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RESERVATIONS: (202) 741–6008

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Contents

Federal Register

Vol. 73, No. 100

Thursday, May 22, 2008

Agriculture Department
See Forest Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29734–29735

Centers for Disease Control and Prevention
NOTICES
Meetings:
Board of Scientific Counselors, National Center for Health Marketing, 29759

Centers for Medicare & Medicaid Services
RULES
Medicare Program:
Changes for Long-Term Care Hospitals Required by Certain Provisions of the Medicare, Medicaid, SCHIP Extension Act of 2007:
3-Year Moratorium on the Establishment of New Long-Term Care Hospitals and Long-Term Care Hospital Satellite Facilities etc., 29699–29711

Children and Families Administration
See Refugee Resettlement Office

Coast Guard
RULES
Drawbridge Operation Regulations:
Illinois Waterway, Lockport, IL; Repair and Maintenance, 29688
Mill Neck Creek, Oyster Bay, NY, 29688–29690
Drawbridge Operation Regulations; Thames River, New London, CT, 29690–29691
PROPOSED RULES
Drawbridge Operation Regulations:
Atlantic Intracoastal Waterway (AIWW), Albemarle and Chesapeake Canal, Chesapeake, VA, 29722–29723
Duwamish Waterway, Seattle, WA, 29723–29725
Safety Zones:
Annual Events Requiring Safety Zones in the Captain of the Port Detroit Zone, 29725–29731

Commerce Department
See International Trade Administration
See National Oceanic and Atmospheric Administration

Commission of Fine Arts
RULES
Procedures and Policies, 29711–29712

Commodity Futures Trading Commission
NOTICES
Meetings; Sunshine Act, 29742

Defense Department
PROPOSED RULES
National Security Personnel System, 29882–29927

Drug Enforcement Administration
RULES
Changes to Patient Limitation for Dispensing or Prescribing Approved Narcotic Controlled Substances for Maintenance or Detoxification Treatment by, etc., 29685–29688

Education Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29742–29743

Election Assistance Commission
NOTICES
Meetings; Sunshine Act, 29743

Employment and Training Administration
PROPOSED RULES
Labor Certification Process and Enforcement:
Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States, etc., 29942–29975
NOTICES
Amended Certification Regarding Eligibility to Apply for Worker Adjustment Assistance, etc.:
Magnesium Aluminum Corp. et al., 29781
Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance, etc., 29781–29783
Negative Determination Regarding Application for Reconsideration:
Russound, a/k/a Folded Metal Products, Inc., Newmarket, NH, 29783–29784
Revised Determination on Reconsideration:
Fraser Timber Ltd. Including On-Site Leased Workers of Tempo Employment Services, Ashland, ME, 29784
Termination of Investigation:
Automated Equipment, Inc., Paris, TN, 29784
Employment Giant, LLC, Warren, MI, 29784
Honeywell International, Inc., Phoenix, AZ, 29784–29785
Sun Chemical Corp., North American Inks Division, Hopkinsville, KY, 29785

Energy Department
See Federal Energy Regulatory Commission

Environmental Protection Agency
RULES
Approval and Promulgation of Implementation Plans; Mississippi; CFR Correction, 29691
Requirements for Preparation, Adoption, and Submittal of Implementation Plans; CFR Correction, 29691
Update of Continuous Instrumental Test Methods; Technical Amendments, 29691–29698
PROPOSED RULES
Approval and Promulgation of Implementation Plans:
South Carolina; Interstate Transport of Pollution, 29731–29733
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29750–29752
Massachusetts Marine Sanitation Device Standard - Notice of Determination, 29752–29753

Receipt of a Request from the State of Texas for a Waiver of a Portion of the Renewable Fuel Standard, 29753–29755

Executive Office of the President
See Management and Budget Office

Federal Aviation Administration
PROPOSED RULES
Airworthiness Directives:
Boeing Model 747-100, 747-100B, 747-100B SUD, et al. Series Airplanes, 29716–29720
Dornier Model 328-100 Airplanes, 29720–29722
NOTICES
Meetings:
RTCA Special Committee 216; Aeronautical System Security, 29836
RTCA Special Committee 218; Future ADS-B/TCAS Relationships, 29836
Special Committee 214; Standards for Air Traffic Data Communication Services Joint with EUROCAE Working Group 78, 29836–29837
Transport Airplane Wheels and Wheel and Brake Assemblies, 29837

