular saw, the best strategy for preventing future injuries may not be to revise the regulations but to increase compliance with existing laws through public awareness initiatives, targeted compliance assistance efforts, and stepped-up enforcement activities. The Report also did not consider potential approaches for decreasing workplace injuries that provide an alternative to a complete ban on employment, such as safety training, increased supervision, the use of effective personal protective equipment, and strict adherence to recognized safe working practices.

Though cognizant of the limitations of the Report, the Department places great value on the information provided by NIOSH. Since receiving the Report, the Department has conducted a detailed review and has met with various stakeholders to evaluate and prioritize each recommendation for possible regulatory action consistent with the established national policy of balancing the benefits of employment opportunities for youth with the necessary and appropriate safety protections. The 2004 Final Rule addressed six of the recommendations.

As an adjunct to its review of these issues the Department contracted with a private consulting firm, SiloSmashers, Inc., to construct a model that, using quantitative analysis, would help determine the costs and benefits associated with implementing, or not implementing, each of the Report's recommendations. The SiloSmashers report, Determination of the Costs and Benefits of Implementing NIOSH Recommendations Relating to Child Labor Hazardous Orders, was completed in November 2004 and covers 34 of the NIOSH HO recommendations in agricultural and nonagricultural occupations, as well as several occupations or activities not presently addressed by an existing HO.

The methodology used by SiloSmashers was to compare the direct costs and benefits of implementing or revising an HO, as recommended by NIOSH, with the costs and benefits of not implementing or revising the HO based on the NIOSH recommendations. Each SiloSmashers analysis was conducted on a mutually exclusive basis to yield a net present value (NPV). SiloSmashers defines NPV as ''the discounted dollar value of an investment across the expected planning horizon. As a dollar figure, NPV is presented at the full value level for each implementation approach (implementing versus not implementing) as well as at the incremental approach (the difference between implementing versus not implementing). As a comparison tool and under the incremental approach, the higher the NPV, the higher the expected value of implementation.'' The NPVs reported by SiloSmashers for each of the NIOSH recommendations addressing the current nonagricultural HOs range from a negative $9,537,000 to a positive $113,556,000.

Although the SiloSmashers report includes both a quantitative analysis and a qualitative analysis of each NIOSH recommendation, the Department is concerned that some readers might try to rank each recommendation solely on the basis of the quantitative results (i.e., on the basis of the NPVs) listed in the HO Comprehensive Summary. This simplistic ranking would not be appropriate due to several constraints inherent in the methodology adopted by SiloSmashers, especially the lack of reliable and pertinent data.

In addition, not only was the methodology used by SiloSmashers to generate the NPVs subject to the same data limitations faced by NIOSH regarding the employment, fatality, and injury rates of young workers, but it also raises additional concerns. First, if SiloSmashers were unable to identify any minors who were fatally injured while performing work that was the subject of the NIOSH recommendation being examined, even if many adult workers were killed while performing that exact same work, the analysis would reflect that implementation of the recommendation would have no benefit in reducing occupational hazards to youth. Such an assumption is contrary to the Department's long-held position that work which is dangerous for adults is inherently dangerous for youth. For example, because SiloSmashers found no deaths of youth resulting from the operation of chainsaws, it concluded that implementation of the NIOSH recommendation to expand HO 14 to prohibit the operation of chainsaws on all materials, and not just on wood and wood products as currently prohibited by HOs 4 and 5, would have no impact on the number of occupational fatalities suffered by 16- and 17-year-olds. The Department strongly disagrees with this conclusion. NIOSH based its

recommendation on data that demonstrate that chainsaws continue to be the source of substantial numbers of fatalities as well as nonfatal injuries which may be unusually severe. Accordingly, the Department believes that the operation of chainsaws is inherently dangerous for young workers, regardless of the lack of youth-specific injury and fatality data. The Department agrees with NIOSH that the prudent course of action is to prohibit the use of chainsaws by all workers under the age of 18.

Secondly, when youth fatalities were identified, the values the SiloSmashers report placed on the lives saved and injuries prevented under the various NIOSH Report recommendations are based on estimates published in economic literature that are based on adult populations. Applying those estimates to children may result in an underestimate of the risk to children because the susceptibility of a developing child's body to illness, injury, or death will most likely differ from that of the fully developed body of an adult. These differences are important in any such analysis, as society tends to place a higher value on the lives of children compared to adults. By their very nature, child labor laws are intended to protect children from situations that are permissible for adults. Thus, even without some of the other data limitations discussed above, the estimates presented in the SiloSmashers report consistently understate the benefits of implementing the NIOSH recommendations. Because of the data limitations and flaws in methodology, the Department does not consider the individual analysis prepared by SiloSmashers to be influential for rulemaking purposes.

It was the Department's intention that the SiloSmashers analysis would help in identifying and defining the scope of each recommendation and provide additional information to consider after the decision was made to implement or not to implement a particular recommendation. This is in keeping with the ultimate recommendation made in the SiloSmashers report that the Department consider both quantitative and qualitative factors, as well as other internal and external factors-such as budget constraints, priorities established by the Department or Administration, additional stakeholder input, etc.—when determining which NIOSH Report recommendations to implement. The entire report provided to the Department by SiloSmashers can be viewed on the Internet at *http://www.youthrules.dol.gov/clri/Final_Report.pdf.*

As mentioned, the NIOSH Report made 35 recommendations concerning the existing nonagricultural HOs. The Department addressed six of those recommendations in the 2004 Final Rule (see 69 FR 75382; Dec. 16, 2004). The Department has decided that, in this first proposal since the dissemination of the NIOSH Report, it will address 25 of the remaining 29 Report recommendations dealing with existing nonagricultural hazardous occupations orders. The Department believes there is sufficient data to support implementing its proposals. In an attempt to acquire additional data in order to address the remaining nonagricultural NIOSH recommendations, as well as pursue items not explored in the NIOSH Report, the Department is publishing an ANPRM concurrently with this NPRM.

The NIOSH Report also makes 11 recommendations that impact the current agricultural HOs as well as 17 recommendations that urge the creation of new HOs. The Department, in the ANPRM being published on the same day as this NPRM, is requesting public comment on the feasibility of one of those recommendations regarding the creation of an HO that would prohibit the employment of youth in construction occupations. The Department is continuing to review the remaining recommendations, but for administrative reasons excluded them from its consideration of the NIOSH proposals covered in this phase to keep the size and scope manageable. Their absence from this current round of rulemaking is not an indication that the Department believes them to be of less importance or that they will not be given the same level of consideration as the recommendations addressing the current nonagricultural HOs.

## III. Proposed Regulatory Revisions

### *A. Occupations That Are Prohibited for the Employment of Minors Between the Ages of 14 and 16 Years of Age (29 CFR 570.31–.34)*

Section 3(l) of the FLSA, defining *oppressive child labor,* expressly prohibits children under the age of 16 from performing any work other than that which the Secretary of Labor permits, by order or regulation, upon finding that it does not interfere with their schooling or health and well-being (see 29 U.S.C. 203(l), see also 29 CFR 570.117–.119). Before 14- and 15-year-olds may legally perform work covered by the FLSA, the Act requires that the work itself be exempt, or that the Secretary determines that the work to be performed does not constitute oppressive child labor. The Secretary's declarations of what forms of labor are not deemed oppressive for children between the ages of 14 and 16 appear in Reg. 3 (29 CFR 570.31–.38).

Reg. 3 identifies a number of occupations or activities that are specifically prohibited for these minors without regard to the industry or the type of business in which their employer is engaged (*e.g.*, operating or tending any power-driven machinery other than office machines, see § 570.33(b)). Reg. 3 also incorporates by reference all of the prohibitions contained in the Hazardous Occupations Orders (29 CFR 570.50–.68), which identify occupations that are ''particularly hazardous'' and, therefore, banned for 16- and 17-year-olds (*e.g.*, occupations involved in the operation of power-driven metal forming, punching, and shearing machines, see § 570.33(e)).

As previously mentioned, Reg. 3 was revised to reflect the 1961 amendments to the FLSA, which by extending the Act's coverage to include enterprises engaged in commerce or the production of goods for commerce, brought more working youth employed in retail, food service, and gasoline service establishments within the protections of the Act. Section 570.34(a) expressly authorizes the performance of certain activities by 14- and 15-year-olds in retail, food service, and gasoline service establishments, while § 570.34(b) details those activities that 14- and 15-year-olds are expressly prohibited from performing in such establishments. For example, clerical work, cashiering, and clean-up work are authorized, whereas ''all work requiring the use of ladders, scaffolds, or their substitutes'' is prohibited. These special rules apply only in the designated types of business.

Since 1961, new, positive, and safe employment opportunities have opened up for youth in industries other than retail, food service, and gasoline service that Reg. 3 does not currently specifically address. Jobs in such areas as state and local governments, banks, insurance companies, advertising agencies, and information technology firms all normally fall outside of the declarations made in Reg. 3. Because these jobs are not specifically permitted by § 570.33, they are prohibited. There has been some confusion about this over the years. Some employers have believed that 14- and 15-year-old are permitted to be employed in any industry or occupations not expressly prohibited by Reg. 3, or that any employer in any industry may employ such youth in the occupations permitted

by § 570.34(a). However, where these jobs are not located in retail, food service, or gasoline service establishments, the provisions of § 570.34 (both authorizations and prohibitions) do not apply to the employment of 14- and 15-year-olds. The exception to this rule is where there is some discrete operation or division that could legitimately be characterized as such an establishment and therefore would be subject to these rules (*e.g.*, minors employed in a food service operation at a city park or a publicly owned sports stadium). The Department's interpretation of Reg. 3 would prohibit employers such as state and local governments, banks, insurance companies, advertising agencies, and information technology firms from employing 14- and 15-year-old workers in any jobs other than those that occur in those discrete operations or divisions that may be characterized as retail, food service, or gasoline service establishments.

In 2004, in recognition of the importance of youth employment programs operated by public sector employers that provide safe and meaningful developmental opportunities for young people, and in response to specific requests received from two municipalities, the Department adopted an enforcement position that permits state and local governments to employ 14- and 15-year-old minors under certain conditions. Consistent with its enforcement position, the Department has exercised its prosecutorial discretion, as authorized by 29 U.S.C. 216(e), in declining to cite Reg. 3 occupations violations for the employment of 14- and 15-year-olds by state and local governments as long as that employment falls within the occupations authorized by Reg. 3 (§ 570.34(a)) and does not involve any of the tasks or occupations prohibited by Reg. 3 (§§ 570.33 and 570.34(b)). The other provisions of Reg. 3, including the restrictions on hours of work, remain fully applicable to the employment of such minors and continue to be enforced.

The Department's administration of this enforcement position permitting the employment of 14- and 15-year-olds by state and local governments has had extremely positive results. There are strong indications that when such youth are employed under the guidelines established by this enforcement position, the employment does not interfere with their schooling or with their health and well-being, and thus accords with the FLSA.

Based upon the success of the above enforcement position, the Department is proposing to revise and to reorganize §§ 570.33 and 570.34 to clarify and to expand the list of jobs that are either permitted or prohibited for minors who are 14 and 15 years of age and to remove the language that limits the application of § 570.34 to only retail, food service, and gasoline service establishments. The revised § 570.33 would detail certain specific occupations that are prohibited for 14- and 15-year-olds. This revision also necessitates a change to § 570.35a(c)(3), which references the current §§ 570.33 and 570.34 as they pertain to WECEPs. The Department proposes to retain all the current prohibitions contained in § 570.33 but will modify the prohibition regarding the employment of 14- and 15-year-olds in manufacturing occupations to comport with the provisions of the Department of Labor Appropriations Act, 2004, which enacted section 13(c)(7) of the FLSA. Fourteen- and 15-year-olds would continue to be permitted to be employed in all those retail, food service, and gasoline service establishment occupations in which they may currently be employed.

The Department also proposes to apply to FLSA-covered nonagricultural employers of minors, with certain modifications, all the permitted occupations contained in § 570.34(a) and all the prohibited occupations contained in § 570.34(b) that currently apply only to retail, food service, and gasoline service establishments. This proposal would be accomplished by revising § 570.34 to identify permitted occupations. The Department also proposes to continue to permit youth 14- and 15-years of age to perform those occupations involving processing, operating of machines, and working in rooms where processing and manufacturing take place, that are currently permitted under § 570.34(a), as referenced in § 570.34(b)(1).

As mentioned, certain modifications to the existing lists of permissible and prohibited occupations are being proposed. The traditionally prohibited occupations and industries would be contained in a revised § 570.33, and all the permitted occupations and industries would be contained in a revised § 570.34. The Department is aware that, given the FLSA's mandate that before 14- or 15-year-olds may legally be employed to perform any covered work the Secretary of Labor must first determine that the work to be performed does not constitute oppressive child labor, it could choose to publish only a list of permissible occupations and industries, and not provide a list of certain commonly arising prohibited occupations and industries. However, the Department believes that by continuing the long-standing Reg. 3 tradition of publishing lists of those occupations and industries in which such youth may be employed as well as detailed examples of those industries and occupations in which the employment of such youth is prohibited, it can greatly enhance the public's understanding of these important provisions. The list of prohibited industries and occupations helps to define and to provide clarity to the list of permitted industries and occupations. However, the list of prohibited occupations is not intended to identify every prohibited occupation, but rather only to provide examples of those prohibited occupations that have historically been the most common sources of violations or concern. As previously explained, any job not specifically permitted is prohibited.

The Department also understands that, given the constant development and changes occurring in the modern workplace, in continuing to provide a definitive list of permitted occupations and industries, the Department may unintentionally discourage the creation of positive and safe employment opportunities for young workers. But the Department believes that, by continuing its past practice of carefully reviewing inquiries regarding individual occupations or industries not currently addressed by Reg. 3 and then exercising its prosecutorial discretion and issuing enforcement positions that may eventually lead to rulemaking—as evidenced by certain proposals contained in this NPRM—it has developed an efficient and effective mechanism which overcomes the limitations of a definitive list.

The proposed modifications to the list of prohibited occupations are as follows:

1. Prohibited Machinery (§§ 570.33–.34)

Section 570.33(b) prohibits youth 14 and 15 years of age from employment in occupations involving the operation or tending of any power-driven machinery other than office equipment. Even though this prohibition is clear and quite broad, other sections of Reg. 3 have traditionally named certain pieces of power-driven machinery so as to eliminate any doubt or confusion as to their prohibited status. For example, § 570.34(a)(6) prohibits the employment of 14- and 15-year-olds in the operation of power-driven mowers or cutters and § 570.34(b)(6) prohibits the employment of such minors in occupations that involve operating, setting up, adjusting, cleaning, oiling, or repairing power-

driven food slicers, grinders, choppers, and cutters, and bakery-type mixers.

The Department proposes to combine §§ 570.33(b), 570.34(a)(6), and 570.34(b)(6)—all of which address power-driven machinery—into a single paragraph located at § 570.33(e) and expand the list of examples of prohibited equipment to include power-driven trimmers, weed-eaters, edgers, golf carts, food processors, and food mixers. Even though Reg. 3 for many years has prohibited the employment of 14- and 15-year-olds to operate any power-driven equipment other than office machines, the Department routinely receives inquiries as to the status under Reg. 3 of these individual pieces of equipment. The Department believes that by continuing to reference certain common prohibited machinery by name, both clarity and compliance will be increased.

2. Loading of Personal Hand Tools Onto Motor Vehicles and Riding on Motor Vehicles (§§ 570.33(f) and 570.34(b)(8))

Section 570.33(c) prohibits the employment of 14- and 15-year-olds in the operation of motor vehicles or service as helpers on such vehicles. The term *motor vehicle* is defined in § 570.52(c)(1). The Department has interpreted the Reg. 3 prohibition regarding service as helpers on a motor vehicle to preclude youth under the age of 16 from riding outside the passenger compartment of the motor vehicle. Such youth may not ride in the bed of a pick-up truck, on the running board of a van, or on the bumper of a refuse truck. This interpretation dates back to at least the 1940 enactment of HO 2 which prohibits 16- and 17-year-olds from serving as outside helpers on motor vehicles.

The Department does not interpret the helper prohibition as applying to 14- and 15-year-olds who simply ride inside a motor vehicle as passengers and, thus, Reg. 3 permits a 14- or 15-year-old to ride inside the enclosed passenger compartment of a motor vehicle when driven by a driver whose employment complies with HO 2 under certain circumstances. For example, a minor may ride in a motor vehicle to reach another work site where he or she will perform work, to receive special training or instructions while riding, or to meet other employees or customers of the employer. While a 14- or 15-year old may be a passive passenger in a vehicle, that same minor is not permitted to ride in a motor vehicle when a significant reason for the minor being a passenger is for the purpose of performing work in connection with the transporting—or assisting in the transporting—of other persons or property. This interpretation comports with the provision of § 570.33(f)(1), which prohibits the employment of 14- and 15-year-olds in occupations in connection with the transportation of persons or property by highway. Performing work in connection with the transportation of the other persons or property does not have to be the primary reason for the trip for this prohibition to apply.

The Department is proposing to include its long-standing interpretation that prohibits 14- and 15-year-olds riding outside of motor vehicles in Reg. 3 at § 570.33(f). The Department is also proposing to revise Reg. 3 at § 570.34(o) to permit 14- and 15-year-olds to ride in the enclosed passenger compartments of motor vehicles, except when a significant reason for the minors being passengers in the vehicle is for the purpose of performing work in connection with the transporting—or assisting in the transporting—of other persons or property. Each minor must have his or her own seat in the passenger compartment, each seat must be equipped with a seat belt or similar restraining device, and the employer must instruct the minors that such belts or other devices must be used. These provisions mirror the requirements of Drive for Teen Employment Act as contained in HO 2.

In addition, the Department's interpretation of prohibited helper services under § 570.33(c), since at least the mid-1950s, has included the loading and unloading of materials from motor vehicles when the purpose of the operation of the vehicle is the transportation of such materials. Section 570.33(f)(1) furthers this prohibition by banning the employment of minors in occupations in connection with the transportation of property by highway. Section 570.34(b)(8) prohibits the employment of such youth by retail, food service, and gasoline service establishments to load or unload goods to and from trucks, railroad cars, or conveyors. These prohibitions are designed to protect young workers from the hazards associated with loading docks, motor vehicles, and receiving departments; strains from lifting and moving heavy items; and falls and falling items. Accordingly, 14- and 15-year-olds generally are prohibited from loading and unloading any property (not just ''goods'') onto and from motor vehicles, including the light personal hand tools they use in performing their duties.

In 2000, the Department was requested by a municipality (the City) to review certain aspects of the prohibitions against employing 14- and 15-year-olds to load and unload items onto and from motor vehicles. The City advised the Department that, even with the adoption of the enforcement position that permits state and local governments to employ minors under certain conditions, it was being forced to abandon a youth-employment program that provided 14- and 15-year-olds with certain jobs because of the prohibition against loading materials into vehicles. The City specifically requested permission to allow such minors to load and unload, onto and from motor vehicles, the light, non-power-driven tools each youth would personally use as part of his or her employment. The Department carefully considered this request and, again using its prosecutorial discretion, decided that it would not assert a violation of the child labor provisions when 14- and 15-year-old employees of state and local governments loaded and unloaded the light non-power-driven hand tools—such as rakes, hand-held clippers, and spades—that they personally use as part of their employment. The City was advised that this enforcement policy did not extend to other prohibited transportation-related work such as the loading or unloading of materials other than the light hand tools the minors may encounter on-the-job, such as trash or garbage, or power-driven equipment such as lawn mowers, edgers, and weed trimmers—the use of which by this age group is prohibited under Reg. 3.

The Department proposes to revise Reg. 3 at §§ 570.33(f) and (k) and 570.34(k) to incorporate the enforcement position that allows 14- and 15-year-olds to be employed to load onto and unload from motor vehicles the light non-power-driven personal hand tools they use as part of their employment and to make it available to all covered employers, not just state and local governments. Such light non-power-driven hand tools would include, but not be limited to, rakes, hand-held clippers, shovels, and brooms, but would not include items like lawn mowers or other power-driven lawn maintenance equipment. In addition, such minors would be permitted to load onto and unload from motor vehicles any personal protective equipment they themselves will use at the work site and any personal items such as backpacks, lunch boxes, and coats their employers allow them to take to the work site. Such minors would not be permitted to load or unload such jobsite-related equipment as barriers, cones or signage.

3. Work in Meat Coolers and Freezers (§ 570.34(b)(7))

Section 570.34(b)(7) prohibits 14- and 15-year-olds from working in freezers and meat coolers. Since its inception, the Department has interpreted this section to mean that such youth are prohibited from working as dairy stock clerks, meat clerks, deli clerks, produce clerks, or frozen-food stock clerks where their duties would require them to enter and remain in the freezer or meat cooler for prolonged periods. Inventory and cleanup work, involving prolonged stays in freezers or meat coolers, are also prohibited. On the other hand, the Department has taken the position since at least 1981 that counter workers in quick service establishments or cashiers in grocery stores whose duties require them to occasionally enter freezers only momentarily to retrieve items are not considered to be working in the freezers for enforcement purposes. In order to provide clarification, the Department is proposing to incorporate this long-standing interpretation into the regulations at § 570.33(i).

4. Youth Peddling

The Department is proposing to amend Reg. 3 and create § 570.33(j) to ban the employment of 14- and 15-year-old minors in occupations involving youth peddling, also referred to as ''door-to-door sales'' and ''street sales.'' Controversies regarding young children conducting commercial sales of items, often on a ''door-to-door'' basis, are not new. The Department has over the years documented reports of minors, many as young as 10 or 11 years of age, working as part of mobile sales crews, selling such items as candy, calendars, and greeting cards for profit-making companies. Injuries, and even deaths, have occurred as the result of young children engaging in youth peddling activities. The door-to-door sales industry employing these minors generally is composed of a number of crew leaders who, during the course of a year, operate in many different states. The crew leaders, who often have ties to regional or national businesses, mistakenly claim that they and their young sales crews are independent contractors. Typically, a crew leader attempts to saturate a particular area with sales crews, make as many sales as possible, and then quickly move to a new location. Crews often work from late afternoon to late at night as that is when most of the potential customers are likely to be at home. Because youth peddlers typically qualify as outside sales employees under FLSA section 13(a)(1), they are usually exempt from the minimum wage and overtime requirements of the FLSA (see 29 CFR 541.500).

Congressional hearings and the Department's enforcement experience have shown that the problems associated with children performing door-to-door sales and street sales are numerous. These youth are often transported by crew leaders in vans, which fail to meet proper safety and insurance requirements, to areas quite distant from their home neighborhoods. They are often required to work many hours on school nights and late into the evening. These minors are frequently placed by employers, without adult supervision, at subway entrances, outside large office buildings, at high-traffic street corners, and on median strips at busy intersections where they can attract potential customers. Reports of children being abandoned, suffering injuries from violence and motor vehicle crashes, and being exposed to the elements have been substantiated. Youth have been injured and have died as a result of these activities. Intimidation by crew leaders is commonly reported.