Federal Communications Commission
RULES
Universal Service Fund Contribution, 29712–29715
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29755–29758

Federal Energy Regulatory Commission
NOTICES
Applicant Prepared Environmental Assessment Using the Alternative Licensing Procedures:
Alaska Power & Telephone Co., 29743–29744
Application for Temporary Amendment of License, etc.:
Pacific Gas and Electric Co., 29744–29745
Combined Notice of Filings, 29745–29746
Filings:
Department of Energy, Portsmouth/Paducah Project Office, 29746
Intent to Prepare an Environmental Assessment:
Eric Jacobson, 29746–29747
South System Expansion III Project and Joint Pipeline Expansion Phase II Project, 29747–29750
Issuance of Order:
Polytop Corp., 29750

Federal Highway Administration
NOTICES
Environmental Impact Statements; Notice of Intent:
Virginia; Rescind Five Notices, 29837–29838

Federal Railroad Administration
NOTICES
Petition for Waiver of Compliance, 29838
Railroad Safety Advisory Committee; Working Group Activity Update, 29838–29841

Federal Reserve System
NOTICES
Formations of, Acquisitions by, and Mergers of Bank Holding Companies, 29758–29759
Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities, 29759

Federal Transit Administration
NOTICES
Buy America Waiver for the National Fuel Cell Bus Technology Development Program, 29841–29843
Fiscal Year 2008 Clean Fuels Grant Program Funds: Solicitation of Project Proposals, 29843–29846

Fine Arts Commission
See Commission of Fine Arts

Food and Drug Administration
RULES
Implantation or Injectable Dosage Form New Animal Drugs:
Cefovecin, 29685
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29759–29760
Draft Guidance for Industry:
Considerations for Allogeneic Pancreatic Islet Cells; Availability, 29760–29761
Meetings:
Cardiovascular and Renal Drugs Advisory Committee, 29761–29762
Endocrinologic and Metabolic Drugs Advisory Committee, 29762–29763
Gastroenterology and Urology Devices Panel of the Medical Devices Advisory Committee, 29763
Ophthalmic Devices Panel of the Medical Devices Advisory Committee, 29763–29764
Memorandum of Understanding With the U.S. Army Corps of Engineers, Mobile District, 29764–29769

Foreign Assets Control Office
NOTICES
Additional Designations of Entities Pursuant to Executive Order (13405), 29849

Forest Service
NOTICES
Plumas National Forest, CA; Moonlight and Wheeler Fires Recovery and Restoration Project, 29735–29736

Health and Human Services Department
See Centers for Disease Control and Prevention
See Centers for Medicare & Medicaid Services
See Food and Drug Administration
See National Institutes of Health
See Refugee Resettlement Office

Homeland Security Department
See Coast Guard
See U.S. Citizenship and Immigration Services
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29773–29774

Housing and Urban Development Department
NOTICES
Certification and Funding of State and Local Fair Housing Enforcement Agencies, 29775–29776

Interior Department
See Land Management Bureau

International Boundary and Water Commission, United States and Mexico
NOTICES
Final Supplemental Environmental Impact Statement:
South Bay International Wastewater Treatment Plant, San Diego County, CA, 29779

International Trade Administration
NOTICES
Antidumping Duties; New-Shipper Review and Rescission:
Solid Urea from the Russian Federation, 29736–29738
Extension of Time Limit for Final Results of Second Administrative Reviews:
Certain Frozen Warmwater Shrimp from Thailand and the Socialist Republic of Vietnam, 29738
Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review:
Polyethylene Retail Carrier Bags; Thailand, 29738–29739
Scope Rulings, 29739–29741

International Trade Commission
NOTICES
Investigation:
Certain Steel Nails from China and The United Arab Emirates, 29779–29780

Justice Department
See Drug Enforcement Administration
NOTICES
Record of Decision:
Contract to House Federal Detainees within a Contractor-Owned/Contractor-Operated Detention Facility in the Las Vegas, NV Area, 29780–29781