In 1987, the permanent Subcommittee on Investigations of the Committee on Governmental Affairs of the United States Senate held hearings on the Exploitation of Young Adults in Door-to-Door Sales. The hearings included a staff study that documented many abuses that had occurred in this industry, including indentured servitude, physical and sexual abuse, and criminal activity. In 1998, the Interstate Labor Standards Association created a subcommittee to work toward ending door-to-door sales by children and recommended that the Department of Labor act as a national clearinghouse regarding information concerning door-to-door sales operations. In response to the 1994 ANPRM issued by the Department, calls for banning door-to-door sales by those under 18 years of age were received from the National Consumers League, the Defense for Children International, USA, and the Food and Allied Service Trades Department, AFL–CIO. At least 17 states have rules prohibiting or regulating door-to-door sales by minors.

The Department's proposal to prohibit youth peddling would not be limited to just the attempt to make a sale or the actual consummation of a sale, but would include such activities normally associated with and conducted as part of the individual youth peddler's sales activities, such as the loading and unloading of vans or other motor vehicles, the stocking and restocking of sales kits and trays, the exchanging of cash and checks, and the transportation of minors to and from the various sales areas by the employer.

As used here, the terms youth peddling, door-to-door-sales, and street sales do not include legitimate fund-raising activities by eleemosynary organizations such as cookie sales conducted by the Girl Scouts of America or school fund-raising events where the students are truly volunteers and are not promised compensation for the sales they make. The term compensation would not include the small prizes, trophies, or other awards of minimal value that the eleemosynary organization may give a volunteer in recognition of his or her efforts. In administering the FLSA, the Department considers such individuals, who volunteer or donate their services, usually on a part-time basis, for public service, religious, or humanitarian objectives, without contemplation of pay, not to be employees of the religious, charitable, or similar nonprofit corporations that receive their services. In addition, FLSA section 3(e)(4) excludes from the definition of ''employee'' individuals who volunteer to public agencies. These provisions apply equally whether the volunteer is an adult or a minor.

5. Poultry Catching and Cooping

The Department has long taken the position that 14- and 15-year-olds may not be employed to catch and coop poultry in preparation for transportation or for market because it is a ''processing'' occupation prohibited by § 570.33(a). Such employees are often referred to as ''chicken catchers or poultry catchers.'' In addition, the prohibitions against operating or tending power-driven equipment contained in § 570.33(b) and the prohibition against employment in occupations in connection with the transportation of property contained in § 570.33(f)(1) generally preclude the employment of such youth as poultry catchers. These activities are normally performed in environments and under conditions that present risks of injury and illness to young workers. Working in the dark, with the only illumination provided by ''red lights'' which the fowl cannot see, and in poorly ventilated rooms, is not uncommon. The risks associated with poultry catching also occur in the catching and cooping of poultry other than chicken—for example, processors of turkeys and Cornish game hens employ similar methods of moving their products to slaughter.

Despite the Department's consistent interpretation that 14- and 15-year-olds

may not be employed as poultry catchers, employers still have questions concerning how the regulations address such work, and violations still occur. For example, the Department investigated the death of a 15-year-old male in 1999 who was employed as a poultry catcher, working in the dark and under red lighting, in Arkansas. The youth was electrocuted shortly after midnight when he bumped into a fan while performing his ''catching'' duties. In order to remove any confusion and increase employer compliance, the Department is therefore proposing to amend Reg. 3 and create § 570.33(l) to specifically prohibit the employment of 14- and 15-year-old minors in occupations involving the catching and cooping of poultry for preparation for transport or for market. The prohibition would include the catching and cooping of all poultry, not just chickens.

It is important to note that in those rare instances when the catching activities would be agricultural in nature, such as where poultry catchers are employed solely by a farmer on a farm to catch poultry raised by that farmer, the catchers would be subject to the agricultural child labor provisions contained in FLSA sections 13(c)(1) and (2).

*B. Occupations That Are Permitted for Minors Between 14 and 16 Years of Age (29 CFR §§ 570.33–.34)*

As mentioned, section 3(l) of the FLSA expressly prohibits children under the age of 16 from performing any work other than that which the Secretary of Labor permits, by order or regulation, upon finding that it does not interfere with their schooling or health and well-being (see 29 U.S.C. 203(l)). Before a 14- or 15-year-old may legally perform work covered by the FLSA, the Act requires that the work itself be exempt, or that the Secretary of Labor has determined that the work to be performed does not constitute oppressive child labor. The Secretary's declarations of what forms of labor are not deemed oppressive for children between the ages of 14 and 16 appear in Reg. 3 (29 CFR 570.31–.38).

Reg. 3 identifies a number of occupations or activities that are specifically permitted for the employment of youth 14 and 15 years of age in retail, food service, and gasoline service establishments. As mentioned, the Department proposes to revise this list of permitted occupations by clarifying it, adding to it, and extending its application to all employment covered by the FLSA, except those employers engaged in mining or manufacturing, or any industry or occupation prohibited by the proposed § 570.33. This revised list would be contained in § 570.34.

The Department also proposes to revise § 570.34(a)(8) by clarifying that 14- and 15-year-olds may perform car cleaning, washing, and polishing, but only by hand. Such youth are prohibited from operating or tending any power-driven machinery, other than office equipment, and this prohibition has always included automatic car washers, power-washers, and power-driven scrubbers and buffers. The Department believes this clarification will provide guidance to employers.

The additional occupations the Department is proposing to permit 14- and 15-year-olds to perform are discussed below.

1. Work of a Mental or Artistically Creative Nature

The Department routinely receives inquiries asking whether 14- and 15-year-old youth may be employed to perform certain mental or artistically creative activities in industries not specifically permitted by Reg. 3. The inquiries have concerned such jobs as a computer programmer and computer applications demonstrator for a college, print and runway model, and musical director at a church or school. Often, these inquiries concern students who are especially gifted or career oriented in a particular field. A strict adherence to Reg. 3 requirements would not permit the employment of a 14- or 15-year-old in any of these scenarios, even though talented and motivated youth could safely and successfully perform these tasks without interfering with their schooling or health and well-being.

The Department is proposing to revise Reg. 3 at § 570.34(b) to permit the employment of 14- and 15-year-olds to perform work of a mental or artistically creative nature such as computer programming, the writing of software, teaching or performing as a tutor, serving as a peer counselor or teacher's assistant, singing, playing a musical instrument, and drawing. Permitted work of a mental nature would be limited to work that is similar to that performed in an office setting and not involving the use of any power-driven equipment other than office machines. Artistically creative work would be limited to work in a recognized field of artistic or creative endeavor. The employment would be permitted in any industry other than those prohibited by Reg. 3 and would also be subject to all the applicable hours and times standards established in § 570.35 and occupation standards contained in § 570.33.

2. The Employment of 15-Year-Olds (But Not 14-Year-Olds) as Lifeguards

The Department is proposing to revise Reg. 3 at § 570.34(l) to permit the employment of 15-year-olds as lifeguards at swimming pools and water amusement parks under certain conditions. A local chapter of the American Red Cross (Chapter) first raised this issue in 2000. The Chapter advised the Department that the Red Cross had revised its own rules and was now certifying 15-year-olds as lifeguards. Prior to 2000, according to the Chapter, 16 years was generally the minimum age at which the Red Cross would provide such certification. The Chapter inquired as to whether Reg. 3 would permit the employment of 15-year-olds as lifeguards. Also in 2000, a municipality contacted the Department inquiring whether it could legally employ such youth as lifeguards at its city-owned swimming pools.

The occupation of lifeguard is not specifically authorized in Reg. 3 as an occupation that 14- and 15-year-olds may perform. In response to the inquiries, the Department adopted an enforcement policy in 2000 that allowed 15-year-olds (but not 14-year-olds) to be employed at swimming pools owned and operated by state and local governments or private-sector retail establishments under certain conditions. Those conditions included that the youth be trained and certified in aquatics and water safety by the Red Cross, or by some similarly recognized certifying organization, and that the youth work under conditions acceptable to the Red Cross, or some similarly recognized certifying organization. This enforcement position permitted such employment at swimming pools operated by hotels, amusement parks, cities, and state-owned universities, but did not permit such employment at pools operated by non-public and non-retail establishments such as apartment houses, country clubs, private schools, home-owner associations, and private health clubs. In early 2005, the Department, after reviewing additional information, extended this enforcement position to permit the employment of 15-year-olds as lifeguards at (1) all traditional swimming pools regardless of who owns, operates or manages the establishments, and (2) those facilities of water amusement parks that constitute traditional swimming pools.

The Department proposes to revise Reg. 3 by creating § 570.34(l) to incorporate portions of the current enforcement position. The revision would permit 15-year-olds, but not 14-year-olds, to be employed as lifeguards,

performing lifeguard duties, at traditional swimming pools and certain areas of amusement water parks operated by all types of employers, if the minors have been trained and certified by the Red Cross or a similarly recognized certifying organization.

The occupation of lifeguard, as used in this subpart, entails the duties of rescuing swimmers in danger of drowning, the monitoring of activities at a swimming pool to prevent accidents, the teaching of water safety, and assisting patrons. Lifeguards may also help to maintain order and cleanliness in the pool and pool areas, give swimming instructions, conduct or officiate at swimming meets, and administer first aid. Additional ancillary lifeguard duties may include checking in and out such items as towels, rings, watches and apparel. Permitted duties for 15-year-olds would include the use of a ladder to access and descend from the lifeguard chair; the use of hand tools to clean the pool and pool area; and the testing and recording of water quality for temperature and/or pH levels, using all of the tools of the testing process including adding chemicals to the test water sample. Fifteen-year-olds employed as lifeguards would, however, be prohibited from entering or working in any mechanical rooms or chemical storage areas, including any areas where the filtration and chlorinating systems are housed. The other provisions of Reg. 3, including the restrictions on hours of work contained at § 570.35(a), would continue to apply to the employment of 15-year-old lifeguards.

Under the proposed rule, no youth under 15 years of age, whether properly certified or not, could legally perform any portion of the lifeguard duties detailed above as part of his or her FLSA covered employment. The core and defining duty of a lifeguard is the rescuing of swimmers in danger of drowning, often by entering the water and physically bringing the swimmer to safety. Under the Department's proposal, any employee under the age of 16 whose duties include this core duty—such as a ''junior lifeguard'' or a ''swim-teacher aide''—or whose employment could place him or her in a situation where the employer would reasonably expect him or her to perform such rescue duties, would be performing the duties of a lifeguard while working in such a position. For such employment to comply with Reg. 3, the employee would have to be at least 15 years of age and be properly certified.

A *traditional swimming pool,* as used in this subpart, would mean a water-tight structure of concrete, masonry, or other approved materials located either indoors or outdoors, used for bathing or swimming and filled with a filtered and disinfected water supply, together with buildings, appurtenances and equipment used in connection therewith. A *water amusement park* means an establishment that not only encompasses the features of a traditional swimming pool, but may also include such additional attractions as wave pools; lazy rivers; specialized activities areas such as baby pools, water falls, and sprinklers; and elevated water slides. Properly certified 15-year-olds would be permitted to be employed as lifeguards at most of these water park features.

Not included in the definition of a traditional swimming pool or a water amusement park would be such natural environment swimming facilities as rivers, streams, lakes, reservoirs, wharfs, piers, canals, or oceanside beaches.

It is important to note that § 570.33(b) prohibits the employment of 14- and 15-year-olds in occupations involving the operation or tending of power-driven machinery, except office machines. This prohibition has always encompassed the operation or tending of all power-driven amusement park and recreation establishment rides—including elevated slides found at water amusement parks. Such slides, which often reach heights of over 40 feet, rely on power-driven machinery that pump water to the top of the slides which facilitates the descents of the riders to the ''splash-down'' areas at the base of the slides. Minors less than 16 years of age may not be employed as dispatchers or attendants at the top of elevated water slides—employees who maintain order, direct patrons as to when to depart the top of the slide, and ensure that patrons have safely begun their ride—because such work constitutes ''tending'' as used in Reg. 3. In addition, when serving as dispatchers or attendants at the top of an elevated water slide, minors under 16 years of age are not performing, nor can they reasonably be expected to perform, the core lifeguard duty of rescuing swimmers because they are so far removed from the splash-down area of the slide. Accordingly, even if 15-year-old minors have been certified as lifeguards, the provisions of § 570.34(l) would not apply to the time spent as dispatchers or attendants at an elevated water slide. Properly certified 15-year-old lifeguards, however, may be stationed at the ''splashdown pools'' located at the bottom of the elevated water slides to perform traditional lifeguard duties.

The Department is aware that permitting 15-year-olds to be employed as lifeguards at such water amusement park facilities as lazy rivers, wave pools, and the splashdown pools of elevated slides could be construed as allowing these youth to tend power-driven machinery. But the Department believes that the overall predominance of their responsibility to perform the core life-saving duty of rescuing patrons who are in the water, which they have been properly trained and certified to perform, outweighs the minimum, isolated, and sporadic amount of tending such lifeguards may potentially be called upon to do when stationed at wave pools, lazy rivers, and splashdown pools.

3. The Employment of Certain Youth by Places of Business Where Machinery Is Used To Process Wood Products

The provisions of the Department of Labor Appropriations Act, 2004, amended the FLSA by creating a limited exemption from the youth employment provisions for certain minors 14 through 17 years of age who are excused from compulsory school attendance beyond the eighth grade. The exemption, contained at section 13(c)(7) of the FLSA, allows eligible youth to work inside and outside of places of businesses that use machinery to process wood products, subject to specified limitations. The Department is incorporating the new requirements of this amendment into its regulations. The Department is proposing to incorporate the amendment into Reg. 3 at § 570.34(m), and into § 570.54, Logging occupations and occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage stock mill (Order 4).

Section 13(c)(7) overrides the heretofore complete prohibition on the employment of 14- and 15-year-olds in manufacturing occupations contained in section 3(l) of the FLSA. Accordingly, to meet the requirements of this legislation, the Department is proposing to revise Reg. 3 to permit the employment of qualifying 14- and 15-year-olds inside and outside of places of business where manufacturing (the processing of wood products by machinery) takes place, subject to specified conditions and limitations.

The Department proposes to limit the types of employers who may employ such minors, as well as the worksites at which such minors may be employed, to those contemplated by the language of the statute and mentioned by the sponsors of the legislation and the interested parties that testified at the hearings held by Congress prior to the enactment of the legislation (see, e.g., Testimony Before Senate Labor, Health

and Human Services, and Education Subcommittee of the Committee on Appropriations, The Employment Needs of Amish Youth, 107th Cong. 2 (2001)). The term *places of business where machinery is used to process wood products* shall mean such permanent workplaces as sawmills, lath mills, shingle mills, cooperage stock mills, furniture and cabinet making shops, gazebo and shed making shops, toy manufacturing shops, and pallet shops. The term shall not include construction sites, portable sawmills, areas where logging is being performed, or mining operations. The term *inside or outside places of business* refers to the distinct physical place of the business, i.e., the buildings and the immediate grounds necessary for the operation of the business. This exemption would not apply to tasks performed at locations other than inside or outside the place of business of the employer such as the delivery of items to customers or the installation of items at customers' establishments or residences.

Although section 13(c)(7) permits the employment of certain youth inside and outside of places of business where machinery is used to process wood products, it does so only if the youth do not operate or assist in the operation of power-driven woodworking machines. The terms *operate or assist in the operation* and *power-driven woodworking machines* are well-established in 29 CFR 570.55, and the Department proposes to revise Reg. 3 to include these definitions along with the specific prohibition against operating or assisting in the operation of power-driven woodworking machines. Section 570.55 lists, when discussing the prohibited occupations involved in the operation of power-driven woodworking machines, such activities as supervising or controlling the operation of the machines, feeding materials into such machines, and helping the operator feed material into such machines. The list also includes the occupations of setting up, adjusting, repairing, oiling, or cleaning the machines. That same section defines *power-driven woodworking machines* to mean all fixed or portable machines or tools driven by power and used or designed for cutting, shaping, forming, surfacing, nailing, stapling, wire stitching, fastening, or otherwise assembling, pressing, or printing wood or veneer. The Department is proposing to amend the definition of *power-driven woodworking machines* to include those machines that process trees, logs, and lumber in recognition that section 13(c)(7) now permits certain youth 14 through 17 years of age to work in sawmills where trees, logs, and lumber would be processed. This revised definition of *power-driven woodworking machines* would be included in § 570.34(m) of Reg. 3 and both § 570.54 (HO 4) and § 570.55 (HO 5).

The limited exemption contained in section 13(c)(7) applies only to certain youth—new entrants into the workforce—and only when certain additional criteria are met. Section 13(c)(7) defines a *new entrant into the workforce* as an individual who is under the age of 18 and at least the age of 14, and, by statute or judicial order, is exempt from compulsory school attendance beyond the eighth grade.

In addition, in order to be employed inside or outside of places of business where machinery is used to process wood products, the new entrant must be supervised by an adult relative or an adult member of the same religious sect or division as the entrant. The term *supervised* refers to the requirement that the youth's on-the-job activities be directed, monitored, overseen, and controlled by a specified named adult. Although the statute does not define the terms *adult* and *relative*, the Department proposes that, for purpose of this exemption, a relative would include a parent (or person standing in place of a parent), a grandparent, an aunt, an uncle, and a sibling; and an adult would be someone who has reached his or her eighteenth birthday. The Department also proposes that the term *adult member of the same religious sect or division as the youth* would mean an adult who professes membership in the same religious sect or division to which the youth professes membership. The Department believes that in order to ensure these youth receive the degree of protection from injury Congress intended, the supervision of the minors must be close, direct, and uninterrupted. No other provision of the federal nonagricultural youth employment rules requires such a specific level of supervision. It is important to note that this requirement of supervision, just like the requirement that youth not operate or assist in the operation of power-driven woodworking machinery, applies to the employment of 16- and 17-year-olds as well as 14- and 15-year-olds.

Furthermore, section 13(c)(7) permits the employment of a new entrant inside or outside places of business where machinery is used to process wood products only if the youth is (1) protected from wood particles or other flying debris within the workplace by a barrier appropriate to the potential hazard of such wood particles or flying debris or by maintaining a sufficient distance from machinery in operation, and (2) required to use personal protecting equipment to prevent exposure to excessive levels of noise and saw dust. It is the Department's position that section 13(c)(7)'s prerequisite that the youth is ''required to use personal protective equipment to prevent exposure to excess levels of noise and saw dust'' includes the youth's actual use of such equipment and not just the employer's obligation to mandate such use.

The Wage and Hour Division has consulted with representatives of the Department's Occupational Safety and Health Administration (OSHA) and will defer to that agency's expertise and guidance when determining whether an employer is in compliance with the safety provisions of this exemption—i.e., whether a workplace barrier is appropriate to the potential hazard, whether a sufficient distance has been maintained from machinery in operation, and whether the youth is exposed to excessive levels of noise and saw dust. The Department proposes that compliance with the safety and health provisions discussed in the previous paragraph will be accomplished when the employer is in compliance with the requirements of the applicable governing standards issued by OSHA or, in those areas where OSHA has authorized the state to operate its own Occupational Safety and Health Plan, the applicable standards issued by the Office charged with administering the State Occupational Safety and Health Plan.

*C. Periods and Conditions of Employment (29 CFR § 570.35)*

FLSA section 3(l) authorizes the Secretary of Labor to provide by regulation for the employment of young workers 14 and 15 years of age in suitable nonagricultural occupations and during periods and under conditions that will not interfere with their schooling or with their health and well-being. In enacting FLSA section 3(l), Congress intended to assure the health and educational opportunities of 14- and 15-year-olds, while allowing them limited employment opportunities.

In 1939, Reg. 3 was promulgated under the direction of the Chief of the Children's Bureau, in whom Congress vested the original delegation of authority to issue child labor regulations. The record on which Reg. 3 was based included hearings where child labor advocates expressed concern over the need for children to avoid fatigue, so as not to deplete the energy

required for their school work. Similarly, witnesses stressed that early morning and late evening work hours, which interfered with sleep and often fostered exhaustion, were unhealthful for children and also diminished the time that children should have spent with the family (see In the Matter of Proposed Regulation Relating to the Employment of Minors Between 14 and 16 Years of Age Under the Fair Labor Standards Act, Official Report of the Proceedings Before the Children's Bureau, February 15, 1939, at 19, 21, 34, 82). Reg. 3 limits the hours that 14- and 15-year-olds may work to:

(1) Outside school hours;

(2) Not more that 40 hours in any 1 week when school is not in session;

(3) Not more than 18 hours in any 1 week when school is in session;

(4) Not more than 8 hours in any 1 day when school is not in session;

(5) Not more than 3 hours in any 1 day when school is in session; and

(6) Between 7 a.m. and 7 p.m. in any 1 day, except during the summer (June 1 through Labor Day) when the evening hour will be 9 p.m.

The Department is not proposing to change any of these hours and time-of-day limitations, but wishes to foster both understanding of, and compliance with, these provisions by incorporating into the regulations certain long-standing Departmental enforcement positions and interpretations. For example, the Department has developed long-standing enforcement positions regarding the application of certain of the hours standards limitations to minors, who for differing reasons, no longer attend or are unable to attend school. Some of these positions have been in place since the 1970s and all have been detailed in the Wage and Hour Division's Field Operations Handbook since 1993. The Department proposes to incorporate them into Reg. 3 to promote both clarity and compliance. The Department proposes to amend § 570.35 to reflect that school would not be considered to be in session for a 14-or 15-year-old minor who has graduated from high school; or has been excused from compulsory school attendance by the state or other jurisdiction once he or she has completed the eighth grade and his or her employment complies with all the requirements of the state school attendance law; or has a child to support and appropriate state officers, pursuant to state law, have waived school attendance requirements for this minor; or is subject to an order of a state or federal court prohibiting him or her from attending school; or has been permanently expelled from the local public school he or she would normally attend. Such minors would be exempt from the ''when school is in session'' hours standards limitations contained in §§ 570.35(a)(1), (a)(3) and (a)(5). The employment of such minors would still be governed by the remaining provisions of Reg. 3, including the daily, weekly, morning, and evening hours standards limitations contained in §§ 570.35(a)(2), (a)(4), and (a)(6).

The Department also proposes to clarify the hours restriction contained in § 570.35(a)(5), which limits the employment of 14- and 15-year-olds in nonagricultural employment to no more than 3 hours on a day when school is in session, by adding a statement that this restriction also applies to Fridays. The Wage and Hour Division occasionally receives requests for clarification from employers seeking to lengthen the work shifts of younger employees on nights that do not precede a school day. As the stated purposes of the hours standards limitations include the protection of young workers from exhaustion and the preservation of time for rest and family relations, no more than 3 hours of work is permitted on any day when school was in session.

The Department also proposes to incorporate into Reg. 3 its long standing position that the term week as used in Reg. 3 means a standard calendar week of 12:01 a.m. Sunday through midnight Saturday, not an employer's workweek as defined in 29 CFR § 778.105. The calendar week would continue to serve as the timeframe for determining whether a minor worked in excess of 18 hours during any week when school was in session or in excess of 40 hours in any week when school was not in session.

Finally, as noted above, Reg. 3 limits the employment of 14- and 15-year-olds to periods that are outside of school hours and to designated hours depending whether or not school is in session. Although neither the FLSA nor Reg. 3 defines the terms *school hours* and *school is in session* as they apply to nonagricultural employment, the Department has developed and applied a long-standing enforcement position that these terms refer to the normal hours of the public school system in the child's district of residence. This enforcement position mirrors the provisions of FLSA section 13(c)(1), which Congress added in1949, to clarify how these terms applied to the employment of youth in agricultural employment. FLSA section 13(c)(1) states, in relevant part: ''The provisions of section 12 relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee * * * (c) is fourteen years of age or older.''

The Department, though not proposing specific regulatory language regarding these terms at this time, is seeking information from the public regarding whether such regulatory provisions would be appropriate including whether: (1) The Department should continue to use the hours of operation of the local public school where a minor resides to determine when he or she may legally be employed, even when that minor does not attend that local public school or, for whatever reason, may actually have attendance requirements that differ from that of the rest of the students attending that local school; (2) the FLSA's requirement that such a minor only be employed under conditions and during periods that will not interfere with his or her schooling or health and well-being would be equally or better served if it were based on the minor's own actual academic schedule; (3) using the academic schedule and attendance requirements of each minor when determining when school was in session for that minor would provide working youths greater opportunities and flexibility when seeking safe, positive and legal employment. Based on comments received, the Department will consider adding a regulatory provision defining the terms school hours and school is in session, as they apply to nonagricultural employment.

*D. Work-Study Programs*

Effective November 5, 1969, Reg. 3 was amended to provide a variance from some of the provisions of § 570.35 for the employment of minors 14 and 15 years of age enrolled in and employed pursuant to a school-supervised and administered Work Experience and Career Exploration Program (WECEP). Although originally proposed as an experimental program, Reg. 3 was amended to make the WECEP a permanent exception.

WECEP was created to provide a carefully planned work experience and career exploration program for 14- and 15-year-old youth who can benefit from a career oriented educational program designed especially to meet the participants' needs, interests, and abilities. The program was, and continues to be, specifically geared to helping dropout-prone youth become reoriented and motivated toward education and to prepare for the world of work.

Section 570.35a establishes the criteria that must be met in order for

states to apply for and receive authorization to operate a WECEP. This same section details the terms, conditions, and responsibilities participating states agree to assume upon receiving authorization to operate a WECEP.

As mentioned, certain provisions of § 570.35 relating to the Reg. 3 hours standards are varied for youth enrolled in and employed pursuant to an approved WECEP. Such youth may work up to 23 hours in any one week when school is in session, any portion of which may be during school hours. The other provisions of § 570.35 (limiting employment to no more than 3 hours on any one day school is in session, no more than 8 hours a day on any one day school is not in session, and no more than 40 hours in any one week when school is not in session) remain applicable to the employment of WECEP participants. Section 570.35a also includes provisions that allow the Administrator of the Wage and Hour Division discretion to grant requests for special variances from the occupation standards established by §§ 570.33 and 570.34.

Several states have advised the Department that WECEP serves its targeted audience well, helping dropout-prone students, especially those who are not academically oriented, stay in school and complete their high school educations. However, WECEP, by design, does little to help those students who wish to use work experience, and the wages such experiences generate, as a means to realize their academic potential and acquire a college education.

In 2003, the Department became aware of a non-profit network of private schools, hereafter referred to as the Network, that was operating a corporate work-study program for its students. The Network is an association of private, not-for-profit college preparatory high schools that strive to meet the educational needs of people in many economically challenged areas throughout the country. The work-study program was implemented to help students offset the costs of a quality college preparatory education and develop important work experience and socialization skills that will allow them to assume leadership roles as adults.

Under the Network's model, five students share a single, full-time clerical position with a private employer at a work place screened and selected by the school. Each youth works five full days per four-week period for the employer at the work place-one eight hour-day once a week for three weeks, and two eight-hour days every fourth week. The academic schedules of the students are carefully coordinated so that students do not miss any classes on the days they work and the school year has been extended beyond the standard academic schedule of the local public school to compensate for the time the students spend at work. These accommodations ensure that students complete a fully accredited, college preparatory curriculum that exceeds both state and accrediting agency requirements. Under the Network model, students do not work more than eight hours a day, before 7 a.m. or after 7 p.m., and are transported to and from their jobs by the school. The students receive at least the applicable federal and state minimum wages, and applicable taxes are withheld and reported by their respective employers. The Network envisioned the work-study program as an integral part of the academic program, yielding benefits on many different levels. Students, their parents, and the work-study director sign an agreement defining performance expectations and program support structures. Participating employers are also required to sign an agreement defining job duties and expectations. All students are required to participate in the work-study program, beginning with their freshman year and ending at graduation.

The Network provided information that its model is achieving its stated aims. It advised the Department that 100 percent of the students of the 2003 graduating class of one of its schools were accepted into college. The school is located in a neighborhood where 20 percent of those attending the local public school drop out annually and the high school graduation rate is 55 percent.

Reg. 3, as currently written, does not allow 14- and 15-year-olds to participate in such work-study programs. Such youth may not work during the hours school is in session—unless participating in a state sponsored WECEP—and may not work more than three hours on a day the local public school is in session.

Because the Department believes that the health, well-being, and educational opportunities of 14- and 15-year-olds who are academically oriented are not placed at risk by participation in structured work-study programs such as the Network's model- and are in fact enhanced by such participation-it is proposing that Reg. 3 be revised to accommodate such programs. The Department proposes to allow public and private school districts or systems to apply to the Administrator of the Wage and Hour Division for approval to operate a work-study program that would permit certain 14- and 15-year-olds to work during school hours and up to eight hours on a school day under specific circumstances. An individual private school that was not part of a network, district, or system would also be able to apply to participate in a work study program.

The youth would have to be enrolled in a college preparatory curriculum and must receive, every year they participate in the work-study program, at least the minimum number of hours of class room instruction required by the applicable state educational agency responsible for establishing such standards. Participating youth would also be required to receive annual classroom instruction in work place safety and youth employment provisions. Home-schooled youth would be able to participate in work-study programs operated by local public schools in the same manner many currently participate in team sports programs, band, and other extracurricular activities.

Each participating school would be required to name a teacher-coordinator to supervise the work-study program, make regularly scheduled visits to the students' work sites, and ensure that participants are employed in compliance with the minimum wage and youth employment provisions of the FLSA. In addition, the teacher-coordinator, the employer and the student would be required to sign a written participation agreement that details the objectives of the work-study program, describes the specific job duties to be performed by the student, and the number of hours and times of day that the student would be employed each week. The agreement, which must also be signed or otherwise consented to by the student's parent or guardian, would also affirm that the student will receive the minimum number of hours of class room instruction as required by the state educational agency for the completion of a fully-accredited college preparatory curriculum and that the employment will comply with the applicable youth employment and minimum wage provisions of the FLSA.

Students participating in a valid work-study program would be permitted to work up to eighteen hours a week, a portion of which may be during school hours, in accordance with the following formula that is based upon a continuous four-week cycle. In three of the four weeks, the participant would be permitted to work during school hours on only one day per week, and for no more than for eight hours on that day. During the remaining week of the four-

week cycle, such minor would be permitted to work during school hours on no more than two days, and no more than for eight hours on each of those two days. The employment of such minors would still be subject to the time of day and number of hours standards contained in §§ 570.35(a)(2), (a)(3), (a)(4), and (a)(6).

*E. Logging Occupations and Occupations in the Operation of Any Sawmill, Lath Mill, Shingle Mill, or Cooperage Stock Mill (Order 4) (29 CFR 570.54)*

HO 4 generally prohibits minors 16 and 17 years of age from being employed in most occupations in logging and in the operation of a sawmill, lath mill, shingle mill or cooperage stock mill. The HO was created because of the extremely high numbers of occupational fatalities and injuries that were experienced by workers of all ages in these industries.

HO 4 currently provides exemptions that allow 16- and 17-year-olds to perform some occupations within the logging industries. Such minors may perform work in offices or repair or maintenance shops. They may work in the construction, operation, repair, or maintenance of living and administrative quarters of logging camps. They may work in the peeling of fence posts, pulpwood, chemical wood, excelsior wood, cordwood, or similar products when not done in conjunction with and at the same time and place as other logging occupations declared hazardous by HO 4. They may work in the feeding and care of animals. Finally, they may work in timber cruising, surveying, or logging engineering parties; in the repair or maintenance of roads, railroads, or flumes; in forest protection, such as clearing fire trails or roads, piling and burning slash, maintaining fire-fighting equipment, constructing and maintaining telephone lines, or acting as fire lookouts or fire patrolman away from the actual logging operations—but only if such tasks do not involve the felling and bucking of timber, the collecting or transporting of logs, the operation of power-driven machinery, the handling or use of explosives, and working on trestles.

HO 4 also provides exemptions at § 570.54(a)(2), permitting 16- and 17-year-olds to be employed in certain sawmill, lath mill, shingle mill, or cooperage stock mill occupations. These exemptions, which do not apply to work performed in a portable sawmill or that entails the young worker entering the sawmill building, permit 16- and 17-year-olds employed in sawmills, lath mills, shingle mills, or cooperage stock mills to work in offices or in repair or maintenance shops; straighten, mark, or tally lumber on the dry chain or the dry drop sorter; pull lumber from the dry chain; clean up the lumberyard; pile, handle, or ship cooperage stock in yards or storage sheds other than operating of or assisting in the operation of power-driven equipment; clerical work in the yards or shipping sheds, such as done by ordermen, tally-men, and shipping clerks; clean-up work outside shake and shingle mills, except when the mill is in operation; split shakes manually from precut and split blocks with a fore and mallet, except inside the mill building or cover; pack shakes into bundles when done in conjunction with splitting shakes manually with a froe and mallet, except inside the mill building or cover; and manually load bundles of shingles or shakes into trucks or railroad cars, provided that the employer has on file a statement from a licensed doctor of medicine or osteopathy certifying the minor capable of performing this work without injury to himself.

The NIOSH Report recommends that the Department not only retain HO 4, but expand its coverage to include work in the operation of timber tracts (Standard Industrial Classification (SIC) 081) and forestry services (SIC 085) because of the high number of fatalities occurring in such operations. The SIC industry group of timber tracts encompasses establishments primarily engaged in the operation of timber tracts or tree farms for the purpose of selling standing timber, including those establishments that grow Christmas trees. The SIC industry group of forestry services encompasses establishments primarily engaged in performing, on a contract or fee basis, services related to timber production, wood technology, forestry economics and marketing, as well as other forestry services not contained in another SIC such as cruising timber, forest firefighting, and reforestation. Establishments that perform timber estimation and valuation and forest fire prevention and pest control are also included in SIC 085.

The Report states ''The logging industry * * * had the highest lifetime risk of fatal injury of any industry, at 47 deaths per 1,000 workers based on an analysis of National Traumatic Occupational Fatality Surveillance System data for 1990 and 1991. Sawmills, planing mills, and millwork * * * had the 14th highest lifetime risk of 5.8 deaths per 1,000 workers.'' The Report also documents that the forestry industry has a high fatality rate as well, and workers face injury risks similar to those of logging workers. Citing data from the Census of Fatal Occupational Injuries (CFOI), the Report identified 82 fatalities of workers between 1992 and 1997 employed in the forestry industry as a whole, which includes establishments primarily engaged in the operation of timber tracts, tree farms, forest nurseries and those providing related forest service activities such as cruising and estimating timber, reforestation, fire prevention and fire fighting, pest control, timber valuation, and the gathering of forest products.

Although the Report notes that there was almost no data specific to workers 16 and 17 years of age, the CFOI identifies 35 deaths in timber tract operations for all age groups between 1992 and 1997 and 39 deaths in forestry service operations for all age groups during the same period. In addition, NIOSH also was able to identify 16 additional deaths of workers of all ages that were clearly attributable to forest firefighting activities. These are indeed occupations that experience high rates of fatalities.

NIOSH notes that work in SIC 083, forest nurseries and gathering of forest products, is associated with very small numbers of fatalities and should not be prohibited by HO 4. SIC 083 encompasses those establishments primarily engaged in growing trees for purposes of reforestation or in gathering forest products. The concentration or distillation of these products, when carried out in the forest, is also included in this industry. Examples of industries or activities included in SIC 083 are the gathering of balsam needles, ginseng, huckleberry greens, maple sap, moss, Spanish moss, sphagnum moss, teaberries, and tree seeds; the distillation of gum, turpentine, and rosin if carried on at the gum farm; and the extraction of pine gum. It should also be noted that section 13(d) of the FLSA already provides an exemption from the Act's minimum wage, overtime, and youth employment provisions to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

The Report also recommends that that the Department remove the current exemption that permits 16- and 17-year-olds to work in the construction of living and administrative quarters of logging camps. The Report states: ''Construction work has high risks for fatal and nonfatal injuries and should not be exempted in the construction of living or administrative quarters at logging sites or mills.'' The Department is seeking public comments about this

issue in the ANPRM that is being published concurrently with this NPRM.

As mentioned earlier, the Department of Labor Appropriations Act, 2004 (Pub. L. 108–199), amended the FLSA by creating a limited exemption from the youth employment provisions for minors 14 to 18 years of age who are excused from compulsory school attendance beyond the eighth grade. The exemption, contained in section 13(c)(7) of the FLSA, allows eligible youth, under specific conditions, to be employed by businesses that use machinery to process wood products, but does not allow such youth to operate or assist in operating power-driven woodworking machines. This exemption necessitates that the Department revise both Reg. 3 and HO 4.

The Department agrees with the Report recommendation that HO 4 should be expanded to cover work in forest firefighting and forest fire prevention because of the risks inherent in those occupations. The Department is also inclined to adopt NIOSH's recommendation that the employment of 16- and 17-year-olds be prohibited in the operation of timber tracts, tree farms and forestry services, but is concerned that such youth may be able to be safely employed in certain facets or occupations within those industries without jeopardizing their health or well-being. Therefore, the Department is asking, in this NPRM, for information from the public that will help it identify which occupations or tasks within the timber tract, tree farm, and forestry services industries, if any, are not particularly hazardous or detrimental to the health and well-being of youth.

The Department is proposing to revise HO 4 to add a prohibition on the employment of youth 16 and 17 years of age in forest firefighting and forest fire prevention occupations to the current prohibitions on logging occupations, and occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage stock mill. The Department proposes to revise the title of HO 4 to reflect these changes.

Under this proposal, all occupations in forest firefighting and forest fire prevention shall include the controlling and extinguishing of fires, the wetting down of areas or extinguishing of spot fires, the patrolling of burned areas to assure the fire has been extinguished, and the piling and burning of slash. The term shall also include the following tasks when performed in conjunction with, or in support of, efforts to extinguish an actual fire: The clearing of fire trails or roads; the construction, maintenance, and patrolling of firelines; acting as a fire lookout or fire patrolman; and tasks associated with the operation of a temporary firefighting base camp. The prohibition concerning the employment of youth in forest firefighting and forest fire prevention would apply to all forest locations and buildings located within the forest, not just where logging or sawmilling takes place. We note that, because the FLSA does not cover individuals who volunteer to perform services for state or local government agencies when the provisions in section 3(e)(4) are met, this proposal would not prohibit 16- and 17-year-old volunteers from donating their forest firefighting services to state and local governments.

The Department is also proposing to incorporate into HO 4 the provisions of the Department of Labor Appropriations Act, 2004 (Pub. L. 108–199), which amended the FLSA by creating a limited exemption from the youth employment provisions for certain minors 14 through 17 years of age who are excused from compulsory school attendance beyond the eighth grade. The exemption, contained at section 13(c)(7) of the FLSA, overrides the HO 4 prohibition against 16- and 17-year-olds performing any work in the sawmill industry that entails entering the sawmill building by permitting certain youth to be employed inside and outside of places of business where machinery is used to process wood products. The Department proposes to revise HO 4 to incorporate the provisions of section 13(c)(7) in the same manner, and using the same definitions and interpretations, as it proposed when discussing revisions to Reg. 3, above.

The term *all occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage stock mill*, as defined by HO 4, specifically excludes work performed in the planing-mill department or other remanufacturing departments of any sawmill, or in any planing mill or remanufacturing plant not a part of a sawmill. Although not defined in the regulations, the Department has, since at least 1942, considered the term *remanufacturing departments* to mean those departments of a sawmill where lumber products such as boxes, lawn furniture, and the like are remanufactured from previously cut lumber. The kind of work performed in such departments is similar to that done in planing mill departments in that rough lumber is surfaced or made into other finished products. The term is not intended to denote those operations in sawmills where rough lumber is cut to dimensions. Because the Department has, over the years, received requests for clarification as to the meaning of *remanufacturing departments*, it proposes to add the above definition to HO 4.

The Department is also proposing to revise HO 4 to include the above definition of *remanufacturing departments*, as well as the all definitions necessitated by the incorporation of the provisions of FLSA section 13(c)(7) and discussed earlier in this document. The Department also proposes to restructure all the definitions in HO 4 in an alphabetical sequence to comport with guidance provided by the **Federal Register**.

The Department has decided not to address, in this NPRM, the Report recommendation to remove the HO 4 exemption that permits 16- and 17-year-olds to work in the construction of living and administrative quarters of logging camps. This is because the Report also recommends the creation of a new HO that would prohibit all work in construction occupations which, if adopted, would impact the provisions of not only HO 4 but several other HOs. The Department believes additional information is needed before it can address such a broad recommendation that would impact all construction occupations. Accordingly, the Department is issuing an ANPRM, in conjunction with and on the same day as this NPRM, that requests public comment on this issue.

*F. Occupations Involved in the Operation of Power-Driven Wood Working Machines (Order 5) (29 CFR 570.55)*

HO 5 generally prohibits the employment of 16- and 17-year-olds in occupations involving the operating, setting up, adjusting, repairing, oiling, or cleaning of power-driven woodworking machines. It also prohibits the occupations of off-bearing from circular saws and from guillotine-action veneer clippers. As previously mentioned, FLSA section 13(c)(7) now permits certain minors who are at least 14 years of age and under the age of 18 years to be employed inside and outside of places of business where machinery is used to process wood products, but does not allow such youth to operate or assist in operating power-driven woodworking machines.

The term *power-driven woodworking machines* has long been defined in § 570.55(b) to mean all fixed or portable machines or tools driven by power and used or designed for cutting, shaping, forming, surfacing, nailing, stapling, wire stitching, fastening, or otherwise assembling, pressing, or printing wood or veneer. Although FLSA section

13(c)(7) does not impact the prohibitions of HO 5 because eligible youth are still prevented from operating power-driven woodworking machinery, it does expand the types of workplaces where certain youth may be employed to include sawmills, lath mills, shingle mills, and cooperage stock mills as well as other workplaces the Department is proposing to include under Reg. 3 and HO 4. Employees at these newly permitted work sites routinely use power-driven equipment that process materials that may not be included in the current definition of *power-driven woodworking machines* contained in HO 5, such as trees, logs, and lumber. Accordingly, the Department is proposing to amend the definition of power-driven woodworking machines to include those machines that process trees, logs, and lumber. To ensure consistency, the Department is proposing that this single definition of *power-driven woodworking machines* be included in § 570.34(m) (Reg. 3), § 570.54 (HO 4), and § 570.55 (HO 5).

The Department is also proposing to restructure the two definitions in this section to reflect an alphabetical sequence in accordance with guidance provided by the **Federal Register**.

*G. Occupations Involved in the Operation of Power-Driven Hoisting Apparatus (Order 7) (29 CFR 570.58)*

HO 7 generally prohibits 16- and 17-year-olds from employment in occupations that involve the work of: (1) Operating an elevator, crane, derrick, hoist, or high-lift truck except such youth may operate unattended automatic operation passenger elevators and electric or air operated hoists not exceeding one ton capacity; (2) riding on a manlift or on a freight elevator, except a freight elevator operated by an assigned operator; and (3) assisting in the operation of a crane, derrick or hoist performed by crane hookers, crane chasers, hookers-on, riggers, rigger helpers, and like occupations.

The Report recommends that the Department expand HO 7 to prohibit the repairing, servicing, disassembling of the machines and assisting in tasks being performed by the machines named in the HO. Assisting in tasks being performed by the machines would be tending the machines. The Report reflects substantial numbers of deaths and injuries are associated with operating and assisting in tasks performed by power-driven hoisting apparatus, including deaths of youth. Additionally, a considerable number of deaths were associated with activities not directly related to operation of the hoisting apparatus, notably servicing, repairing, and disassembling. Currently, the work of repairing, servicing, disassembling, and tending the machines covered by HO 7 is prohibited to 14- and 15-year-olds under Reg. 3 at § 570.33(b). Under HO 7, 16- and 17-year-olds may currently perform such work, except they may not assist in the operation of a crane, derrick, or hoist as defined by the HO.

The Report also recommends that HO 7 be expanded to prohibit youth from riding on any part of a forklift as a passenger (including the forks) and from working from forks, platforms, buckets, or cages attached to a moving or stationary forklift. The Report notes that substantial numbers of fatalities occur among workers who are passengers on forklifts, riding on the forks, or working from the raised forklift attachments. Currently, 14- and 15-year-olds are prohibited from riding on forklifts because Reg. 3 prohibits such youth from operating or tending hoisting apparatus and any power-driven machines other than office equipment. The Department has long interpreted tending to include riding upon the power-driven equipment. HO 7, however, prohibits older youth only from operating high-lift trucks such as forklifts. Since 1999, the WHD has investigated at least three incidents where youth under 18 years of age were seriously injured while riding on forklifts being operated by other employees. One 16-year-old who was riding on the tines of a forklift suffered especially serious injuries to his liver and pancreas as a result of being pinned against a wall when the driver was unable to stop the forklift.

The Report also recommends that HO 7 be expanded to prohibit work from truck-mounted bucket or basket hoists commonly termed ''bucket trucks'' or ''cherry pickers'' because worker fatalities are associated with work from such equipment. The Report specifically notes the risk of falls and electrocution being linked with such equipment. The Report, citing CFOI data, reflects that there were 99 worker deaths associated with truck mounted bucket or basket hoists between 1992 and 1997.

In addition, the Report recommends that HO 7 be expanded to prohibit 16- and 17-year-olds from employment involving certain commonly used manlifts—especially aerial platforms-that do not meet the current definition of *manlift* contained in the HO. The Report contends that such manlifts appear to pose more significant injury risk than those traditionally prohibited by HO 7. HO 7 defines a *manlift* as a device intended for the conveyance of persons that consists of platforms or brackets mounted on, or attached to, an endless belt, cable, chain or similar method of suspension; such belt, cable or chain operating in a substantially vertical direction and being supported by and driven through pulleys, sheaves or sprockets at the top and bottom. The Report is correct that this current definition of *manlift* does not include, and therefore does not prohibit, 16- and 17-year-olds from operating or tending aerial platforms and other manlifts such as scissor lifts, boom-type mobile elevating work platforms, work assist vehicles, cherry pickers, basket hoists, and bucket trucks.

The Report also recommends that HO 7 be revised to eliminate the exemption that permits 16- and 17-year-olds to operate an electric or air-operated hoist not exceeding one-ton capacity. The Report states that current injury and fatality surveillance systems do not provide sufficient detail to justify this exemption. ''A hoisted load weighing less than one ton has the potential to cause injury or death as a result of falling, or being improperly rigged or handled. Hoist-related fatalities of young workers have been reported, including a recent case in which a youth was killed while operating a half-ton capacity hoist.''