Labor Department
See Employment and Training Administration

Land Management Bureau
NOTICES
Motor Vehicle Travel Closure and Restrictions on Public Lands in Beaver County, UT, 29776
Proposed Reinstatement of Terminated Oil and Gas Lease:
Wyoming, 29777
Realty Action:
Direct Sale of Public Lands in Nye County, NV, 29777–29779

Management and Budget Office
NOTICES
Standard Occupational Classification Policy Committee's Recommendations for the 2010 SOC, 29930–29939

Mexico and United States, International Boundary and Water Commission
See International Boundary and Water Commission, United States and Mexico

National Credit Union Administration
NOTICES
Meetings; Sunshine Act, 29785

National Institutes of Health
NOTICES
Meetings:
Center for Scientific Review, 29769
National Cancer Institute, 29769–29770
National Institute of Child Health and Human Development, 29770–29772
National Institute of Nursing Research, 29772
National Institute on Drug Abuse, 29771–29772

National Oceanic and Atmospheric Administration
NOTICES
Endangered Species; (File No. 1576), 29741–29742

Nuclear Regulatory Commission
NOTICES
Combined License Application:
Progress Energy Carolinas, Inc.; Shearon Harris Nuclear Power Plant (Units 2 And 3), 29785–29787
Consideration of Issuance of Amendment to Facility Operating License etc.:
FirstEnergy Nuclear Operating Co., 29787–29791
Draft Regulatory Guide; Issuance, Availability, 29791–29792

Office of Management and Budget
See Management and Budget Office

Personnel Management Office
PROPOSED RULES
National Security Personnel System, 29882–29927

Pipeline and Hazardous Materials Safety Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29846–29847
Application for Special Permits, 29847–29848
Applications for Modification of Special Permit, 29848–29849

Postal Regulatory Commission
NOTICES
Universal Postal Service Obligation, 29792–29793

Refugee Resettlement Office
NOTICES
Supplement Funding to the 2008 Voluntary Agency Matching Grant Program, 29773

Securities and Exchange Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29793
Self-Regulatory Organizations; Proposed Rule Changes:
American Stock Exchange LLC, 29793–29796
Chicago Board Options Exchange, Inc., 29796–29797
Fixed Income Clearing Corp., 29797–29798
Municipal Securities Rulemaking Board, 29799–29800
NASDAQ Stock Market LLC, 29800–29804
New York Stock Exchange LLC, 29804–29805
Philadelphia Stock Exchange, Inc., 29805–29808
Subcommittee Reports of the SEC Advisory Committee on Improvements to Financial Reporting, 29808–29832

Small Business Administration
NOTICES
Disaster Declaration:
Missouri, 29832–29833
Oklahoma, 29832

Social Security Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29833–29834

State Department
NOTICES
Culturally Significant Objects Imported for Exhibition Determinations:
Women Impressionists: Berthe Morisot, Mary Cassatt, Eva Gonzales, Marie Bracquemond, 29834

Thrift Supervision Office
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29849–29850

Transportation Department
See Federal Aviation Administration
See Federal Highway Administration
See Federal Railroad Administration
See Federal Transit Administration
See Pipeline and Hazardous Materials Safety Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29834–29836

Treasury Department
See Foreign Assets Control Office
See Thrift Supervision Office

U.S. Citizenship and Immigration Services
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29774–29775

Veterans Affairs Department
RULES
Accreditation of Agents and Attorneys; Agent and Attorney Fees, 29852–29880

Separate Parts In This Issue

Part II
Veterans Affairs Department, 29852–29880

Part III
Defense Department; Personnel Management Office, 29882–29927

Part IV
Executive Office of the President, Management and Budget Office, 29930–29939

Part V
Labor Department, Employment and Training Administration, 29942–29975

Reader Aids

Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

5 CFR

Proposed Rules:

9901 29882

14 CFR

Proposed Rules:

39 (2 documents) 29716, 29720

20 CFR

Proposed Rules:

655 29942
656 29942

21 CFR

522 29685
1301 29685

33 CFR

117 (3 documents) 29688, 29690

Proposed Rules:

117 (2 documents) 29722, 29723
165 29725

38 CFR

1 29852
14 29852
19 29852
20 29852

40 CFR

51 29691
52 29691
60 29691

Proposed Rules:

52 29731

42 CFR

412 29699

45 CFR

2102 29711

47 CFR

54 29712

Rules and Regulations

Federal Register
Vol. 73, No. 100
Thursday, May 22, 2008

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.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 522

Implantation or Injectable Dosage Form New Animal Drugs; Cefovecin

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Pfizer, Inc. The NADA provides for the veterinary prescription use of a solution of cefovecin sodium in cats and dogs by subcutaneous injection for the treatment of skin infections.