The Department is proposing to implement all five of the Report recommendations concerning HO 7. Sections 570.58(a)(1) and (a)(2) would be revised to reflect that in addition to work involved with operating the named equipment, the work of tending, riding upon, working from, servicing, repairing or disassembling such equipment would also be prohibited. Section 570.58(a)(3) would be eliminated because its provisions would now be contained in the revised § 570.58(a)(1); the work of assisting in the operation of a crane, derrick, or hoist would be prohibited because such tasks fall within the scope of tending of equipment. The exemption contained in § 570.58(a)(1) permitting youth to operate and ride inside passenger elevators would be retained, but the exemption that currently allows 16- and 17-year-olds to operate an electric or air-operated hoist not exceeding one ton capacity would be eliminated as per the Report recommendation.

The Department also proposes to reformat the definitions section contained in HO 7 to reflect an alphabetical sequence in accordance with guidance provided by the **Federal Register**. In addition, the Department proposes to revise the definition of *manlift* so that, as recommended by the Report, it incorporates those pieces of equipment that perform the same

functions as manlifts but that do not currently fall within the prohibitions of the HO. The proposed definition includes a statement that the term *manlift* shall also include truck-or equipment-mounted aerial platforms commonly referred to as scissor lifts, boom-type mobile elevating work platforms, work assist vehicles, cherry pickers, basket hoists, and bucket trucks.

The Department is also proposing to revise the definition of *high-lift truck* to incorporate a long-standing enforcement position that industrial trucks such as skid loaders, skid-steer loaders, and Bobcat loaders are *high-lift trucks* as defined by HO 7. Although not specifically named as high-lift trucks by HO 7, such equipment meets the definition of high-lift trucks because each is ''a power-driven industrial type of truck equipped with a power-operated lifting device * * * capable of tiering loaded pallets or skids one above the other.'' The Department has opined on this matter, in writing, since at least 1993. By adding skid loaders, skid-steer loaders, and Bobcat loaders to the definition of high-lift trucks, the Department believes it will clarify the requirements for compliance with HO 7. The Department has successfully defended this enforcement position, most recently in a case where minors were employed to operate a skid-steer loader to clean trailers used to haul livestock. The Department prevailed despite the fact that the youth did not operate or utilize the loader's hoisting device but used the skid-steer loader as a ''scraper'' (see *Lynnville Transport, Inc.* v. *Chao*, 316 F. Supp. 2d 790 (S.D. Iowa 2004)).

*H. Occupations in the Operation of Power-Driven Meat-Processing Machines and Occupations Involving Slaughtering, Meat Packing or Processing, or Rendering (Order 10) (29 CFR 570.61)*

HO 10 generally prohibits 16- and 17-year-olds from being employed in all occupations in or about slaughtering, meat packing or processing establishments, and rendering plants. The HO also prevents such minors from performing all occupations involved in the operation or feeding of several power-driven meat processing machines when performed in slaughtering and meat packing establishments, as well as in wholesale, retail, or service establishments. The term *slaughtering and meat packing establishments* is defined in HO 10 to mean places in which cattle, calves, hogs, sheep, lambs, goats, or horses are killed, butchered, or processed. The term also includes establishments that manufacture or process meat products or sausage casing from such animals. The term currently does not include establishments that process only poultry, rabbits, or small game. The term *retail/wholesale or service establishments*, as defined in HO 10, includes establishments where meat or meat products are processed or handled, such as butcher shops, grocery stores, restaurants, quick service establishments, hotels, delicatessens, and meat locker (freezer-locker) companies, and establishments where any food product is prepared or processed for serving to customers using machines prohibited by the HO. Included on the list of prohibited power-driven meat processing machines are meat patty forming machines, meat and bone cutting saws, meat slicers, knives (except bacon-slicing machines), headsplitters, and guillotine cutters; snoutpullers and jawpullers; skinning machines; horizontal rotary washing machines; casing-cleaning machines such as crushing, stripping, and finishing machines; grinding, mixing, chopping, and hashing machines; and presses (except belly-rolling machines). The term *operation* includes setting-up, adjusting, repairing, oiling, or cleaning such machines, regardless of the product being processed by the machine. For example, HO 10 prohibits a minor from operating a meat slicer in a restaurant to cut cheese or vegetables. In addition, the Department has, as early as 1991, interpreted the prohibition on cleaning such machines as precluding 16- and 17-year-olds from performing the hand or machine washing of parts of and attachments to power-driven meat processing machines, even when the machine was disassembled and reassembled by an adult. This provision is designed to prevent such youth from being injured by contact with the machines' sharp blades and cutting surfaces. HO 10 provides a limited exemption that permits the employment of apprentices and student-learners under the conditions prescribed in § 570.50(b) and (c).

The Report recommends that HO 10 be expanded to prohibit work in all meat products manufacturing industries including those engaged in the processing of sausages and/or other prepared meat products and those engaged in poultry slaughtering and/or processing. The rationale for this recommendation is that although injury fatality rates in meat products manufacturing industries are relatively low, rates of disorders due to repeated trauma are extremely high. This is also true for poultry processing which is not encompassed in the existing HO. In addition, there are a number of diverse and serious health hazards associated with the slaughtering of animals and manufacturing of meat products, including exposure to infectious agents and respiratory hazards. The Report notes that in 1997 there were an estimated 13,646 occupational injuries and illnesses resulting in days away from work among employees in the meat product manufacturing industry. Although the greatest number of these injuries and illnesses occurred in meat packing plants (5,526), establishments that produce sausages and prepared meats experienced 4,147 injuries and illnesses, and poultry slaughtering and processing establishments experienced 3,937 that same year. In 1999, the Department investigated the death of a young poultry processing worker in Arkansas and the serious injury of a similarly employed minor in Missouri who injured both of his legs when he slipped and fell into an auger. The minor also suffered severe nerve damage and second degree burns.

The Report also recommends that HO 10 be revised to allow 16- and 17-year-olds to operate and feed power-driven meat and food slicers in retail, wholesale and service industry establishments. This is one of the few recommendations the Report makes that would relax current prohibitions, and it is made with the rationale that ''although data show high numbers of injuries associated with power-driven slicers, the injuries appear to be relatively minor.'' NIOSH includes the caveat that if this recommendation is implemented ''it should be accompanied by a mandatory reporting period in which all serious youth injuries and deaths resulting from previously prohibited activities are promptly reported to the U.S. Department of Labor.'' Such a reporting plan would allow an assessment as to whether the revision should be rescinded or further refined to best protect working youth.

Finally, the Report recommends that the apprenticeship and student-learner exemption contained in HO 10 be restricted to apply only to 16- and 17-year-olds employed in retail, wholesale, and service industries. The Report recommends that this exemption no longer be applicable to the employment of such minors in meat products manufacturing industries.

The Department proposes to implement the Report recommendation to expand the application of HO 10 to prohibit the employment of 16- and 17-year-olds in all meat products manufacturing industries, including

those engaged in the processing of sausages and/or other prepared meat products and those engaged in poultry slaughtering and/or processing. The Department proposes to revise the term *slaughtering and meat packing establishments* contained in § 570.61(b) so that the term also includes places where poultry are killed, butchered, or processed. This term would also include establishments that manufacture or process meat products, including poultry, sausage, or sausage casings. The Department also proposes to add buffalo and deer to the lists of animals contained in the definitions of the terms *killing floor* and *slaughtering and meat packing establishments* and note that these lists are not exhaustive. The Department also proposes to revise the title of HO 10 to reflect its expansion to the slaughtering of poultry, and the processing, packing, and rendering of poultry and poultry products. The current HO 10 exemption permitting the killing and processing of rabbits or small game in areas physically separated from the killing floor would not be changed.

The Department also proposes to revise § 570.61(a)(4) to incorporate its interpretation that the prohibition against 16- and 17-year-olds cleaning power-driven meat processing machines extends to washing the machine's parts and attachments, even if the machine is disassembled and reassembled by an adult. This proposal, however, would not prevent a 16- or 17-year-old from operating a commercial dishwasher to run a self-contained rack containing parts of or attachments to a power-driven meat processing machine through the dishwasher so long as the youth does not actually handle or touch the machine parts or attachments.

The Department also proposes to reformat, in an alphabetical sequence, all the definitions found in § 570.61(b) to comport with guidance provided by the **Federal Register**.

The Department has decided not to implement the Report recommendation that would allow 16- and 17-year-olds to operate and feed power-driven meat and food slicers in retail, wholesale and service industry establishments. Both the Report and the Department's enforcement experience reflect that meat slicers are responsible for many occupational injuries. The Report notes that the Survey of Occupational Injuries and Illnesses reports that in 1997, food and beverage processing machinery were responsible for 11,737 nonfatal injuries and illness that resulted in days away from work. Over sixty percent of that number, 7,280 injuries and illnesses, were caused by food slicers. The median number of days away from work for workers who suffered food slicer related injuries or illnesses was four days, not an insignificant number. Since October 1999, the Department has investigated at least 36 injuries of young workers that were caused by operating or cleaning power-driven meat slicers. Although none of these injuries was life threatening, most were considered to be serious and many caused the partial loss of digits and will leave some permanent scarring.

The Department has also decided not to implement at this time the Report recommendation concerning limiting the current apprenticeship and student-learner exemption contained in HO 10 to retail, wholesale and service industries. The apprenticeship and student learner exemptions contained in certain HOs were developed relatively independently of each other as each HO was adopted. The issue of allowing certain training exemptions from the HOs first arose in the early 1940s, after the enactment of the first six HOs. HO 5 was amended to permit the employment of student learners and apprentices, but HOs 1 through 4 were not. Each committee convened thereafter to study, draft, and implement a new HO developed its own criteria for determining the appropriateness of including apprentice and student-learner exemptions and was not restricted by the determinations made by previous committees. The Report makes several recommendations concerning the establishment, revision, and elimination of apprenticeship and student-learner exemptions, but the rationale for each recommendation either is vague or is not provided. The Department believes that before any changes to the existing exemptions are made, it is important to consider and develop criteria for determining when apprenticeship and student-learner exemptions are appropriate. Such criteria, which must be consistent with the established national policy of balancing the benefits of employment opportunities for youth with the necessary and most effective safety protections, will also be of value as the Department considers creating new HOs. Accordingly, the Department is issuing an ANPRM, in conjunction with and on the same day as this NPRM, to solicit public comment on this important issue.

*I. Occupations Involved in the Operation of Bakery Machines (Order 11) (29 CFR 570.62)*

HO 11 generally prohibits the employment of 16- and 17-year-olds in occupations involved in the operation of power-driven bakery machines. Prohibited activities include operating, assisting to operate, setting up, adjusting, repairing, oiling, or cleaning any horizontal or vertical dough mixer; batter mixer; bread dividing, rounding, or molding machine; dough brake; dough sheeter; combination bread slicing and wrapping machine; or cake cutting band saw. The HO also prevents the employment of such youth in the occupation of setting up or adjusting a cooky (sic) or cracker machine. The prohibitions of the HO do not differentiate between portable and non-portable equipment, and models designed for use in the home versus those solely designed for industrial applications. Therefore, the prohibitions of HO 11 include the employment of 16- and 17-year-olds to operate even the smallest of counter top vertical mixers.

In response to information presented by several restaurants and employer associations, the Department adopted an enforcement position in 1990 that it would not assert a violation of HO 11 when a 16- or 17-year-old employee operated a pizza-dough roller, a type of dough sheeter, when the machine: (1) Is constructed with safeguards contained in the basic design so as to prevent fingers, hands, or clothing from being caught in the in-running point of the rollers; (2) has gears that are completely enclosed; and (3) has microswitches that disengage the machinery if the backs or sides of the rollers are removed. This enforcement position applies only when all the safeguards detailed above are present on the machine, are operational, and have not been overridden. In addition, this enforcement position applies only to the operation of the machine. HO 11 still prohibits 16- and 17-year-olds from being employed in occupations involving the setting up, adjusting, repairing, oiling, or cleaning of such pizza-dough rollers. The Department has restated this position numerous times in response to written requests and has included this position in its Field Operations Handbook since at least 1992.

The Report recommends that HO 11 be relaxed to allow the operation of counter-top models of power-driven bakery machines, comparable to those intended for household use. The Report's rationale for this recommendation is that available data suggest that there were no fatalities involving such counter-top power-driven machines, and nonfatal injuries requiring time away from work are of moderate severity. Although, as noted, the HO prohibits the use of several different power-driven bakery machines, the thrust of the Report's

recommendation involves food mixers. The Report notes that there were 712 non-fatal injuries and illnesses in 1997, with a median of 11 days away from work, associated with work with mixers, blenders, and whippers.

The Department's enforcement experience includes situations where employers have questioned why 16- and 17-year-olds were not permitted to use small mixers to process such things as cheese dip and batter for seafood when such machines generally appeared to present no risks to such minors. Recently, the Department adopted an enforcement policy that it would not assert violations of HO 11 when 16- and 17-year-olds operate, assist to operate, setup, adjust, repair, oil, or clean certain small, lightweight, countertop mixers.

The Department proposes to implement this recommendation by creating a new § 570.62(b)(1) that would include an exemption allowing the employment of 16- and 17-year-olds to operate—including setting-up, adjusting, repairing, oiling, and cleaning—lightweight, small capacity, portable counter-top power-driven food mixers that are, or are comparable to, those models intended for household use. The Department, during its meetings with various stakeholders held after the release of the Report, sought to identify which types of mixers could be operated safely in the workplace by 16- and 17-year-olds. The information provided, which also echoed the Department's enforcement experiences, indicated that such factors as bowl capacity, the horsepower of the motor, the portability of the machine (light weight and not permanently wired or ''hardwired'' into the establishment's electrical power source), and similarity to equipment designed exclusively for home use were all important criteria. For purposes of this exemption, the Department proposes that a lightweight, small capacity mixer is one that is not hardwired into the establishment's power source, is equipped with a motor that operates at no more than ½ horsepower, and whose bowl capacity does not exceed five quarts. Minors 14- and 15-years of age would still be prohibited from operating or assisting in the operation of such mixers under the provisions of Reg. 3.

The Department is also proposing to incorporate into part 570 its long-standing enforcement position regarding the operation of certain pizza-dough rollers by 16- and 17-year-old workers. The Department's enforcement experience indicates that when employers properly apply this limited enforcement position, 16- and 17-year-olds can safely operate pizza-dough rollers. Accordingly, the Department is proposing to create a new § 570.62(b)(2) that will permit such youth to operate—but not set-up, adjust, repair, oil, or clean—those power-driven pizza-dough rollers that: (1) Are constructed with safeguards contained in the basic design so as to prevent fingers, hands, or clothing from being caught in the in-running point of the rollers; (2) have gears that are completely enclosed; and (3) have microswitches that disengage the machinery if the backs or sides of the rollers are removed. The exception in § 570.62(b)(2) would apply only when all the safeguards detailed above are present on the machines, are operational, and have not been overridden.

The Department is also proposing to change the word cooky in § 570.62(a)(2) to cookie to reflect the more common spelling of that word.

*J. Occupations Involved in the Operation of Paper-Products Machines, Scrap Paper Balers, and Paper Box Compactors (Order 12) (29 CFR 570.63)*

Hazardous Occupations Order No. 12 generally prohibits minors under 18 years of age from working in occupations involving the operation of paper-products machines. The HO prohibits, with certain exceptions discussed below, the loading, operating, and unloading of scrap paper balers, including paper box balers and compacting machines, and other power-driven machines used in the remanufacture or conversion of paper or pulp into a finished product. When HO 12 was promulgated in 1954, the dangers specifically associated with the operation of scrap paper balers involved being caught in the plungers during the compression process and suffering strains and other injuries while moving the compressed bales.

The Department has consistently interpreted HO 12 to apply to any establishments that use such paper-products machines, including retail stores. The Department had long interpreted the regulation as applying to paper box compactors (which generally perform the same function, utilize the same processes of compacting, and present the same dangers as scrap paper balers) although paper box compactors were not specifically named in the HO until 2005. Prior to 2005, the prohibitions of HO 12 applied only to equipment used exclusively to process paper products, even though machines used to process other materials, in addition to paper products, share the identical machine designs, operation methods, and potential risks.

As a result of reports received in the 1980s of injuries to minors employed in retail stores involving paper balers, the Department conducted a review of HO 12 in 1990–91 as it applied to grocery stores and other retail operations. Through a Proposed Rule (55 FR 42812), followed by a Final Rule (56 FR 58626), HO 12 was amended in December 1991. The regulation was clarified as applying where the baled paper products were recycled, as well as where they were disposed of as trash. Further, the regulation's prohibition on ''operation'' was clarified so as not to include (i.e., to permit) the stacking of materials in areas adjacent to the machine. Finally, the regulation was revised to state explicitly that HO 12 applied to all covered establishments that used such machines, consistent with long-established Departmental interpretation.

The Department published an ANPRM in 1994 (59 FR 25167), seeking the public's views on possible changes in the child labor regulations, including the Hazardous Occupations Orders. Although HO 12 was not specifically mentioned in the ANPRM, the Department received comments from representatives of the grocery industry asserting that recent technological changes have rendered certain new balers and compactors safe for minors to load. The Food and Allied Service Trades Department, AFL–CIO, opposed any relaxation of the prohibitions contained in HO 12. The Child Labor Coalition also opposed any relaxation of HO 12 and suggested that it should be expanded to include all compactors.

The Compactor and Baler Act was enacted on August 6, 1996 (Pub. L. 104–174). This legislation amended the FLSA by adding a new subsection 13(c)(5) which permits 16- and 17-year-olds to load, but not operate or unload, certain scrap paper balers and paper box compactors only when certain conditions are met. One such condition is that the equipment must meet specific standards issued for balers or for compactors by the American National Standard Institute (ANSI). ANSI is a national organization that coordinates the development of voluntary, consensus standards in a wide range of areas, including product and worker safety.

When enacting the Compactor and Baler Act, Congress explicitly applied certain industry standards for the determination of which balers and/or compactors are safe for minors to load: ANSI Standard ANSI Z245.5–1990 for scrap paper balers or Standard ANSI Z245.2–1992 for paper box compactors. Congress has used ANSI standards in other contexts as expressions of the best

available technology in the safety area. For example, the Occupational Safety and Health Act of 1970 directed the Department of Labor to adopt the then-existing ANSI standards, rather than delay any activity until the agency promulgated particular occupational safety and health standards (see section 6(a) of the Occupational Safety and Health Act, 29 U.S.C. 655(a)). The ANSI standards for scrap paper balers and paper box compactors govern the manufacture and modification of the equipment, the operation and maintenance of the equipment, and employee training. The Compactor and Baler Act also provides that any new standard(s) adopted by ANSI would also be sufficient for the safety of the scrap paper balers and paper box compactors, if the Secretary of Labor certifies the new standard(s) to be at least as protective of the safety of minors as the two standards specified in the Act. In the Final Rule issued in 2004, the Department stated that it would publish a Notice in the **Federal Register** when the Secretary made any such certifications.

Because these ANSI standards are copyright-protected, the Department cannot include them in the regulations or reproduce them for distribution to the public. Copies of the applicable ANSI standards are available for inspection at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC 20408, at the Occupational Safety and Health Administration Docket Office at Room N–2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, and at any of the OSHA regional offices. Copies of these standards are available for purchase at the American National Standards Institute, 11 West 42nd Street, New York, New York 10036.

The Department issued a Final Rule on December 16, 2004 (69 FR 75382), which revised HO 12 to incorporate the provisions of the Compactor and Baler Act. The final rule became effective on February 14, 2005. As supported by the provisions of the Compactor and Baler Act, the Final Rule expanded the coverage of HO 12 to include those balers and paper box compactors that process other materials in addition to paper products. The final rule also included the Secretary's certification, as permitted by the Compactor and Baler Act, that the new Standard ANSI Z245.5–1997 is as protective of the safety of minors as Standard ANSI–S245.5–1990 and that the new Standard ANSI Z245.2–1997 is as protective of the safety of minors as Standard ANSI Z245.2–1992. Accordingly, these newer standards were incorporated into HO 12.

The Department, when issuing the 2004 Final Rule (69 FR 75397, December 16, 2004), noted that there still remained one class of balers and compactors that falls outside of the scope of HO 12—those machines that process anything and everything but paper products. The Report, in recognition of this gap in coverage, recommends that HO 12 be revised to include such machines because ''balers and compactors used to process other scrap materials such as plastic and aluminum cans pose similar risk of injury from crushing or amputation.''

The Report notes that baler and compactor related deaths are not limited to those in which paper or cardboard is being processed. Many machines are adaptable for the baling and compacting of a wide variety of materials, including paper, aluminum cans, plastic milk jugs, and general refuse. Other machines are intended specifically for processing a single product, such as metals. These specialized metal balers and compactors, which process such items as cars, radiators, and siding, may share similar designs and operating procedures with those compactors and balers that process only paper products or process other materials in addition to paper products. However, these specialized metal balers also include large industrial machines that feature shear blades that are not normally present on lighter-duty type balers. The Report notes that while these large specialized balers are generally found in facilities that specialize in processing scrap and waste materials, smaller general-purpose portable machines that serve the same functions are marketed for use in businesses such as grocery stores, hotels, restaurants, and hospitals. These smaller general-purpose machines operate in essentially the same manner as the larger machines and present similar risks of injury.

In addition, the Report recommends that the Department continue to emphasize enforcement of portions of the Compactor and Baler Act requiring that balers and compactors conform to construction and operations standards that greatly reduce exposure to hazardous energy. The Report notes that investigations of baler-related incidents show that failure to maintain machinery in safe operating condition contributes to fatalities and serious injuries and that neither adult supervisors nor young workers may fully appreciate the risks posed by uncontrolled hazardous energy. The Report also recommends that the Department retain the limited exemption contained in § 570.63(c)(2) that permits apprentices and student-learners to perform, under specific guidelines, tasks that would otherwise be prohibited by HO 12.

The Department agrees with the NIOSH Report recommendation regarding the scope of the HO and is proposing to revise HO 12 to prohibit 16- and 17-year-olds from operating, loading, and unloading, with limited exceptions, all balers and compactors, regardless of the materials being processed. Both NIOSH occupational injury data and the Department's enforcement experience reflect that injuries occur when youth operate balers and compactors that are designed and used to process materials other than paper. For example, the Department investigated the employment of a 17-year-old who had both legs amputated in a large industrial baler machine at a recycling center. The machine was the only baler at the center and, therefore, was used to process a wide variety of items. In a different investigation, another 17-year-old lost his right index finger while putting recyclables into an industrial waste compactor by hand.

The limited exemption provided by FLSA section 13(c)(5) and contained in § 570.63(c)(1), which allows 16- and 17-year-old workers, under specific conditions, to load but not operate or unload certain scrap paper balers and paper box compactors, would remain. This exemption, as detailed in the Compactor and Baler Act, would apply only to certain scrap paper balers and paper box compactors, as currently defined in § 570.63(b), and would not apply to those balers and compactors that are not designed or used to process paper or cardboard.

This proposed revision would be accomplished by adding new subsections to § 570.63 that would prohibit 16- and 17-year-olds from performing the occupations of operating or assisting to operate any baler or compactor that is designed or used to process materials other than paper. A *baler that is designed or used to process materials other than paper* would be defined in § 570.63(b) to mean a powered machine designed or used to compress materials other than paper or cardboard boxes, with or without binding, to a density or form that will support handling and transportation as a material unit without requiring a disposable or reusable container. A *compactor that is designed or used to process materials other than paper* would be defined in § 570.63(b) to mean a powered machine that remains stationary during operation, designed or used to compact refuse other than paper or cardboard boxes, into a detachable or

integral container or into a transfer vehicle. The occasional processing of paper or a cardboard box by a machine designed to process other materials would not bring the loading of such machines within the limited exemption provided by section 13(c)(5).

The prohibition against such youth setting up, adjusting, repairing, oiling, or cleaning any of the machines currently listed in HO 12 would be extended to include compactors and balers that are designed to process materials other than paper.

As previously noted, the Compactor and Baler Act provides that any new standard(s) adopted by ANSI would also be sufficient for the determination of the safety of the scrap paper balers and paper box compactors, if the Secretary of Labor certifies the new standard(s) to be at least as protective of the safety of minors as the two standards specified in the Act. In the 2004 Final Rule, the Secretary certified that Standard ANSI Z245.5–1997 is as protective of the safety of minors as Standard ANSI–S245.5–1990 and that Standard ANSI Z245.2–1997 is as protective of the safety of minors as Standard ANSI Z245.2–1992. Accordingly, the newer standards were incorporated into HO 12.

The Department has learned that in 2004 ANSI adopted Standard ANSI Z245.2–2004 (Stationary Compactors—Safety Requirements for Installation, Maintenance, and Operations) and Standard ANSI Z245.5–2004 (Baling Equipment—Safety Requirements for Installation, Maintenance, and Operations). The Department's preliminary review of these new Standards, which includes input from NIOSH, indicates that the Standards are as protective as those cited in the Compactor and Baler Act and should be included in HO 12 along with the older Standards should a Final Rule be implemented. The public is invited to provide comment on whether Standard ANSI Z245.5–2004 is as protective of the safety of minors as Standard ANSI Z245.5–1990 and whether Standard ANSI Z245.2–2004 is as protective of the safety of minors as Standard ANSI Z245.2–1992.

The Department appreciates the Report's recommendation to continue emphasizing enforcement of portions of the Compactor and Baler Act requiring that balers and compactors conform to construction and operations standards that greatly reduce exposure to hazardous energy. The Report notes that investigations of baler-related incidents show that failure to maintain machinery in safe operating condition contributes to fatalities and serious injuries and that neither adult supervisors nor young workers may fully appreciate the risks posed by uncontrolled hazardous energy. The Department's enforcement experience supports these findings. Most recently, the Department investigated the death of a 16-year-old grocery store worker in New York who was crushed to death by a baler that had been jerry-rigged to operate while the door to the loading chamber was open. This over-riding of an important safety device required by each of the ANSI Standards was done to speed up the loading process. As discussed previously, in order for an employer to avail itself of the limited exemption contained in § 570.63(c)(1) that permits 16- and 17-year-olds under certain conditions to load, but not operate or unload, certain scrap paper balers and paper box compactors, the employer must determine that the equipment meets an appropriate ANSI Standard listed in HO 12. The employer must also post a notice on the machine that states, among other things, which applicable ANSI Standard the machine meets. The appropriate ANSI Standards govern not only the manufacture and modification of the equipment, but the operation and maintenance of the equipment, and employee training as well. During enforcement actions involving employers who avail themselves of the limited exemption contained in § 570.63(c)(1), the Department routinely confirms whether the scrap paper baler or paper box compactor being loaded by 16- or 17-year-olds meets the requirements of the applicable ANSI Standard as determined and declared by the employer. If the equipment does not meet the requirements of an applicable ANSI Standard or if the employer failed to make such a determination, the provisions of the limited exemption have not been met and a violation of HO 12 has most likely occurred. The Department will carry on these efforts and will continue to work with both NIOSH and OSHA to better educate employers, employees, and enforcement personnel about the requirements of the ANSI Standards. Such efforts impact the safety of all workers, not just those under the age of 18.

Finally, the Department proposes to take no action concerning the NIOSH Report recommendation concerning the apprenticeship and student-learner exemption to HO 12 at this time. As previously discussed, the Department is issuing an ANPRM, in conjunction with and on the same day as this NPRM, that requests information from the public on this issue.

*K. Occupations Involved in the Operation of Circular Saws, Band Saws, and Guillotine Shears (HO 14) (29 CFR 570.65)*

HO 14 generally prohibits the employment of 16- and 17-year-olds in the occupations of operator or helper on power-driven circular saws, band saws, and guillotine shears, except those that are properly guarded and equipped with devices for full automatic feeding and ejection. The prohibitions of HO 14 are based on the equipment and apply regardless of the materials being processed. Section 570.65(b)(4) defines the term *circular saw* to mean a machine equipped with a thin steel disc having a continuous serious of notches or teeth on the periphery, mounted on shafting, and used for sawing materials. The term *band saw* is defined in § 570.65(b)(5) to mean a machine equipped with an endless steel band having a continuous serious of notches or teeth, running over wheels or pulleys, and used for sawing materials. Section 570.65(b)(6) defines the term *guillotine shear* to mean a machine equipped with a moveable blade operated vertically and used to shear materials. The term does not include other types of shearing machines, using a different form of shearing action, such as alligator shears or circular shears. HO 14 also prohibits such minors from setting-up, adjusting, repairing, oiling, or cleaning circular saws, band saws, and guillotine shears.

The original report that led to the issuance of HO 14 in 1960 noted that these machines had already been found and declared to be particularly hazardous for 16- and 17-year-old employees when used to process certain materials. Circular saws and band saws were already covered under HO 5 when used on wood, HO 10 when used on meat, and HO 12 when used on paper products. Band saws were also covered under HO 11 when used to cut sheet cakes to desired sizes and shapes. Guillotine shears are covered under HOs 5, 8, 10 and 12 when used on wood, metal, meat, and paper products, respectively. Reports showing that minors were being injured when operating these machines on materials not covered by an existing HO led the Department to issue the all-encompassing HO 14.

The Report recommends that HO 14 be expanded to cover other machines, such as chain saws, that perform cutting and sawing functions through direct contact between the cutting surfaces and the materials. The Report also recommends, alternatively, that the Department consider developing a new HO that would prohibit all sawing

machinery that perform cutting and sawing functions through direct contact of the cutting surface and the material being processed. The Report states: ''Stationary saws and hand-held saws, including chain saws, continue to be the source of substantial numbers of fatalities as well as nonfatal injuries which may be unusually severe.'' The Report observes that not all machines that perform cutting and sawing functions fit into HO 14's definitions of circular saw, band saw, or guillotine shears. The Report notes that available data demonstrate that chainsaws specifically contributed to 70 worker deaths between 1992 and 1997 and over 1,600 lost workday injuries. Some of these fatalities and deaths involved workers under 18 years of age. The Report also recommends that the Department retain the exemption contained in HO 14 that permits 16- and 17-year-old apprentices and student learners to perform work that would be otherwise prohibited by the HO.

The Department has long taken the position that HO 4 (Logging occupations and occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage stock mill) prohibits 16- and 17-year-olds from operating chain saws in logging operations because the HO prohibits all work ''in connection with the felling of timber.'' Likewise, the Department has consistently taken the position, starting as early as 1959, that HO 5 (Occupations involved in the operation of power-driven woodworking machines) prohibits these same minors from using chain saws to cut wood and wood products, including trees and branches. Over the last ten years, the Department has investigated the serious injuries of several youth that resulted from the use of chain saws to cut branches and trees, charged violations under HO 5, and assessed and collected civil money penalties because of those violations. However, as the Report implies, the use of chain saws by 16- and 17-year-olds would not be prohibited when cutting other materials such as metal, concrete, stone, and ice.

The Department has also long taken the position that HO 5 prohibits the employment of 16- and 17-year-olds to operate wood chippers to grind tree limbs, branches, and trunks into chips, mulch, or debris. Some questions have recently been raised concerning the appropriateness of this position, but the Department has been consistent in its application when the equipment is used to process wood and trees. Young workers have been killed or seriously injured while operating wood chippers. In 2000, the Department investigated the death of a 14-year-old member of a tree-trimming crew who was dismembered when he became entangled in branches he was feeding into a drum-type wood chipper. In 2001, the Department investigated the serious injury of a 17-year-old who suffered a fractured skull when the wood chipper he was feeding ''spit out'' a 12-inch long, 4-inch diameter, piece of a tree branch. Three titanium plates were permanently implanted into the minor's skull. The Department charged the employer of this youth with a violation of HO 5, and assessed and collected a civil money penalty because of the violation.

Just like in 1960 when HO 14 was first issued, the Department is receiving reports of injuries and deaths, such as the ones described in the preceding paragraphs, of youth operating power-driven machines that may be prohibited when used to process certain types of materials and not prohibited when processing other types of materials. Reciprocating saws constitute another example of such a machine. HO 5 prohibits the employment of 16- and 17-year-olds to operate reciprocating saws that are used or designed for cutting wood, but the same piece of equipment is permitted when used or designed exclusively to cut materials other than wood, such as metal. The Department has learned of occupational injuries to workers operating reciprocating saws to cut materials other than wood. The Department is aware of the death of an adult plumber in Minnesota in 2002 who was killed when the blade of the reciprocating saw he was using to rough-in plumbing entered his head near his eye. The U.S. Department of Energy has also reported that in 2002 an adult worker injured his larynx when the reciprocating saw he was operating kicked back and cut him in his lower throat. The American Journal of Forensic Medicine and Pathology (Volume 28, No. 4, December 2001) reports on the death of a 32-year-old male who lost his balance and fell on the blade of an electric reciprocating saw he was using to trim branches. The blade perforated his anterior chest wall, right lung, heart and aorta. The Journal noted that the victim had been drinking beer while trimming the branches. Finally, in 2004, the Department investigated the death of a 17-year-old worker who was employed to operate a reciprocating saw to salvage automobile catalytic converters for recycling. While operating the saw, the vehicle upon which he was using the saw fell on him and crushed him to death.

The Department is proposing to revise the prohibitions of HO 14 to include chain saws, wood chippers, and reciprocating saws. The prohibition would not depend on the material or materials being processed and would encompass the occupations of setting-up, adjusting, repairing, oiling, or cleaning such machines. This revision would be accomplished by revising § 570.65(a)(2) to prohibit the employment of minors in the occupations of operator of or helper on power-driven chain saws, wood chippers, and reciprocating saws, whether the machines are fixed or portable. Unlike the machines currently listed in § 570.65(a)(1), the prohibition would not be lifted if the chain saws, wood chippers, or reciprocating saws were equipped with full automatic feed and ejection-devices that are almost never found on such equipment. The current § 570.65(a)(2) would be renumbered as § 570.65(a)(3) and revised to reflect that 16- and 17-year-olds could not be employed in occupations involving the setting-up, adjusting, repairing, oiling, or cleaning of any of the equipment covered by the HO. The Department is also proposing to revise the title of HO 14 to reflect its application to the additional pieces of machinery and to change the word operations to operation. Finally, the Department proposes to restructure the definitions section contained at § 570.65(b) in an alphabetical sequence to comport with guidance provided by the **Federal Register** and to include definitions of the terms *chain saw, wood chipper*, and *reciprocating saw.* The term *chain saw* would mean a machine that has teeth linked together to form an endless chain used for cutting materials. The term *wood chipper* would mean a machine equipped with a feed mechanism, knives mounted on a rotating chipper disc or drum, and a power plant used to reduce to chips or shred such materials as tree branches, trunk segments, landscape waste, and other materials. The term *reciprocating saw* would mean a machine equipped with a moving blade that alternately changes direction on a linear cutting axis used for sawing materials.

The Department is evaluating the alternative recommendation made by the Report that it consider developing a new HO that combines the sawing machinery covered under HO 14 with other specialized machinery that performs cutting and sawing functions through direct contact of the cutting surface and the material. Similar alternative recommendations were made regarding HO 5 (Occupations involved in the operation of power-driven woodworking machines) and HO 8 (Occupations involved in the operation of power-driven metal forming,

punching, and shearing machines). The Department will continue to study these recommendations and, in an ANPRM, issued in conjunction with and on the same day as this NPRM, is requesting information from the public on these recommendations.

Finally, the Report also recommended that the Department retain the limited exemption contained in § 570.65(c) that permits apprentices and student-learners to perform, under specific guidelines, tasks that would otherwise be prohibited by HO 14. As discussed previously in the sections dealing with HOs 10 and 12, the Department proposes to take no action concerning the apprenticeship and student-learner exemptions to certain HOs at this time. The Department is issuing an ANPRM, in conjunction with and on the same day as this NPRM, that requests information from the public on this issue.

*L. Additional Recommendations of the Report*

The Report recommends that the Department retain, as currently issued, HO 3 (Coal mining occupations), HO 13 (Occupations involved in the manufacture of brick, tile, and kindred products), HO 15 (Occupations involved in wrecking, demolition, and shipbreaking occupations), and HO 17 (Occupations in excavation operations). The Department accepts these recommendations and proposes no revisions to these HOs. The Report also recommends that the Department remove the limited exemption for apprentices and student-learners contained in HO 16 (Occupations in roofing operations and on or about a roof) and HO 17, and retain the same exemption as it applies to HO 5 (Occupations involved in the operation of power-driven woodworking machines) and HO 8 (Occupations involved in the operation of power-driven metal forming, punching, and shearing machines). As discussed previously in the sections dealing with HOs 10, 12, and 14 of this preamble, the Department proposes to take no action concerning the apprenticeship and student-learner exemptions to any of the HOs at this time. The Department believes that before any changes to the existing exemptions are made, it is important to first consider and develop criteria for determining when apprenticeship and student-learners are appropriate. Accordingly, the Department is issuing an ANPRM, in conjunction with and on the same day as this NPRM, that seeks information from the public on this and other issues.

*M. Subpart G—General Statements of Interpretation of the Child Labor Provisions of the Fair Labor Standards Act of 1938, as Amended (29 CFR 570.101–570.129)*

Subpart G discusses the meaning and scope of the child labor provisions of the FLSA. The interpretations of the Secretary of Labor contained in subpart G indicate the construction of the law that guides the Secretary in administrating and enforcing of the Act. Since the last revision of subpart G in 1971, Congress has passed several amendments to the FLSA and the Department has revised other subparts of 29 CFR part 570 that are not currently reflected in subpart G. The Department proposes to revise subpart G to accommodate not only the statutory and regulatory changes that have occurred, but to reflect the proposed revisions to part 570 made by this NPRM and discussed earlier in this document. The proposed revisions to subpart G are as follows:

1. Section 570.103(c) states that there are only four specific child labor exemptions contained in the FLSA, and that only one of them applies to the minimum wage and overtime requirements of the Act as well. Congress has created four additional exemptions to the child labor provisions of the FLSA that are not currently reflected in subpart G (the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens by homeworkers; the loading of certain scrap paper balers and paper box compactors by 16- and 17-year-olds; the limited driving of certain automobiles and trucks by 17-year-olds; and the employment of certain youth between the ages of 14 and 18 years inside and outside of places of business that use power-driven machinery to process wood products). The exemption concerning the employment of homeworkers who make wreaths, contained in FLSA section 13(d), is an exemption from the minimum wage and overtime provisions of the Act as well as its child labor provisions. The Department is proposing to revise § 570.103(c) to reflect that the FLSA now contains eight exemptions from the child labor provisions and that two of these exemptions are also exemptions from the Act's minimum wage and overtime requirements.

This same subsection cites FLSA section 3(d), which defines the term employer and then, in footnote 4, discusses that definition. FLSA section 3(d) was amended in 1966, and the provisions of that amendment are not reflected in subpart G. The Department proposes to revise footnote 4 of § 570.101(c) to include the more recent definition of the term *employer* and to correct an erroneous reference to FLSA section 13(d).

2. Section 570.118 notes that the FLSA sets a minimum age of 16 years for employment in manufacturing or mining, but does not take into account the effects of the 2004 enactment of FLSA section 13(c)(7). Section 13(c)(7) allows the employment of certain 14- and 15-year-olds inside and outside of places of business that use power-driven machinery to process wood products as discussed above. The Department is proposing to revise § 570.118 to incorporate the provisions of FLSA section 13(c)(7).

3. Section 570.119 discusses those occupations in which 14- and 15-year-old minors may and may not be employed under Reg. 3. The Department proposes to revise this section to incorporate the changes necessitated by the adoption of FLSA section 13(c)(7) and to reflect the proposed revisions to §§ 570.33 and 570.34 as discussed above. For the sake of both brevity and clarity, the Department proposes not to repeat in § 570.119 the lists of all the occupations contained in §§ 570.33 and 570.34, but rather to refer readers to those sections.

The proposed revision to § 570.119 would contain the general prohibition against the employment of minors under 14 years of age under any circumstances that is currently included at the end of § 570.119.

4. Section 570.120 describes the authority and process by which HOs are adopted, and lists those occupations the Secretary has found and declared to be particularly hazardous or detrimental to the health or well-being of minors 16 and 17 years of age. Since subpart G was last revised, not only have several HOs been amended, but the process for promulgating and revising the HOs has also changed. Before 1995, the process for promulgating and amending HOs included public hearings and advice from committees composed of representatives of employers and employees of the impacted industry and the public, in accordance with the procedures established by subpart D of this part. The Department issued a Final Rule on April 17, 1995 (60 FR 19336) that deleted subpart D and placed the process of promulgating and revising HOs solely under the provisions of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, which control Departmental rulemaking.

The Department proposes to revise § 570.120 to reflect the 1995 change in the process for issuing and revising

HOs. The Department is also proposing, for the sake of brevity and clarity, not to repeat the list of individual HOs as they are already listed in subpart E of 29 CFR part 570.

5. Section 570.122 lists the four exemptions from the FLSA child labor provisions that existed when subpart G was last revised. As discussed earlier, Congress has added four more exemptions that are not included in the current subpart G. Section 13(d) exempts from the FLSA minimum wage, overtime, and child labor provisions the employment of homeworkers engaged in the making of wreaths composed principally of evergreens. Section 13(c)(5) authorizes the employment of 16- and 17-year-olds to load, but not operate or unload, certain scrap paper balers and paper box compactors under specific conditions. Section 13(c)(6) permits the employment of 17-year-olds to drive on an occasional and incidental basis, during daylight hours, certain automobiles and trucks under specified conditions. Section 13(c)(7) permits the employment of certain youth between the ages of 14 and 18 years, under certain conditions, inside and outside of places of business that use power-driven machinery to process wood products.

The Department proposes to revise § 570.122 by creating new subsections (e), (f), (g), and (h), which will list the exemptions from the child labor provisions contained in FLSA sections 13(d), 13(c)(5), 13(c)(6), and 13(c)(7), respectively. A more thorough discussion of each of these exemptions is proposed to be included in §§ 570.127–.130.

6. The Department proposes to revise §§ 570.127, .128, and .129, and create a new § 570.130 to present detailed discussions of the exemptions from the child labor provisions contained in FLSA sections 13(d), 13(c)(5), 13(c)(6), and 13(c)(7). These proposed provisions are structured similarly to those already contained in subpart G that address the earlier FLSA exemptions concerning employment of youth in agriculture (§ 570.123), in the delivery of newspapers (§ 570.124), as actors and performers (§ 570.125), and by one's parents (§ 570.126). The Department also proposes to revise and redesignate the sections of subpart G currently dealing with general enforcement (§ 570.127), good faith defense (§ 570.128), and the relation of the child labor provisions to other laws (§ 570.129). These sections would be redesignated as § 570.140, § 570.141, and § 570.142, respectively. The Department proposes to reserve §§ 570.131 through 570.139 to accommodate any additional statutory amendments to the FLSA child labor provisions that may be enacted.

7. Section 570.127 contains a general discussion of the enforcement of the FLSA child labor provisions. Since that last revision of subpart G, Congress has amended the FLSA at section 16(e) so that any person who violates the provisions of section 12 or section 13(c)(5) relating to child labor, or any regulation issued under section 12 or section 13(c)(5), shall be subject to a civil money penalty, currently not to exceed $11,000, for each employee who was the subject of such a violation. The Department, as discussed above, proposes to redesignate this section as § 570.140 and to revise it to include the Department's authority to assess civil money penalties against persons who violate the child labor provisions of the Act.

8. Section 570.128 deals with a provision of FLSA section 12(a) that relieves from liability a purchaser who ships or delivers for shipment in commerce goods acquired in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with section 12 and that were acquired for value without notice of any violation. The Department proposes to redesignate this section as § 570.141.

9. Section 570.129 discusses the relationship of the child labor provisions of the FLSA to other laws. The Department proposes to redesignate this section as § 570.142.

*N. Miscellaneous Matters*

The Department proposes to change the name of HO 8 from Occupations involved in the operations of power-driven metal forming, punching, and shearing machines (Order 8) to Occupations involved in the operation of power-driven metal forming, punching, and shearing machines (Order 8).

## IV. Paperwork Reduction Act

*Circumstances Necessitating Collection:* DOL proposes to revise its regulations about youth employment and create a new 29 CFR 570.35b that would contain the requirements describing the criteria for use, occupations permitted, and conditions of employment that would allow the employment of 14- and 15-year-olds—pursuant to a school-supervised and school-administered Work-Study Program (WSP)—under conditions Reg. 3 otherwise prohibits. The new regulation would require the implementation of a new paperwork burden with regard to a WSP.

FLSA section 3(l) establishes a minimum age of 16 years for most nonagricultural employment but allows the employment of 14- and 15-year-olds in occupations other than manufacturing and mining, if the Secretary of Labor determines such employment is confined to (1) periods that will not interfere with the minor's schooling and (2) conditions that will not interfere with the minor's health and well-being.

FLSA section 11(c) requires all employers covered by FLSA to make, keep, and preserve records of their employees' wages, hours, and other conditions and practices of employment. Section 11(c) also authorizes the Secretary of Labor to prescribe the recordkeeping and reporting requirements for these records. Reg. 3 sets forth the employment standards for 14- and 15-year-olds.

Reporting Requirements: WSP Application: In order to utilize the proposed Reg. 3 WSP provisions, § 570.35(b) would require a local public or private school system to file with the Administrator of the Wage and Hour Division (WHD) of DOL an application for approval of a WSP as one that does not interfere with the schooling or health and well-being of the minors involved.

Written Participation Agreement: The proposed regulations would require preparation of a written participation agreement for each student participating in a WSP and that the teacher-coordinator, employer, and student each sign that agreement. See proposed § 570.35b(b)(3)(iv). The proposed regulation would also require that the student's parent or guardian sign the training agreement, or otherwise give consent to the agreement, in order for it to be valid.

*Recordkeeping Requirements:* The proposed regulation would require a school system operating a WSP to keep a copy of the written participation agreement for each student enrolled in the WSP. Employers of WSP participants would also be required to keep a copy of the written participation agreement for each student employed. These agreements would be maintained for 3 years from the date of the student's enrollment in the WSP.