DATES: This rule is effective May 22, 2008.

FOR FURTHER INFORMATION CONTACT: Melanie R. Berson, Center for Veterinary Medicine (HFV–110), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8337, e-mail: *melanie.berson@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Pfizer, Inc., 235 East 42d St., New York, NY 10017, filed NADA 141–285 that provides for the veterinary prescription use of CONVENIA (cefovecin sodium) Injectable in cats and dogs by subcutaneous injection for the treatment of skin infections. The application is approved as of April 25, 2008, and the regulations are amended in 21 CFR part 522 to reflect approval.

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

Under section 512(c)(2)(F)(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(i)), this approval qualifies for 5 years of marketing exclusivity beginning on the date of approval.

The agency has determined under 21 CFR 25.33(d)(1) that these actions are of a type that do not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

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

List of Subjects in 21 CFR Part 522

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 522 is amended as follows:

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 522 continues to read as follows:

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

§ 522.311 [Redesignated as § 522.300]

■ 2. Redesignate § 522.311 as § 522.300.

§ 522.312 [Redesignated as § 522.304]

■ 3. Redesignate § 522.312 as § 522.304.

■ 4. Add new § 522.311 to read as follows:

§ 522.311 Cefovecin.

(a) *Specifications*. Each milliliter of constituted solution contains 80 milligrams (mg) cefovecin as the sodium salt.

(b) *Sponsor*. See No. 000069 in § 510.600(c) of this chapter.

(c) *Special considerations*. Federal law restricts this drug to use by or on the order of a licensed veterinarian.

(d) *Conditions of use*—(1) *Dogs*—(i) *Amount*. Administer 3.6 mg/pound (lb) (8 mg/kilograms (kg)) body weight as a single subcutaneous injection. A second subcutaneous injection of 3.6 mg/lb (8 mg/kg) may be administered if response to therapy is not complete.

(ii) *Indications for use*. For the treatment of skin infections (secondary superficial pyoderma, abscesses, and wounds) in dogs caused by susceptible strains of *Staphylococcus intermedius* and *Streptococcus canis* (Group G).

(2) *Cats*—(i) *Amount*. Administer 3.6 mg/lb (8 mg/kg) body weight as a single, one-time subcutaneous injection.

(ii) *Indications for use*. For the treatment of skin infections (wounds and abscesses) in cats caused by susceptible strains of *Pasteurella multocida*.

Dated: May 13, 2008.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. E8–11515 Filed 5–21–08; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1301

[Docket No. DEA–275F]

RIN 1117–AA99

Changes to Patient Limitation for Dispensing or Prescribing Approved Narcotic Controlled Substances for Maintenance or Detoxification Treatment by Qualified Individual Practitioners

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Final rule.

SUMMARY: On September 20, 2007, the Drug Enforcement Administration (DEA) published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** (72 FR 53734) proposing to conform its regulations to recent statutory amendments to the Controlled Substances Act that changed certain patient limitations for practitioners who dispense or prescribe certain narcotic drugs for maintenance or detoxification treatment. DEA received one comment in support of this rulemaking. DEA is finalizing the rule as proposed.

DATES: *Effective Date:* This rule is effective June 23, 2008.

FOR FURTHER INFORMATION CONTACT: Mark W. Caverly, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Telephone (202) 307–7297.

SUPPLEMENTARY INFORMATION:

Overview

On August 2, 2005, the President signed amendments to the Controlled Substances Act to increase the patient limitation on prescribing drug addiction treatments by qualified medical practitioners in group practices from 30 patients for each group to 30 patients for each qualified practitioner in a group (Pub. L. 109–56; 119 Stat. 591) (21 U.S.C. 823(g)(2)).