*Purpose and Use: WSP Application:* Under the proposal, a local school system would file a letter of application requesting the Administrator of WHD to approve a WSP that permits the employment of 14- and 15-year-olds under conditions that Reg. 3 would otherwise prohibit. WHD would evaluate the information to determine if

the program meets the requirements specified in the proposed regulation, in order to respond to the request.

*Written Participation Agreement:* The school system administering the WSP and each applicable employer would separately maintain a copy of the written participation agreement for each student. The written agreement would be signed by the teacher-coordinator, the employer, and the student. In addition, the student's parent or guardian would either sign or otherwise provide consent for the participation agreement to be valid. The proposed written participation agreement is structured to ensure that the quality of the student's education, as well as his or her safety and well-being, are not compromised. School systems, employers, and WHD would use these records to document the validity of the WSP.

*Information Technology:* The proposed regulation prescribes no particular form for the application, provided the applicant submits all required information. DOL also does not intend to require a particular format for the written participation agreement. In accordance with the Government Paperwork Elimination Act, WHD would accept electronic submission by e-mail or fax. See 44 U.S.C. 3504(a)(1)(B)(vi). DOL expects to receive only 30 WSP applications per year under the proposal. The costs to develop and maintain an on-line application system would not be justified for such a small information collection. DOL would accept the parties electronically submitting the written participation agreement between each other, provided the copies contain the required information and signatures. As the written participation agreements are third party disclosures requiring multiple signatures, DOL development of an on-line submission option is not practical.

The proposed regulations prescribe no particular order or form of records. Under existing regulations, WHD would accept records preserved in such forms as microfilm or automated word or data processing, provided the school systems and employers make adequate facilities available for their inspection and transcription by DOL representatives. See 29 CFR 516.1.

*Minimizing Duplication:* Federal rules regulating youth employment are unique to WHD, and the agency is not aware of any duplicative effort to collect this information. This information is not already collected under existing authorities, such as the general FLSA recordkeeping requirements under 29 CFR part 516 (See OMB controls 1215–0006, 1215–0016, and 1215–0017) or other sections of the youth employment regulations under 29 CFR part 570 (See OMB controls 1215–0083 and 1215–0121). The requested information would not be available from any other source.

*Small Entities:* This proposed information collection would not have a significant economic impact on a substantial number of small entities. The information DOL proposes to require in the application letter is the minimum necessary to determine if the WSP would meet the proposed regulatory requirements for approval. The written participation agreement would be necessary to document the validity of a WSP. Without this information, small businesses would have no way of documenting their participation in a WSP.

*Agency Need:* Without this proposed information collection, WHD would have no means to determine if a WSP meets the regulatory requirements of the Reg. 3 modification under consideration. The proposed regulations would allow the Administrator of WHD to approve a WSP for a period of up to two years. Less frequent application would not allow WHD to ensure that approved programs do not interfere with the schooling of the minors or with their health and well-being. It would be difficult or impossible for WHD to determine the legal employment of 14- and 15-year-olds during school hours, were records relating to the participation of minors in a WSP under the proposed plan not maintained.

*Special Circumstances:* There are no special circumstances involved in this information collection request.

*Payments or Gifts:* DOL would offer no payments or gifts to respondents.

*Confidentiality:* DOL would offer no assurances of confidentiality in association with this information collection. As a practical matter, WHD would only disclose information submitted in connection with an approval request or contained in records an educational agency or employer must maintain in accordance with the provisions of the Freedom of Information Act (5 U.S.C 552), the Privacy Act (5 U.S.C. 552a), and their attendant regulations, 29 CFR parts 70 and 71.

*Sensitive Questions:* This information collection would contain no sensitive information.

*Hour Burden:* Reporting Burdens: WSP Application: DOL estimates it would take approximately 2 hours for a school system to prepare the letter applying for WSP approval. DOL estimates that approximately 30 school systems would apply each year, for an annual burden of 60 hours.

*Written Participation Agreement:* DOL estimates each written participation agreement between the teacher-coordinator, employer, student, and parent or guardian of the student would take approximately one hour to complete. DOL estimates 50 students would participate under each WSP each year, and three parties (employers, students, and parents or guardians) would have no reporting burden because they would merely sign the document. 50 written agreements × one hour = 50 hours per WSP. 50 hours per WSP × 30 WSPs = 1500 hours annual burden. 60 hours for WSP applications + 1500 hours for written participation agreements = 1560 annual reporting burden hours.

*Recordkeeping Burdens:* DOL estimates it would take participating school systems one-half minute to file each WSP application and participating school systems and employers each would need approximately one-half minute to file each WSP written participation agreement, for a total annual burden of 25.25 hours ([30 applications × (1500 written participation agreements × 2 recordkeepers] × .5 minutes = 25.25 hours). 30 school systems + 1500 employers = 1530 respondents.

Total Annual Reporting and Recordkeeping Burden—1583.25 Hours.

DOL bases these burden estimates on experience garnered while administering WECEP.

Absent any specific data on compensation of respondents in these educational institutions and participating employers, DOL has used the April 2006 average annual hourly rate for production or nonsupervisory workers on educational and health services payrolls of $17.22 to estimate respondent costs. See The Employment Situation, DOL, Bureau of Labor Statistics, July 2006, Table B–3, *http://www.bls.gov/news.release/archives/empsit_08042006.pdf.* Accordingly, DOL estimates annual respondent costs would be $27,263.57 (1583.25 hours × $17.22).

*Cost Burden:* DOL estimates the annual mailing and postage cost for 30 applications would be $12.60 (30 applications × [$.39 postage + $.03 per envelope]).

*Federal Costs:* WHD estimates it would receive 30 applications per year and processing each application would take approximately 2 hours of analyst time and 1 hour of clerical time. The estimate includes analysis of each application and preparation of the letter granting or denying approval.

*Analyzing-Processing:* $29.47 (GS 11/5, Washington, DC) × 2 hours × 30 applications = $1768.20.

*Clerical:* $17.92 (GS 6/5, Washington, DC) × 1 hour × 30 applications = $537.60.

*Total Estimated Annual Federal Cost*—$2305.80.

*Burden Changes:* The proposed regulation would result in a program change with an estimated increased public burden of 1583 hours. This is a new collection that would be required by a proposed revision of 29 CFR part 570.

*Publication:* DOL would not publish this information.

*Displaying OMB Expiration Date:* DOL plans to use no forms on which to place an expiration date for this proposed information collection.

*Certification Requirements:* DOL does not seek any exceptions to the certification requirements.

*Request for comments:* The public is invited to provide comments on this information collection requirement so that the Department may:

(1) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimates of the burdens of the collections of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including 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.

Written comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Employment Standards Administration, U.S. Department of Labor, Washington, DC 20503.

## V. Executive Order 12866; Small Business Regulatory Enforcement Fairness Act; Regulatory Flexibility

This proposed rule is being treated as a ''significant regulatory action'' within the meaning of E.O. 12866 because of its importance to the public and the Department's priorities. Therefore, the Office of Management and Budget has reviewed this proposed rule. However, because this proposed rule is not ''economically significant'' as defined in section 3(f)(1) of E.O. 12866, it does not require a full economic impact analysis under section 6(a)(3)(C) of the Order. The new information collection, recordkeeping, and reporting requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) that would be imposed should the proposed work-study program be enacted are discussed above.

It is well established that several characteristics of youth place adolescent workers at increased risk of injury and death. Lack of experience in the work place and in assessing risks, and developmental factors—physical, cognitive, and psychological—all contribute to the higher rates of occupational injuries and deaths experienced by young workers. CFOI data reflect that during the period of 1994–2004, 15-year-olds experienced an occupational fatality rate of 4.7 fatalities per 100,000 workers—a rate that was greater than that experienced by all workers aged 15 and older. Older working youth share similar risks. The NIOSH Report noted that the fatality rate for adolescents aged 16 and 17 was 5.1 per 100,000 full-time equivalent workers for the 10-year period 1980–89 [Castillo et al. 1994], while the rate for adults aged 18 and older was 6.1. As NIOSH stated, ''[t]his relatively small difference in rates is cause for concern because youth under age 18 are employed less frequently in especially hazardous jobs.'' NIOSH also estimates that youth work injuries exceed 200,000 each year, and of that number, 77,000 are serious enough to warrant treatment in hospital emergency rooms. The NIOSH statistics show that, despite the fact that workers aged 15 through 17 are generally restricted from employment in hazardous occupations such as mining, motor-vehicle driving, logging, sawmilling, and construction, they have a higher rate of injuries requiring emergency room treatment than any other age group except 18- and 19-year-olds (who are not restricted from performing such work). The economic and social costs associated with the deaths and serious injuries of young workers are substantial.

The Department considers the issuance of this proposed rule as an important and necessary step in its ongoing review of the criteria for permissible child labor employment, a review which strives to balance the potential benefits of transitional, staged employment opportunities for youth with the necessary protections for their education, health and safety. Because youth often overcome the effects of those characteristics that initially place them at increased risk of injury and death in the workplace only through the maturation process, it is believed that requiring older workers to perform those tasks that present greater risks to younger workers actually eliminates injuries and deaths—rather than delaying them or transferring them to the older workers.

Additionally, this document proposes to revise the child labor regulations in response to a statutory amendment enacted by the Congress that permits certain youth between the ages of 14 and 18 years of age who are excused from compulsory school attendance beyond the eighth grade to be employed under specific conditions inside and outside places of business that use machinery to process wood products. Affecting both the Reg. 3 occupations standards and HOs 4 and 5, this statutory provision would be available to a very small number of minors and therefore is expected to have little or no economic impact. The Department believes that only a few minors have obtained employment in such occupations since the amendment was enacted and doubts that the number will increase. Moreover, the amendment's strong safety—affecting requirements that such youth not operate or assist in the operation of power-driven woodworking machines, use personal protective equipment to prevent exposure to excessive levels of noise and sawdust, and be protected from wood particles and other flying debris within the workplace, should significantly reduce potential costs resulting from accidents and injuries to minors on the job.

Implementing the Department's proposal to revise subpart G of the child labor regulations, General Statements of Interpretation of the Child Labor Provisions of the Fair Labor Standards Act of 1938, as Amended, to incorporate all the regulatory changes made since this subpart was last revised in 1971, would simply provide compliance guidance on the youth employment provisions detailed in earlier subparts of 570 and therefore imposes no economic costs.

The additional changes being proposed are also expected to have little or no direct cost impact. The proposed changes affecting the types of occupations and industries in which 14- and 15-year-olds may or may not be employed, as well as the periods and conditions of such employment (Reg. 3 occupations and hours standards), are largely clarifications of existing provisions or enforcement positions, though new occupations involving work

of a mental or creative nature, lifeguarding, and the loading of personal hand tools onto motor vehicles, would be added to the list of permitted occupations. The proposals to revise several of the nonagricultural HOs—to implement specific recommendations made by NIOSH or that arise from the Department's enforcement experience—would, in all but one instance involving the use of certain countertop mixers (HO 11), require employers to assign older workers to perform tasks that may currently be performed by 16- and 17-year-olds.

Proposals resulting from the NIOSH recommendations include the expansion of HO 4 to prohibit the employment of minors in forest firefighting and fire prevention activities; the revision of HO 7 to prohibit the employment of minors in the tending, servicing, and repairing of hoisting equipment and the addition of such equipment as cherry pickers, scissor lifts, bucket trucks, aerial platforms, and hoists of less than one ton capacity to the list of prohibited equipment; and the expansion of HO 10 to prohibit the employment of minors in poultry slaughtering and processing occupations. Revisions to HO 12 to prohibit the employment of minors in the operation of balers and compactors not currently covered by the HO, and the expansion of HO 14 to add additional power-driven equipment to the list of equipment minors may not operate, are also being proposed as a result of the NIOSH Report recommendations. The Department's enforcement experience has led it to propose to incorporate certain long-standing enforcement positions involving the definitions of remanufacturing departments of sawmills (HO 4), high-lift trucks (HO 7), and the cleaning of power-driven meat processing equipment (HO 10). The Department is also proposing, based on its enforcement experience, that HO 11 be amended to incorporate the Department's long-standing position permitting 16- and 17-year-olds, under certain conditions, to operate certain pizza-dough rollers, and that HO 14 be expanded to prohibit the employment of minors to operate reciprocating saws.

The Department believes that implementation of the proposed rule would not reduce the overall number of safe, positive, and legal employment opportunities available to young workers. In fact, employment opportunities for 14- and 15-year-olds would increase with implementation of the proposals to (1) create a limited exemption for certain work-study programs and (2) allow those permitted occupations listed in § 570.34(a) to be performed in certain industries in addition to retail, food service, and gasoline service establishments.

Although, as mentioned above, some employers would be required in most cases to replace younger workers with older workers were the Department's proposals implemented, the impact would be minimal as relatively few minors are currently employed to perform these occupations. But the Department believes that adoption of these proposals is important as they are essential to fulfilling its charge of keeping working youth safe by prohibiting occupations that are particular hazardous or detrimental to their health or well-being. Any costs that might result from using older employees to perform the previously permitted tasks would be more than offset by reduced health and productivity costs resulting from accidents and injuries to minors on the job. Rules that limit permissible job activities for working youth to those that are safe do not, by themselves, impose significant added costs on employers, in our view. In fact, ensuring that permissible job opportunities for working youth are safe, healthy, and not detrimental to their education, as required by the statute, produces many positive benefits in addition to fewer occupational injuries and deaths, including reduced health and productivity costs that employers may otherwise incur because of higher accident and injury rates to young and inexperienced workers. In any event, the direct, incremental costs that would be imposed by this proposed rule are expected to be minimal. Collectively, they would not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy or its individual sectors, productivity, jobs, the environment, public health or safety, or state, local, or tribal governments or communities. Therefore, this proposed rule is not ''economically significant'' and no regulatory impact analysis has been prepared.

The Department has similarly concluded for the same reasons noted above that this proposed rule is not a ''major rule'' requiring approval by the Congress under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). It would not likely result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This proposed rule is also not expected to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act for the reasons discussed above. The Department has certified to this effect to the Chief Counsel for Advocacy of the U.S. Small Business Administration. Therefore, no Regulatory Flexibility Analysis is required.

## VI. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this proposed rule does not include any federal mandate that may result in excess of $100 million in expenditures by state, local and tribal governments in the aggregate or by the private sector.

## VII. Executive Order 13132 (Federalism)

The proposed rule does not have federalism implications as outlined in E.O. 13132 regarding federalism. The proposed rule 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.

## VIII. Executive Order 13175, Indian Tribal Governments

This proposed rule was reviewed under the terms of E.O. 13175 and determined not to have ''tribal implications.'' The proposed rule does not have ''substantial direct effects 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 a result, no tribal summary impact statement has been prepared.

## IX. Effects on Families

The undersigned hereby certify that this proposed rule will not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

## X. Executive Order 13045, Protection of Children

E.O. 13045, dated April 23, 1997 (62 FR 19885), applies to any rule that (1) is determined to be ''economically significant'' as defined in E.O. 12866,

and (2) concerns an environmental health or safety risk that the promulgating agency has reason to believe may have a disproportionate effect on children. This proposal is not subject to E.O. 13045 because it is not economically significant as defined in E.O. 12866. In addition, although this proposed rule impacts the youth employment provisions of the FLSA and the employment of adolescents and young adults, it does not impact the environmental health or safety risks of children.

**XI. Environmental Impact Assessment**

A review of this proposal in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*; the regulations of the Council on Environmental Quality, 40 CFR 1500 *et seq.*; and the Departmental NEPA procedures, 29 CFR part 11, indicates that the proposed rule will not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

**XII. Executive Order 13211, Energy Supply**

This proposed rule is not subject to E.O. 13211. It will not have a significant adverse effect on the supply, distribution or use of energy.

**XIII. Executive Order 12630, Constitutionally Protected Property Rights**

This proposal is not subject to E.O. 12630, because it does not involve implementation of a policy ''that has takings implications'' or that could impose limitations on private property use.

**XIV. Executive Order 12988, Civil Justice Reform Analysis**

This proposed rule was drafted and reviewed in accordance with E.O. 12988 and will not unduly burden the federal court system. The proposed rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

**List of Subjects in 29 CFR Part 570**

Child labor, Child Labor occupations, Employment, Government, Incorporation by reference, Intergovernmental relations, Investigations, Labor, Law enforcement, Minimum age.

Signed at Washington, DC this 10th day of April, 2007.

**Victoria A. Lipnic,**

*Assistant Secretary, Employment Standards Administration.*

**Paul DeCamp,**

*Administrator, Wage and Hour Division.*

For the reasons set out in the preamble, the DOL proposes to amend Title 29, part 570, of the Code of Federal Regulations as follows:

## PART 570—CHILD LABOR REGULATIONS, ORDERS AND STATEMENTS OF INTERPRETATION

1. The authority citation for part 570 subpart C continues to read as follows:

**Authority:** 29 U.S.C. 203(l), 212, 213(c)(7).

2. Sections 570.31 through 570.35 are proposed to be revised to read as follows:

### § 570.31 Secretary's determinations concerning the employment of minors 14 and 15 years of age.

The employment of minors between 14 and 16 years of age in the occupations, for the periods, and under the conditions specified in § 570.34 and § 570.35, does not interfere with their schooling or with their health and well-being and shall not be deemed to be oppressive child labor.

### § 570.32 Effect of this subpart.

This subpart concerns the employment of youth between 14 and 16 years of age in nonagricultural occupations; standards for the employment of minors in agricultural occupations are detailed in subpart E–1. The employment (including suffering or permitting to work) by an employer of minors 14 and 15 years of age in occupations detailed in § 570.34, for the periods and under the conditions specified in § 570.35, shall not be deemed to be oppressive child labor within the meaning of the Fair Labor Standards Act of 1938. Employment that is not specifically permitted is prohibited.

### § 570.33 Occupations that are prohibited to minors 14 and 15 years of age.

The following occupations, which is not an exhaustive list, constitute oppressive child labor within the meaning of the Fair Labor Standards Act of 1938 when performed by minors who are 14 and 15 years of age:

(a) Manufacturing, mining, or processing occupations, including occupations requiring the performance of any duties in work rooms or work places where goods are manufactured, mined or otherwise processed, except as permitted in § 570.34 of this subpart.

(b) Occupations that the Secretary of Labor may, pursuant to section 3(l) of the Fair Labor Standards Act, find and declare to be hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being.

(c) Occupations that involve operating, tending, setting up, adjusting, cleaning, oiling, or repairing hoisting apparatus.

(d) Work performed in or about boiler or engine rooms or in connection with the maintenance or repair of the establishment, machines, or equipment.

(e) Occupations that involve operating, tending, setting up, adjusting, cleaning, oiling, or repairing any power-driven machinery, including but not limited to lawn mowers, golf carts, trimmers, cutters, weed-eaters, edgers, food slicers, food grinders, food choppers, food processors, food cutters, and food mixers. Youth 14 and 15 years of age may, however, operate office equipment pursuant to § 570.34(a) and vacuum cleaners and floor waxers pursuant to § 570.34(h).

(f) The operation of motor vehicles; the service as helpers on such vehicles except those tasks permitted by § 570.34(k); and the riding on a motor vehicle, inside or outside of an enclosed passenger compartment, except as permitted by § 570.34(o).

(g) Outside window washing that involves working from window sills, and all work requiring the use of ladders, scaffolds, or their substitutes.

(h) All baking and cooking activities except that cooking which is permitted by § 570.34(c).

(i) Work in freezers and meat coolers and all work in the preparation of meats for sale except as permitted by § 570.34(j). This section, however, does not prohibit the employment of 14- and 15-year-olds whose duties require them to occasionally enter freezers only momentarily to retrieve items.

(j) Youth peddling, which entails the selling of goods or services to customers at locations other than the youth-employer's establishment, such as the customers' residences or places of business, or public places such as street corners or public transportation stations. Prohibited activities associated with youth peddling not only include the attempt to make a sale or the actual consummation of a sale, but also the preparatory and concluding tasks normally performed by a youth peddler in conjunction with his or her sales such as the loading and unloading of vans or other motor vehicles, the stocking and restocking of sales kits and trays, the exchanging of cash and checks with the employer, and the

transportation of minors to and from the various sales areas by the employer. Youth peddling does not include the activities of persons who, as volunteers and without compensation, sell goods or services on behalf of eleemosynary organizations or public agencies.

(k) Loading and unloading of goods or property onto or from motor vehicles, railroad cars, or conveyors, except the loading and unloading of personal non-power-driven hand tools, personal protective equipment, and personal items to and from motor vehicles as permitted by § 570.34(k).

(l) Catching and cooping of poultry for preparation for transport or for market.

(m) Public messenger service.

(n) Occupations in connection with:

(1) Transportation of persons or property by rail, highway, air, water, pipeline, or other means;

(2) Warehousing and storage;

(3) Communications and public utilities;

(4) Construction (including demolition and repair); except such office work (including ticket office) or sales work in connection with paragraphs (n)(1), (2), (3), and (4) of this section, as does not involve the performance of any duties on trains, motor vehicles, aircraft, vessels, or other media of transportation or at the actual site of construction operations.

**§ 570.34 Occupations that may be performed by minors 14 and 15 years of age.**

This subpart authorizes only the following occupations in which the employment of minors 14 and 15 years of age is permitted when performed for periods and under conditions authorized by § 570.35 and not involving occupations prohibited by § 570.33 or performed in areas or industries prohibited by § 570.33.

(a) Office and clerical work, including the operation of office machines.

(b) Work of a mental or artistically creative nature such as, but not limited to, computer programming, the writing of software, teaching or performing as a tutor, serving as a peer counselor or teacher's assistant, singing, the playing of a musical instrument, and drawing, as long as such employment complies with all the other provisions contained in §§ 570.33, 570.34, and 570.35. Artistically creative work is limited to work in a recognized field of artistic or creative endeavor.

(c) Cooking with electric or gas grills which does not involve cooking over an open flame (**Note:** This provision does not authorize cooking with equipment such as rotisseries, broilers, pressurized equipment including fryolators, and cooking devices that operate at extremely high temperatures such as ''Neico broilers''). Cooking is also permitted with deep fryers that are equipped with and utilize a device which automatically lowers the baskets into the hot oil or grease and automatically raises the baskets from the hot oil or grease.

(d) Cashiering, selling, modeling, art work, work in advertising departments, window trimming, and comparative shopping.

(e) Price marking and tagging by hand or machine, assembling orders, packing, and shelving.

(f) Bagging and carrying out customers' orders.

(g) Errand and delivery work by foot, bicycle, and public transportation.

(h) Clean up work, including the use of vacuum cleaners and floor waxers, and the maintenance of grounds, but not including the use of power-driven mowers, cutters, trimmers, edgers, or similar equipment.

(i) Kitchen work and other work involved in preparing and serving food and beverages, including operating machines and devices used in performing such work. Examples of permitted machines and devices include, but are not limited to, dishwashers, toasters, dumbwaiters, popcorn poppers, milk shake blenders, coffee grinders, automatic coffee machines, devices used to maintain the temperature of prepared foods (such as warmers, steam tables, and heat lamps), and microwave ovens that are used only to warm prepared food and do not have the capacity to warm above 140 °F. Minors are permitted to clean kitchen equipment (not otherwise prohibited), remove oil or grease filters, pour oil or grease through filters, and move receptacles containing hot grease or hot oil, but only when the equipment, surfaces, containers and liquids do not exceed a temperature of 100 °F.

(j) Cleaning vegetables and fruits, and the wrapping, sealing, labeling, weighing, pricing, and stocking of items, including vegetables, fruits, and meats, when performed in areas physically separate from a freezer or meat cooler.

(k) The loading onto motor vehicles and the unloading from motor vehicles of the light, non-power-driven, hand tools and personal protective equipment that the minor will use as part of his or her employment at the work site; and the loading onto motor vehicles and the unloading from motor vehicles of personal items such as a back pack, a lunch box, or a coat that the minor is permitted to take to the work site. Such light tools would include, but not be limited to, rakes, hand-held clippers, shovels, and brooms. Such light tools would not include items like trash, sales kits, promotion items or items for sale, lawn mowers, or other power-driven lawn maintenance equipment. Such minors would not be permitted to load or unload safety equipment such as barriers, cones, or signage.

(l)(1) *Lifeguard.* The employment of 15-year-olds (but not 14-year-olds) to perform permitted lifeguard duties at traditional swimming pools and water amusement parks (including such water park facilities as wave pools, lazy rivers, specialized activity areas that may include water falls and sprinkler areas, and baby pools; but not including the elevated areas of power-driven water slides) when such youth have been trained and certified by the American Red Cross, or a similar certifying organization, in aquatics and water safety.

(2) *Definitions.* As used in this section:

*Permitted lifeguard duties*, as used in this subpart, include the rescuing of swimmers in danger of drowning, the monitoring of activities at poolside to prevent accidents, the teaching of water safety, and providing assistance to patrons. Lifeguards may also help to maintain order and cleanliness in the pool and pool areas, give swimming instructions, conduct or officiate at swimming meets, and administer first aid. Additional lifeguard duties may include checking in and out items such as towels and personal items such as rings, watches and apparel. Permitted duties for 15-year-olds include the use of a ladder to access and descend from the lifeguard chair; the use of hand tools to clean the pool and pool area; and the testing and recording of water quality for temperature and/or pH levels, using all of the tools of the testing process including adding chemicals to the test water sample. Fifteen-year-olds employed as lifeguards are, however, prohibited from entering or working in any mechanical room or chemical storage areas, including any areas where the filtration and chlorinating systems are housed. The term *permitted lifeguard duties* does not include the operation or tending of power-driven equipment including power-driven elevated water slides often found at water amusement parks and some swimming pools. Minors under 16 years of age may not be employed as *dispatchers* or *attendants* at the top of elevated water slides performing such tasks as maintaining order, directing patrons as to when to depart the top of the slide, and ensuring that patrons have begun their ''ride'' safely. Properly certified 15-year-old lifeguards may,

however, be stationed at the ''splashdown pools'' located at the bottom of the elevated water slides to perform those permitted duties listed in this subsection.

*Traditional swimming pool*, as used in this subpart, means a water tight structure of concrete, masonry, or other approved materials located either indoors or outdoors, used for bathing or swimming and filled with a filtered and disinfected water supply, together with buildings, appurtenances and equipment used in connection therewith, excluding elevated ''water slides.'' Not included in the definition of a *traditional swimming pool* would be such natural environment swimming facilities as rivers, streams, lakes, reservoirs, wharfs, piers, canals, or oceanside beaches.

*Water amusement park* means an establishment that not only encompasses the features of a traditional swimming pool, but may also include such additional attractions as wave pools; lazy rivers; specialized activities areas such as baby pools, water falls, and sprinklers; and elevated water slides. Not included in the definition of a *water amusement park* would be such natural environment swimming facilities as rivers, streams, lakes, reservoirs, wharfs, piers, canals, or oceanside beaches.

(m)(1) *Employment inside and outside of places of business where machinery is used to process wood products.* The employment of a 14- or 15-year-old who by statute or judicial order is exempt from compulsory school attendance beyond the eight grade inside or outside places of business where machinery is used to process wood products if:

(i) The youth is supervised by an adult relative of the youth or is supervised by an adult member of the same religious sect or division as the youth;

(ii) The youth does not operate or assist in the operation of power-driven woodworking machines;

(iii) The youth is protected from wood particles or other flying debris within the workplace by a barrier appropriate to the potential hazard of such wood particles or flying debris or by maintaining a sufficient distance from machinery in operation; and

(iv) The youth is required to use, and uses, personal protective equipment to prevent exposure to excessive levels of noise and saw dust.

(2) *Compliance.* Compliance with the provisions of paragraphs (m)(1)(iii) and (m)(1)(iv) of this section will be accomplished when the employer is in compliance with the requirements of the applicable governing standards issued by the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) or, in those areas where OSHA has authorized the state to operate its own Occupational Safety and Health Plan, the applicable standards issued by the Office charged with administering the State Occupational Safety and Health Plan.

(3) *Definitions.* As used in this section:

*Inside or outside places of business* shall mean the actual physical location of the establishment employing the youth, including the buildings and surrounding land necessary to the business operations of that establishment.

*Operate or assist in the operation of power-driven woodworking machines* shall mean the operating of such machines, including supervising or controlling the operation of such machines, feeding material into such machines, helping the operator feed material into such machines, unloading materials from such machines, and helping the operator unload materials from such machines. The term also includes the occupations of setting-up, adjusting, repairing, oiling, or cleaning such machines.

*Places of business where machinery is used to process wood products* shall mean such permanent workplaces as sawmills, lath mills, shingle mills, cooperage stock mills, furniture and cabinet making shops, gazebo and shed making shops, toy manufacturing shops, and pallet shops. The term shall not include construction sites, portable sawmills, areas where logging is being performed, or mining operations.

*Power-driven woodworking machines* shall mean all fixed or portable machines or tools driven by power and used or designed for cutting, shaping, forming, surfacing, nailing, stapling, wire stitching, fastening or otherwise assembling, pressing, or printing wood, veneer, trees, logs, or lumber.

*Supervised by an adult relative or is supervised by an adult member of the same religious sect or division as the youth* has several components. *Supervised* means that the youth's on-the-job activities must be directed, monitored, overseen, and controlled by certain named adults. Such supervision must be close, direct, constant, and uninterrupted. An *adult* shall mean an individual who is at least eighteen years of age. A relative shall mean the parent (or someone standing in the place of a parent), grandparent, sibling, uncle, or aunt of the young worker. A *member of the same religious sect or division as the youth* refers to an individual who professes membership in the same religious sect or division to which the youth professes membership.

(n) Work in connection with cars and trucks if confined to the following: dispensing gasoline and oil; courtesy service; car cleaning, washing and polishing by hand; and other occupations permitted by this section, but not including work involving the use of pits, racks, or lifting apparatus, or involving the inflation of any tire mounted on a rim equipped with a removable retaining ring.

(o) Work in connection with riding inside passenger compartments of motor vehicles except as prohibited by §§ 570.33(f) or 570.33(j), or when a significant reason for the minor being a passenger in the vehicle is for the purpose of performing work in connection with the transporting-or assisting in the transporting of-other persons or property. The transportation of the persons or property does not have to be the primary reason for the trip for this exception to apply. Each minor riding as a passenger in a motor vehicle must have his or her own seat in the passenger compartment; each seat must be equipped with a seat belt or similar restraining device; and the employer must instruct the minors that such belts or other devices must be used.

**§ 570.35 Hours of work and conditions of employment permitted for minors 14 and 15 years of age.**

(a) *Hours standards.* Except as provided in paragraph (c) of this section, employment in any of the permissible occupations to which this subpart is applicable shall be confined to the following periods:

(1) Outside of school hours;

(2) Not more than 40 hours in any 1 week when school is not in session;

(3) Not more that 18 hours in any 1 week when school is in session;

(4) Not more than 8 hours in any 1 day when school is not in session;

(5) Not more than 3 hours in any 1 day when school is in session, including Fridays;

(6) Between 7 a.m. and 7 p.m. in any 1 day, except during the summer (June 1 through Labor Day) when the evening hour will be 9 p.m.

(b) *Definition.* As used in this section:

*Week* as used in this subpart means a standard calendar week of 12:01 a.m. Sunday through midnight Saturday, not an *employee's workweek* as defined in § 778.105 of this title.

*Exceptions.* (1) School is not considered to be in session, and exceptions from the hours limitations standards listed in paragraphs (a)(1), (3), and (5) of this section are provided, for any youth 14 or 15 years of age who:

(i) Has graduated from high school;

(ii) Has been excused from compulsory school attendance by the state or other jurisdiction once he or she has completed the eighth grade and his or her employment complies with all the requirements of the state school attendance law;

(iii) Has a child to support and appropriate state officers, pursuant to state law, have waived school attendance requirements for this minor;

(iv) Is subject to an order of a state or federal court prohibiting him or her from attending school; or

(v) Has been permanently expelled from the local public school he or she would normally attend.

(2) In the case of minors 14 and 15 years of age who are employed to perform sports-attending services at professional sporting events, i.e., baseball, basketball, football, soccer, tennis, etc., the requirements of paragraphs (a)(2) through (a)(6) of this section shall not apply, provided that the duties of the sports-attendant occupation consist of pre- and post-game or practice setup of balls, items and equipment; supplying and retrieving balls, items and equipment during a sporting event; clearing the field or court of debris, moisture, etc., during play; providing ice, drinks, towels, etc., to players during play; running errands for trainers, managers, coaches, and players before, during, and after a sporting event; and returning and/or storing balls, items and equipment in club house or locker room after a sporting event. For purposes of this exception, impermissible duties include grounds or field maintenance such as grass mowing, spreading or rolling tarpaulins used to cover playing areas, etc.; cleaning and repairing equipment; cleaning locker rooms, showers, lavatories, rest rooms, team vehicles, club houses, dugouts or similar facilities; loading and unloading balls, items and equipment from team vehicles before and after a sporting event; doing laundry; and working in concession stands or other selling and promotional activities.

(3) Exceptions from certain of the hours standards contained in paragraphs (a)(1) and (a)(3) of this section are provided for the employment of minors who are enrolled in and employed pursuant to a school-supervised work-experience and career exploration program as detailed in § 570.35a.

(4) Exceptions from certain of the hours standards contained in paragraphs (a)(1) and (a)(5) of this section are provided for the employment of minors who are participating in a work-study program designed as described in § 570.35b.

3. In § 570.35a paragraph (c)(3) is proposed to be revised to read as follows:

**§ 570.35a Work experience and career exploration programs.**

* * * * *

(c) * * *

(3) Occupations other than those permitted under § 570.34, except upon approval of a variation by the Administrator of the Wage and Hour Division in acting on the program application of the State Educational Agency. The Administrator shall have discretion to grant requests for special variations if the applicant demonstrates that the activity will be performed under adequate supervision and training (including safety precautions) and that the terms and conditions of the proposed employment will not interfere with the health or well-being or schooling of the minor enrolled in an approved program. The granting of a special variation is determined on a case-by-case basis.

* * * * *

4. A new § 570.35b is proposed to be added and to read as follows:

**§ 570.35b Work-study programs.**

(a) This section varies the provisions contained in § 570.35(a)(1) and (a)(5) for the employment of minors 14 and 15 years of age who are enrolled in and employed pursuant to a school-supervised and school-administered work-study program that meets the requirements of paragraph (b) of this section, in the occupations permitted by § 570.34, and for the periods and under the conditions specified in paragraph (c) of this section. With these safeguards, such employment is found not to interfere with the schooling of the minors or with their health and well-being and therefore is not deemed to be oppressive child labor.

(b)(1) A school-supervised and school-administered work-study program shall meet the educational standards established and approved by the State Educational Agency in the respective state.

(2) The superintendent of the public or private school system supervising and administering the work-study program shall file with the Administrator of the Wage and Hour Division a letter of application for approval of the work-study program as one not interfering with schooling or with the health and well-being of the minors involved and therefore not constituting oppressive child labor. The application shall be filed at least sixty days before the start of the school year and must include information concerning the criteria listed in paragraph (b)(3) of this section. The Administrator of the Wage and Hour Division shall approve the application, or give prompt notice of any denial and the reasons therefor.

(3) The criteria to be used in consideration of applications under this section are the following:

(i) *Eligibility.* Any student 14 or 15 years of age, enrolled in a college preparatory curriculum, whom authoritative personnel from the school attended by the youth identify as being able to benefit from the program shall be able to participate.

(ii) *Instructional schedule.* Every youth shall receive, every school year he or she participates in the work-study program, at least the minimum number of hours of classroom instruction, as required by the State Educational Agency responsible for establishing such standards, to complete a fully-accredited college preparatory curriculum. Such classroom instruction shall include, every year the youth participates in the work-study program, training in workplace safety and state and federal youth employment provisions and rules.

(iii) *Teacher-coordinator.* Each school participating in a work-study program shall designate a teacher-coordinator under whose supervision the program will operate. The teacher-coordinator shall generally supervise and coordinate the work and educational aspects of the program and make regularly scheduled visits to the workplaces of the participating students. The teacher-coordinator shall ensure that minors participating in a work-study program are employed in compliance with all applicable provisions of this part and section 6 of the Fair Labor Standards Act.

(iv) *Written participation agreement.* No student shall participate in the work-study program until there has been made a written agreement signed by the teacher-coordinator, the employer, and the student. The agreement shall also be signed or otherwise consented to by the student's parent or guardian. The agreement shall detail the objectives of the work-study program; describe the specific job duties to be performed by the participating minor as well as the number of hours and times of day that the minor will be employed each week; affirm that the participant will receive the minimum number of hours of class-room instruction as required by the State Educational Agency for the completion of a fully-accredited college preparatory curriculum; and affirm that

the employment of the minor will be in compliance with the youth employment provisions of both this part and the laws of the state where the work will be performed, and the applicable minimum wage provisions contained in section 6 of the FLSA.

(v) *Other provisions.* Any other provisions of the program providing safeguards ensuring that the employment permitted under this section will not interfere with the schooling of the minors or with their health and well-being may also be submitted for use in considering the application.

(4) Every public or private school district having students in a work-study program approved pursuant to these requirements, and every employer employing students in a work-study program approved pursuant to these requirements, shall comply with the following:

(i) *Permissible occupations.* No student shall be assigned to work in any occupation other than one permitted under § 570.34 of this chapter.

(ii) *Records and reports.* A copy of the written agreement for each student participating in the work-study program shall be kept by both the employer and the school supervising and administering the program for a period of three years from the date of the student's enrollment in the program. Such agreements shall be made available upon request to the representatives of the Administrator of the Wage and Hour Division for inspection, transcription, and/or photocopying.

(c) Employment of minors enrolled in a program approved pursuant to the requirements of this section shall be confined to not more that 18 hours in any one week when school is in session, a portion of which may be during school hours, in accordance with the following formula that is based upon a continuous four-week cycle. In three of the four weeks, the participant is permitted to work during school hours on only one day per week, and for no more than for eight hours on that day. During the remaining week of the four-week cycle, such minor is permitted to work during school hours on no more than two days, and for no more than for eight hours on each of those two days. The employment of such minors would still be subject to the time of day and number of hours standards contained in §§ 570.35(a)(2), (a)(3), (a)(4), and (a)(6). To the extent that these provisions are inconsistent with the provisions of § 570.35, this section shall be controlling.

(d) Programs shall be in force and effect for a period to be determined by the Administrator of the Wage and Hour Division, but in no case shall be in effect for longer than two school years from the date of their approval by the Administrator of the Wage and Hour Division. A new application for approval must be filed at the end of that period. Failure to meet the requirements of this section may result in withdrawal of the approval.

## Subpart E—Occupations Particularly Hazardous for the Employment of Minors Between 16 and 18 Years of Age or Detrimental to Their Health or Well-Being

5. The authority citation for subpart E continues to read as follows:

**Authority:** 29 U.S.C. 203(l), 212, 213(c).

6. In § 570.54, the section heading and paragraphs (a) introductory text, (a)(1), (a)(2) introductory text, and (b) are proposed to be revised, and a new paragraph (c) is proposed to be added, to read as follows:

### § 570.54 Forest firefighting and forest fire prevention occupations, logging occupations, and occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage stock mill (Order 4).

(a) *Finding and declarations of fact.* All occupations in forest firefighting and forest fire prevention, logging, and the operation of any sawmill, lath mill, shingle mill, or cooperage stock mill are particularly hazardous for the employment of minors between 16 and 18 years of age, except the following:

(1) Exceptions applying to logging:

(i) Work in offices or in repair or maintenance shops.

(ii) Work in the construction, operation, repair, or maintenance of living and administrative quarters of logging camps.

(iii) Peeling of fence posts, pulpwood, chemicalwood, excelsior wood, cordwood, or similar products when not done in conjunction with and at the same time and place as other logging occupations declared hazardous by this section.

(iv) Work in the feeding or care of animals.

(2) Exceptions applying to the operation of any permanent sawmill or the operation of any lath mill, shingle mill, or cooperage stock mill: *Provided*, That these exceptions do not apply to a portable sawmill the lumber yard of which is used only for the temporary storage of green lumber and in connection with which no office or repair or maintenance shop is ordinarily maintained: *And further provided*, That these exceptions do not apply to work which entails entering the sawmill building, except for minors who meet the requirements of the limited exemption discussed in §§ 570.34(m) and 570.54(c):

* * * * *

(b) *Definitions.* As used in this section:

*All occupations in forest firefighting and forest fire prevention* shall include the controlling and extinguishing of fires, the wetting down of areas or extinguishing of spot fires, the patrolling of burned areas to assure the fire has been extinguished, and the piling and burning of slash. The term shall also include the following tasks when performed in conjunction with, or in support of, efforts to extinguish an actual fire: the clearing of fire trails or roads; the construction, maintenance, and patrolling of firelines; acting as a fire lookout or fire patrolman; and tasks associated with the operation of a temporary firefighting base camp. The prohibition concerning the employment of youth in forest firefighting and fire prevention would apply to all forest locations and buildings located within the forest, not just where logging or sawmilling takes place.

*All occupations in logging* shall mean all work performed in connection with the felling of timber; the bucking or converting of timber into logs, poles, piles, ties, bolts, pulpwood, chemical wood, excelsior wood, cordwood, fence posts, or similar products; the collecting, skidding, yarding, loading, transporting and unloading of such products in connection with logging; the constructing, repairing, and maintaining of roads, railroads, flumes, or camps used in connection with logging; the moving, installing, rigging, and maintenance of machinery or equipment used in logging; and other work performed in connection with logging.

*All occupations in the operation on any sawmill, lath mill, shingle mill, or cooperage-stock mill* shall mean all work performed in or about any such mill in connection with storing of logs and bolts; converting logs or bolts into sawn lumber, lathers, shingles, or cooperage stock; storing drying, and shipping lumber, laths, shingles, cooperage stock, or other products of such mills; and other work performed in connection with the operation of any sawmill, lath mill, shingle mill, or cooperage-stock mill. The term shall not include work performed in the planing-mill department or other remanufacturing departments of any sawmill or remanufacturing plant not a part of a sawmill.

*Inside or outside places of business* shall mean the actual physical location of the establishment employing the youth, including the buildings and surrounding land necessary to the business operations of that establishment.

*Operate or assist in the operation of power-driven woodworking machines* shall mean operating such machines, including supervising or controlling the operation of such machines, feeding material into such machines, helping the operator feed material into such machines, unloading materials from such machines, and helping the operator unload materials from such machines. The term also includes the occupations of setting-up, adjusting, repairing, oiling, or cleaning such machines.

*Places of business where machinery is used to process wood products* shall mean such permanent workplaces as sawmills, lath mills, shingle mills, cooperage stock mills, furniture and cabinet making shops, gazebo and shed making shops, toy manufacturing shops, and pallet shops. The term shall not include construction sites, portable sawmills, areas where logging is being performed, or mining operations.

*Power-driven woodworking machines* shall mean all fixed or portable machines or tools driven by power and used or designed for cutting, shaping, forming, surfacing, nailing, stapling, wire stitching, fastening or otherwise assembling, pressing, or printing wood, veneer, trees, logs, or lumber.

*Remanufacturing department* shall mean those departments of a sawmill where lumber products such as boxes, lawn furniture, and the like are remanufactured from previously cut lumber. The kind of work performed in such departments is similar to that done in planning mill departments in that rough lumber is surfaced or made into other finished products. The term is not intended to denote those operations in sawmills where rough lumber is cut to dimensions.

*Supervised by an adult relative or is supervised by an adult member of the same religious sect or division as the youth*, as a term, has several components. *Supervised* refers to the requirement that the youth's on-the-job activities be directed, monitored, and controlled by certain named adults. Such supervision must be close, direct, constant, and uninterrupted. An *adult* shall mean an individual who is at least eighteen years of age. A *relative* shall mean the parent (or someone standing in place of a parent), grandparent, sibling, uncle, or aunt of the young worker. A *member of the same religious sect or division as the youth* refers to an individual who professes membership in the same religious sect or division to which the youth professes membership.

(c) *Exemptions.* (1) The provisions contained in paragraph (a)(2) of this section that prohibit youth between 16 and 18 years of age from performing any work that entails entering the sawmill building do not apply to the employment of a youth who is at least 14 years of age and less than 18 years of age and who by statute or judicial order is exempt from compulsory school attendance beyond the eighth grade, if:

(i) The youth is supervised by an adult relative or by an adult member of the same religious sect or division as the youth;

(ii) The youth does not operate or assist in the operation of power-driven woodworking machines;

(iii) The youth is protected from wood particles or other flying debris within the workplace by a barrier appropriate to the potential hazard of such wood particles or flying debris or by maintaining a sufficient distance from machinery in operation; and

(iv) The youth is required to use, and uses, personal protective equipment to prevent exposure to excessive levels of noise and saw dust.

(2) Compliance with the provisions of paragraphs (c)(1)(iii) and (iv) of this section will be accomplished when the employer is in compliance with the requirements of the applicable governing standards issued by the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) or, in those areas where OSHA has authorized the state to operate its own Occupational Safety and Health Plan, the applicable standards issued by the Office charged with administering the State Occupational Safety and Health Plan.

7. In § 570.55, paragraph (b) is proposed to be revised to read as follows:

**§ 570.55 Occupations involved in the operation of power-driven woodworking machines (Order 5).**

* * * * *

(b) *Definitions.* As used in this section:

*Off-bearing* shall mean the removal of material or refuse directly from a saw table or from the point of operation. Operations not considered as off-bearing within the intent of this section include:

(1) The removal of material or refuse from a circular saw or guillotine-action veneer clipper where the material or refuse has been conveyed away from the saw table or point of operation by a gravity chute or by some mechanical means such as a moving belt or expulsion roller; and

(2) The following operations when they do not involve the removal of materials or refuse directly from a saw table or point of operation: The carrying, moving, or transporting of materials from one machine to another or from one part of a plant to another; the piling, stacking, or arranging of materials for feeding into a machine by another person; and the sorting, tying, bundling, or loading of materials.