On December 29, 2006, the President signed amendments to the Controlled Substances Act to permit certain qualifying physicians to dispense and prescribe Schedule III, IV, and V narcotic controlled substances approved by the Food and Drug Administration (FDA) specifically for use in maintenance or detoxification treatment to up to 100 patients at any one time, after the practitioner submits to the Secretary of Health and Human Services (HHS) a notification of the practitioner's need and intent to treat the increased number of patients. The amendment was made as part of the Office of National Drug Control Policy Reauthorization Act of 2006 (ONDCPRA) (Section 1102 of Pub. L. 109–469, 120 Stat. 3502).

Notice of Proposed Rulemaking

On September 20, 2007 (72 FR 53734), DEA published a Notice of Proposed Rulemaking (NPRM) proposing to conform DEA regulations to Public Law 109–56 by removing the requirement in 21 CFR 1301.28(b)(iv) that limits to 30 the number of patients that could receive maintenance or detoxification treatment through a group practice. This change means that each qualifying practitioner whether working individually or in a group practice may offer maintenance and detoxification treatment to 30 patients at any one time. That NPRM also proposed to conform DEA regulations to Section 1102 of Public Law 109–469 by permitting certain qualifying physicians to treat up to 100 patients. As discussed in 21 U.S.C. 823(g)(2)(B) and (D) (and not modified by this rule), to be a ''qualifying physician'' the practitioner must submit to the Secretary of HHS notification of the practitioner's intent to begin dispensing the drugs approved by FDA specifically for maintenance or detoxification treatment. The notification must contain the following certifications:

- The practitioner is registered with DEA as an individual practitioner.
- The practitioner is a ''qualifying physician.'' A practitioner is a ''qualifying physician'' if he is licensed under State law and has specific medical certification, training, or experience in maintenance or detoxification treatment as specified in the CSA.
- With respect to patients to whom the practitioner will provide such drugs or combinations of drugs, the practitioner has the capacity to refer the patients for appropriate counseling and other appropriate ancillary services.
- The total number of such patients of the practitioner at any one time will not exceed the applicable number. The applicable number is 30, unless, not sooner than one year after the date on which the practitioner submitted the initial notification, the practitioner submits a second notification to the Secretary of HHS of the need and intent of the practitioner to treat up to 100 patients.
- The notification to the Secretary of HHS must be in writing and must state the name and DEA registration number of the practitioner.
- If the practitioner is a member of a group practice, the notification states the names of the other practitioners in the practice and identifies the registrations issued for the other practitioners.

As noted, certain qualifying physicians may treat up to 100 patients, instead of the thirty permitted for all qualifying physicians. To qualify to treat the additional patients, not sooner than one year after the practitioner submitted the initial notification, the practitioner must submit a second notification to the Secretary of HHS of the need and intent of the practitioner to treat up to 100 patients. Further, the practitioner must be a ''qualifying physician'' under 21 U.S.C. 823(g)(2)(G) as discussed above (21 CFR 1301.28(b)(1)(i) and (ii)). These amendments do not change the requirement that each practitioner must first qualify to prescribe and dispense these medications for maintenance and detoxification treatment, or must be prescribing these approved substances using the ''good faith'' exception, found within current regulations at 21 CFR 1301.28(e).

The ''good faith'' exception was established by the Drug Addiction Treatment Act of 2000, and is not affected by this Final Rule. The Controlled Substances Act (CSA) (21 U.S.C. 823(g)(2)(D)) states that not later than 45 days after the Secretary of HHS receives a notification discussed above, the Secretary shall make a determination of whether the practitioner meets all requirements for a waiver of the requirement of separate registration. Upon the expiration of the 45-day time period, a practitioner who in good faith submits a notification discussed above and reasonably believes that the conditions specified in 21 U.S.C. 823(g)(2)(B) through (D) have been met shall, in dispensing narcotic drugs in schedule III, IV, or V or combinations of such drugs for maintenance treatment or detoxification treatment, be considered to have a waiver until notified otherwise by the Secretary of HHS. The practitioner may commence to prescribe or dispense such narcotic drugs for maintenance or detoxification treatment prior to the expiration of the 45-day period if it facilitates the treatment of an individual patient and both the Secretary and the Attorney General are notified by the practitioner of the intent to commence prescribing or dispensing such narcotic drugs.