*Power-driven woodworking machines* shall mean all fixed or portable machines or tools driven by power and used or designed for cutting, shaping, forming, surfacing, nailing, stapling, wire stitching, fastening or otherwise assembling, pressing or printing wood, veneer, trees, logs, or lumber.

* * * * *

8. In § 570.58, paragraphs (a) introductory text, (a)(1), (a)(2), and (b) are proposed to be revised to read as follows:

**§ 570.58 Occupations involved in the operation of power-driven hoisting apparatus (Order 7).**

(a) *Findings and declaration of fact.* The following occupations involved in the operation of power-driven hoisting apparatus are particularly hazardous for minors between 16 and 18 years of age:

(1) Work of operating, tending, riding upon, working from, repairing, servicing, or disassembling an elevator, crane, derrick, hoist, or high-lift truck, except operating or riding inside an unattended automatic operation passenger elevator.

(2) Work of operating, tending, riding upon, working from, repairing, servicing, or disassembling a manlift or freight elevator, except 16- and 17-year-olds may ride upon a freight elevator operated by an assigned operator.

* * * * *

(b) *Definitions.* As used in this section:

*Crane* shall mean a power-driven machine for lifting and lowering a load and moving it horizontally, in which the hoisting mechanism is an integral part of the machine. The term shall include all types of cranes, such as cantilever gantry, crawler, gantry, hammerhead, ingot pouring, jib, locomotive, motor-truck, overhead traveling, pillar jib, pintle, portal, semi-gantry, semi-portal, storage bridge, tower, walking jib, and wall cranes.

*Derrick* shall mean a power-driven apparatus consisting of a mast or equivalent members held at the top by guys or braces, with or without a boom, for use with a hoisting mechanism or operating ropes. The term shall include

all types of derricks, such as A-frame, breast, Chicago boom, gin-pole, guy, and stiff-leg derrick.

*Elevator* shall mean any power-driven hoisting or lowering mechanism equipped with a car or platform which moves in guides in a substantially vertical direction. The term shall include both passenger and freight elevators (including portable elevators or tiering machines), but shall not include dumbwaiters.

*High-lift truck* shall mean a power-driven industrial type of truck used for lateral transportation that is equipped with a power-operated lifting device usually in the form of a fork or platform capable of tiering loaded pallets or skids one above the other. Instead of a fork or a platform, the lifting device may consist of a ram, scoop, shovel, crane, revolving fork, or other attachments for handling specific loads. The term shall mean and include highlift trucks known under such names as fork lifts, fork trucks, fork lift trucks, tiering trucks, skid loaders, skid-steer loaders, Bobcat loaders, or stacking trucks, but shall not mean low-lift trucks or low-lift platform trucks that are designed for the transportation of but not the tiering of materials.

*Hoist* shall mean a power-driven apparatus for raising or lowering a load by the application of a pulling force that does not include a car or platform running in guides. The term shall include all types of hoists, such as base mounted electric, clevis suspension, hook suspension, monorail, overhead electric, simple drum, and trolley suspension hoists.

*Manlift* shall mean a device intended for the conveyance of persons that consists of platforms or brackets mounted on, or attached to, an endless belt, cable, chain or similar method of suspension; with such belt, cable or chain operating in a substantially vertical direction and being supported by and driven through pulleys, sheaves or sprockets at the top and bottom. The term shall also include truck- or equipment-mounted aerial platforms commonly referred to as scissor lifts, boom-type mobile elevating work platforms, work assist vehicles, cherry pickers, basket hoists, and bucket trucks.

* * * * *

9. In § 570.59, the section heading is proposed to be revised to read as follows:

**§ 570.59 Occupations involved in the operation of power-driven metal forming, punching, and shearing machines (Order 8).**

* * * * *

10. In § 570.61, the section heading and paragraphs (a)(4), (b), and (c)(1) are proposed to be revised to read as follows:

**§ 570.61 Occupations in the operation of power-driven meat-processing machines and occupations involving slaughtering, meat and poultry packing, processing, or rendering (Order 10).**

(a) * * *

(4) All occupations involved in the operation or feeding of the following power-driven machines, including setting-up, adjusting, repairing, or oiling such machines or the cleaning of such machines or the individual parts or attachments of such machines, regardless of the product being processed by these machines (including, for example, the slicing in a retail delicatessen of meat, poultry, seafood, bread, vegetables, or cheese, etc.): meat patty forming machines, meat and bone cutting saws, meat slicers, knives (except bacon-slicing machines), headsplitters, and guillotine cutters; snoutpullers and jawpullers; skinning machines; horizontal rotary washing machines; casing-cleaning machines such as crushing, stripping, and finishing machines; grinding, mixing, chopping, and hashing machines; and presses (except belly-rolling machines).

* * * * *

(b) *Definitions.* As used in this section:

*Boning occupations* means the removal of bones from meat cuts. It does not include work that involves cutting, scraping, or trimming meat from cuts containing bones.

*Curing cellar* includes a workroom or workplace which is primarily devoted to the preservation and flavoring of meat, including poultry, by curing materials. It does not include a workroom or workplace solely where meats are smoked.

*Hide cellar* includes a workroom or workplace where hides are graded, trimmed, salted, and otherwise cured.

*Killing floor* includes a workroom, workplace where such animals as cattle, calves, hogs, poultry, sheep, lambs, goats, buffalo, deer, or horses are immobilized, shackled, or killed, and the carcasses are dressed prior to chilling.

*Retail/wholesale or service establishments* include establishments where meat or meat products, including poultry, are processed or handled, such as butcher shops, grocery stores, restaurants and quick service food establishments, hotels, delicatessens, and meat locker (freezer-locker) companies, and establishments where any food product is prepared or processed for serving to customers using machines prohibited by paragraph (a) of this section.

*Rendering plants* means establishments engaged in the conversion of dead animals, animal offal, animal fats, scrap meats, blood, and bones into stock feeds, tallow, inedible greases, fertilizer ingredients, and similar products.

*Slaughtering and meat packing establishments* means places in or about which such animals as cattle, calves, hogs, poultry, sheep, lambs, goats, buffalo, deer, or horses are killed, butchered, or processed. The term also includes establishments which manufacture or process meat or poultry products, including sausage or sausage casings from such animals.

(c) * * *

(1) The killing and processing of rabbits or small game in areas physically separated from the killing floor.

* * * * *

11. In § 570.62, paragraph (a)(2) is proposed to be revised, and a new paragraph (b) is proposed to be added, to read as follows:

**§ 570.62 Occupations involved in the operation of bakery machines (Order 11).**

(a) * * *

(2) The occupation of setting up or adjusting a cookie or cracker machine.

(b) *Exceptions.* (1) This section shall not apply to the operation, including the setting up, adjusting, repairing, oiling and cleaning, of lightweight, small capacity, portable counter-top power-driven food mixers that are, or are comparable to, models intended for household use. For purposes of this exemption, a lightweight, small capacity mixer is one that is not hardwired into the establishment's power source, is equipped with a motor that operates at no more than ½ horsepower, and is equipped with a bowl with a capacity of no more than five quarts.

(2) This section shall not apply to the operation of pizza-dough rollers, a type of dough sheeter, that: have been constructed with safeguards contained in the basic design so as to prevent fingers, hands, or clothing from being caught in the in-running point of the rollers; have gears that are completely enclosed; and have microswitches that disengage the machinery if the backs or sides of the rollers are removed. This exception applies only when all the safeguards detailed in this paragraph are present on the machine, are operational, and have not been overridden. This exception does not apply to the setting up, adjusting, repairing, oiling or cleaning of such pizza-dough rollers.

12. In § 570.63, the section heading and paragraphs (a)(2) and (b) are proposed to be revised, and new paragraphs (a)(3) and (a)(4) are proposed to be added, to read as follows:

**§ 570.63 Occupations involved in the operation of paper-products machines, balers, and compactors (HO 12).**

(a) * * *

(2) The occupations of operation or assisting to operate any baler that is designed or used to process materials other than paper.

(3) The occupations of operation or assisting to operate any compactor that is designed or used to process materials other than paper.

(4) The occupations of setting up, adjusting, repairing, oiling, or cleaning any of the machines listed in paragraphs (a)(1), (2), and (3) of this section.

(b) *Definitions.* As used in this section:

*Applicable ANSI Standard* means the American National Standard Institute's Standard ANSI Z245.5–1990 (''American National Standard for Refuse Collection, Processing, and Disposal—Baling Equipment—Safety Requirements'') for scrap paper balers or the American National Standard Institute's Standard ANSI Z245.2–1992 (''American National Standard for Refuse Collection, Processing, and Disposal Equipment—Stationary Compactors—Safety Requirements'') for paper box compactors. Additional applicable standards are the American National Standard Institute's Standard ANSI Z245.5–1997 (''American National Standard for Equipment Technology and Operations for Wastes and Recyclable Materials—Baling Equipment—Safety Requirements'') for scrap paper balers or the American National Standard Institute's Standard ANSI Z245.2–1997 (''American National Standard for Equipment Technology and Operations for Wastes and Recyclable Materials—Stationary Compactors—Safety Requirements'') for paper box compactors, which the Secretary has certified to be at least as protective of the safety of minors as Standard ANSI Z245.5–1990 for scrap paper balers or ANSI Z245.2–1992 for paper box compactors. The ANSI standards for scrap paper balers and paper box compactors govern the manufacture and modification of the equipment, the operation and maintenance of the equipment, and employee training. These ANSI standards are incorporated by reference in this paragraph and have the same force and effect as other standards in this part. Only the mandatory provisions (i.e., provisions containing the word ''shall'' or other mandatory language) of these standards are adopted as standards under this part. These standards are incorporated by reference as they exist on the date of the approval; if any changes are made in these standards which the Secretary finds to be as protective of the safety of minors as the current standards, the Secretary will publish a Notice of the change of standards in the **Federal Register**. These incorporations by reference were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of these standards are available for purchase from the American National Standards Institute (ANSI), 23 West 43rd St., Fourth Floor, New York, NY 10036. In addition, these standards are available for inspection at the National Archives and Records Administration (NARA) and at the Occupational Safety and Health Administration's Docket Office, Room N–2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, or any of its regional offices. 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.*

*Baler that is designed or used to process materials other than paper* means a powered machine designed or used to compress materials other than paper and cardboard boxes, with or without binding, to a density or form that will support handling and transportation as a material unit without requiring a disposable or reusable container.

*Compactor that is designed or used to process materials other than paper* means a powered machine that remains stationary during operation, designed or used to compact refuse other than paper or cardboard boxes into a detachable or integral container or into a transfer vehicle.

*Operating or assisting to operate* means all work that involves starting or stopping a machine covered by this section, placing materials into or removing materials from a machine, including clearing a machine of jammed materials, paper, or cardboard, or any other work directly involved in operating the machine. The term does not include the stacking of materials by an employee in an area nearby or adjacent to the machine where such employee does not place the materials into the machine.

*Paper box compactor* means a powered machine that remains stationary during operation, used to compact refuse, including paper boxes, into a detachable or integral container or into a transfer vehicle.

*Paper products machine* means all power-driven machines used in (1) remanufacturing or converting paper or pulp into a finished product, including preparing such materials for recycling; or (2) preparing such materials for disposal. The term applies to such machines whether they are used in establishments that manufacture converted paper or pulp products, or in any other type of manufacturing or nonmanufacturing establishment. The term also applies to those machines which, in addition to paper products, process other material for disposal.

*Scrap paper baler* means a powered machine used to compress paper and possibly other solid waste, with or without binding, to a density or form that will support handling and transportation as a material unit without requiring a disposable or reusable container.

* * * * *

13. In § 570.65, the section heading and paragraphs (a)(2) and (b) are proposed to be revised, and a new paragraph (a)(3) is proposed to be added, to read as follows:

**§ 570.65 Occupations involving the operation of circular saws, band saws, guillotine shears, chain saws, reciprocating saws, and wood chippers (Order 14).**

(a) * * *

(2) The occupations of operator of or helper on the following power-driven fixed or portable machines:

(i) Chain saws.

(ii) Wood chippers.

(iii) Reciprocating saws.

(3) The occupations of setting-up, adjusting, repairing, oiling, or cleaning circular saws, band saws, guillotine shears, chain saws, wood chippers, and reciprocating saws.

(b) *Definitions.* As used in this section:

*Band saw* shall mean a machine equipped with an endless steel band having a continuous series of notches or teeth, running over wheels or pulleys, and used for sawing materials.

*Chain saw* shall mean a machine that has teeth linked together to form an endless chain used for cutting materials.

*Circular saw* shall mean a machine equipped with a thin steel disc having a continuous series of notches or teeth on the periphery, mounted on shafting, and used for sawing materials.

*Guillotine shear* shall mean a machine equipped with a moveable blade operated vertically and used to shear materials. The term shall not include other types of shearing machines, using

a different form of shearing action, such as alligator shears or circular shears.

*Helper* shall mean a person who assists in the operation of a machine covered by this section by helping place materials into or remove them from the machine.

*Operator* shall mean a person who operates a machine covered by this section by performing such functions as starting or stopping the machine, placing materials into or removing them from the machine, or any other functions directly involved in operation of the machine.

*Reciprocating saw* shall mean a machine equipped with a moving blade that alternately changes direction on a linear cutting axis used for sawing materials.

*Wood chipper* shall mean a machine equipped with a feed mechanism, knives mounted on a rotating chipper disc or drum, and a power plant used to reduce to chips or shred such materials as tree branches, trunk segments, landscape waste, and other materials.

* * * * *

## Subpart G—General Statements of Interpretation of the Child Labor Provisions of the Fair Labor Standards Act of 1938, as Amended

14. The authority citation for subpart G continues to read as follows:

**Authority:** 52 Stat. 1060–1069 as amended; 29 U.S.C. 201–219.

15. In § 570.103, paragraph (c) is proposed to be revised to read as follows:

### § 570.103 Comparison with wage and hour provisions.

* * * * *

(c) Another distinction is that the exemptions provided by the Act from the minimum wage and/or overtime provisions are more numerous and differ from the exemptions granted from the child labor provisions. There are only eight specific child labor exemptions of which only two apply to the minimum wage and overtime pay requirements as well. These are the exemptions for employees engaged in the delivery of newspapers to the consumer and homeworkers engaged in the making of wreaths composed principally of evergreens.[3] With these two exceptions, none of the specific exemptions from the minimum wage and/or overtime pay requirements applies to the child labor provisions. However, it should be noted that the exclusion of certain employers by section 3(d)[4] of the Act applies to the child labor provisions as well as the wage and hours provisions.

16. Sections 570.118 through 570.120 are proposed to be revised to read as follows:

### § 570.118 Sixteen-year minimum.

The Act sets a 16-year-age minimum for employment in manufacturing or mining occupations, though under FLSA section 13(c)(7), certain youth between the ages of 14 and 18 may, under specific conditions, be employed inside and outside of places of business that use power-driven machinery to process wood products. Furthermore, the 16-year-age minimum for employment is applicable to employment in all other occupations unless otherwise provided by regulation or order issued by the Secretary.

### § 570.119 Fourteen-year minimum.

With respect to employment in occupations other than manufacturing and mining and in accordance with the provisions of FLSA section 13(c)(7), the Secretary is authorized to issue regulations or orders lowering the age minimum to 14 years where he or she finds that such employment is confined to periods that will not interfere with the minors' schooling and to conditions that will not interfere with their health and well-being. Pursuant to this authority, the Secretary has detailed in § 570.33 the most commonly asked about occupations in which the employment of 14- and 15-year-olds is not permitted and in § 570.34 those occupations in which 14- and 15-year-olds may be employed when the work is performed outside school hours and is confined to other specified limits. The Secretary has also set forth, in § 570.35, additional conditions that limit the periods during which 14- and 15-year-olds may be employed. The employment of minors under 14 years of age is not permissible under any circumstances if the employment is covered by the child labor provisions and not specifically exempt.

### § 570.120 Eighteen-year minimum.

To protect young workers from hazardous employment, the FLSA provides for a minimum age of 18 years in occupations found and declared by the Secretary to be particularly hazardous or detrimental to health or well-being for minors 16 and 17 years of age. Hazardous occupations orders are the means through which occupations are declared to be particularly hazardous for minors. Since 1995, the promulgation and amending of the hazardous occupations orders has been placed solely within the purview of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* The effect of these orders is to raise the minimum age for employment to 18 years in the occupations covered. Seventeen orders, published in subpart E of this part, have thus far been issued under the FLSA and are now in effect.

17. In § 570.122, it is proposed to add new paragraphs (e), (f), (g), and (h) that are proposed to read as follows:

### § 570.122 General.

* * * * *

(e) Employment of homeworkers engaged in the making of evergreen wreaths, including the harvesting of the evergreens or other forest products used in making such wreaths.

(f) Employment of 16- and 17-year-olds to load, but not operate or unload, certain scrap paper balers and paper box compactors under specified conditions.

(g) Employment of 17-year-olds to perform limited driving of cars and trucks during daylight hours under specified conditions.

(h) Employment of youths between the ages of 14 and 18 years who, by statute or judicial order, are excused from compulsory school attendance beyond the eighth grade, under specified conditions, in places of business that use power-driven machinery to process wood products.

18. It is proposed to remove the center heading ''Enforcement'' and revise § 570.127 to read as follows:

### § 570.127 Homeworkers engaged in the making of evergreen wreaths.

FLSA section 13(d) provides an exemption from the child labor provisions, as well as the minimum wage and overtime provisions, for homeworkers engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

### § 570.128 [Redesignated as § 570.141]

19. Section 570.128 is proposed to be redesignated as § 570.141 and a new § 570.128 is proposed to be added to read as follows:

### § 570.128 Loading of certain scrap paper balers and paper box compactors.

Section 13(c)(5) of the FLSA provides for an exemption from the child labor

[3] Both of these exemptions are contained in section 13(d) of the FLSA.

[4] Section 3(d) defines 'employer' as including ''any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.''

provisions for the employment of 16- and 17-year-olds to load, but not operate or unload, certain power-driven scrap paper balers and paper box compactors under certain conditions. The provisions of this exemption, which are contained in HO 12 (§ 570.63), include that the scrap paper baler or compactor meet an applicable standard established by the ANSI identified in the statute, or a more recent ANSI standard that the Secretary of Labor has found and declared to be as protective of the safety of young workers as the ANSI standard named in the statute. In addition, the scrap paper baler or paper box compactor must include an on-off switch incorporating a key-lock or other system and the control of the system must be maintained in the custody of employees who are at least 18 years of age. The on-off switch of the scrap paper baler or paper box compactor must be maintained in an off position when the machine is not in operation. Furthermore, the employer must also post a notice on the scrap paper baler or paper box compactor that conveys certain information, including the identification of the applicable ANSI standard that the equipment meets, that 16- and 17-year-old employees may only load the scrap paper baler or paper box compactor, and that no employee under the age of 18 may operate or unload the scrap paper baler or paper box compactor.

**§ 570.129 [Redesignated as § 570.142]**

20. Section 570.129 is proposed to be redesignated as § 570.142 and a new § 570.129 is proposed to be added to read as follows:

**§ 570.129 Limited driving of automobiles and trucks by 17-year-olds.**

Section 13(c)(6) of the FLSA provides an exemption for 17-year-olds, but not 16-year-olds, who, as part of their employment, perform the occasional and incidental driving of automobiles and trucks on public highways under specified conditions. These specific conditions, which are contained in HO 2 (§ 570.52), include that the automobile or truck may not exceed 6,000 pounds gross vehicle weight, the driving must be restricted to daylight hours, the vehicle must be equipped with a seat belt or similar restraining device for the driver and for any passengers, and the employer must instruct the employee that such belts or other devices must be used. In addition, the 17-year-old must hold a State license valid for the type of driving involved in the job, have successfully completed a State-approved driver education course, and have no records of any moving violations at the time of his or her hire. The exemption also prohibits the minor from performing any driving involving the towing of vehicles; route deliveries or route sales; the transportation for hire of property, goods, or passengers; urgent, time-sensitive deliveries; or the transporting of more than three passengers at any one time. The exemption also places limitations on the number of trips the 17-year-old may make each day and restricts the driving to a thirty mile radius of the minor's place of employment.

21. It is proposed that a new § 570.130 be added to read as follows:

**§ 570.130 Employment of certain youth inside and outside of places of business that use power-driven machinery to process wood products.**

Section 13(c)(7) of the FLSA provides a limit exemption from the child labor provisions for certain youths between the ages of 14 and 18 years who, by statute or judicial order, are excused from compulsory school attendance beyond the eighth grade, that permits their employment inside and outside of places of business that use power-driven machinery to process wood products. The provisions of this exemption are contained in subpart C of this part (§ 570.34(m)) and HO 4 (§ 570.54). Although the exemption allows certain youths between the ages of 14 and 18 years to be employed inside and outside of places of business that use power-driven machines to process wood products, it does so only if such youths do not operate or assist in the operation of power-driven woodworking machines. The exemption also requires that the youth be supervised by an adult relative or by an adult member of the same religious sect as the youth. The youth must also be protected from wood particles or other flying debris within the workplace by a barrier appropriate to the potential hazard of such wood particles or flying debris or by maintaining a sufficient distance from machinery in operation. For the exemption to apply, the youth must also be required to use personal protective equipment to prevent exposure to excessive levels of noise and sawdust.

22. It is proposed that new §§ 570.131 through 570.139 be added and reserved.

**§§ 570.131 through 570.139 (Reserved).**

23. It is proposed that a center heading and new § 570.140 be added to read as follows:

## Enforcement

**§ 570.140 General.**

(a) Section 15(a)(4) of the Act makes any violation of the provisions of sections 12(a) or 12(c) unlawful. Any such unlawful act or practice may be enjoined by the United States District Courts under section 17 upon court action, filed by the Secretary pursuant to section 12(b) and, if willful will subject the offender to the criminal penalties provided in section 16(a) of the Act. Section 16(a) provides that any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) In addition, FLSA section 16(e) states that any person who violates the provisions of FLSA section 12, relating to child labor, or any regulations issued under that section, shall be subject to a civil penalty, currently not to exceed $11,000 for each employee who was the subject of such a violation. Part 579 of this chapter, *Child Labor Violations—Civil Money Penalties*, provides for the issuance of the notice of civil money penalties for any violation of FLSA section 12 relating to child labor. Part 580 of this chapter, *Civil Money Penalties—Procedures for Assessing and Contesting Penalties*, describes the administrative process for assessment and resolution of the civil money penalties. When a civil money penalty is assessed against an employer for a youth employment violation, the employer has the right, within 15 days after receipt of the notice of such penalty, to file an exception to the determination that the violation or violations occurred. When such an exception is filed with the office making the assessment, the matter is referred to the Chief Administrative Law Judge, and a formal hearing is scheduled. At such a hearing, the employer or an attorney retained by the employer may present such witnesses, introduce such evidence and establish such facts as the employer believes will support the exception. The determination of the amount of any civil money penalty becomes final if no exception is taken to the administrative assessment thereof, or if no exception is filed to the decision and order of the administrative law judge.

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## LIST OF PUBLIC LAWS

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**S. 494/P.L. 110–17**

NATO Freedom Consolidation Act of 2007 (Apr. 9, 2007; 121 Stat. 73)

**Last List March 30, 2007**

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