Background

On October 17, 2000, Congress passed the Drug Addiction Treatment Act of 2000 (DATA), amending the Controlled Substances Act (CSA) (21 U.S.C. 801 *et seq.*) to establish ''waiver authority for physicians who dispense or prescribe certain narcotic drugs for maintenance treatment or detoxification treatment'' (Pub. L. 106–310, title XXXV; 114 Stat. 1222, codified at 21 U.S.C. 823(g)(2)). Prior to DATA, the Controlled Substances Act and DEA regulations required practitioners who wanted to conduct maintenance or detoxification treatment using narcotic controlled drugs to be registered as a Narcotic Treatment Program (NTP) in addition to the practitioner's individual registration. The separate NTP registration authorized the practitioner to dispense or administer, but not prescribe, narcotic drugs.

With passage of DATA, DEA published a NPRM (68 FR 37429; June 24, 2003) proposing to amend the regulations affecting maintenance and detoxification treatment for narcotic treatment by establishing an exemption from the separate registration requirement. After consideration of the comments received on the NPRM, DEA published a Final Rule on June 23, 2005 (70 FR 36338). The June 23, 2005, Final Rule permitted the following:

(1) Qualifying physicians to dispense and prescribe Schedule III, IV, and V narcotic controlled drugs approved by the Food and Drug Administration

specifically for use in maintenance or detoxification treatment.

(2) Narcotic-dependent patients to have one-on-one consultations with a practitioner in a private practice setting.

(3) Pharmacies to fill prescriptions for Schedule III, IV, and V narcotic controlled drugs approved by the Food and Drug Administration specifically for use in maintenance or detoxification treatment.

(4) Practitioners to offer maintenance and detoxification treatment with Schedule III, IV, and V narcotic controlled drugs approved by the Food and Drug Administration specifically for use in maintenance or detoxification treatment to no more than 30 patients in their private practices without having a second registration as a NTP.

The exemption and other amendments established by the Final Rule apply to individual practitioners working in traditional NTPs as well as any other practice setting. The rule does not affect the existing prohibition against prescribing any Schedule II narcotic controlled drugs for maintenance or detoxification treatment.

Under the provisions of DATA implementing regulations as codified in 21 CFR 1301.28(b)(1)(iii) and (iv), the 30-patient limitation applied equally to individual practices and to group practices (i.e., 30 patients per group), severely limiting the number of patients that could be treated by physicians in group practices.

Pursuant to Public Law 109–56 effective on August 2, 2005, and Section 1102 of Public Law 109–469 effective on December 29, 2006, this Final Rule makes conforming changes to DEA's regulations at 21 CFR 1301.28(b)(1)(iii) and (iv). Specifically, paragraph (b)(1)(iii) is amended to permit the treatment of up to 100 patients by a qualifying practitioner if the necessary criteria are met (i.e., the practitioner previously was granted authority to dispense or prescribe Schedule III, IV, or V narcotic controlled drugs or combinations of narcotic controlled drugs approved by the Food and Drug Administration specifically for use in maintenance or detoxification treatment without being separately registered as a narcotic treatment program, and, not sooner than one year after the submission of the initial notification, the practitioner submits a second notification to the Secretary of HHS of the need and intent of the practitioner to treat up to 100 patients) and notification is submitted to the Secretary of Health and Human Services. Further, paragraph (b)(1)(iii) is amended by removing the phrase ''Where the individual practitioner is not a member of a group practice,'' since there is no longer a distinction between practitioners in group practices and those practicing independently. Finally, paragraph (b)(1)(iv) is deleted to remove language regarding members of group practices.

Relevant to the change regarding the treatment of up to 100 patients, the Director of the Center for Substance Abuse Treatment in the Department of Health and Human Services issued a letter announcing the statutory change as follows:

> Under ONDCPRA (effective December 29, 2006), physicians who meet the following criteria may notify the Secretary of Health and Human Services (HHS) of their need and intent to treat up to 100 patients at any time: (1) The physician must currently be qualified under DATA 2000; (2) at least one year must have elapsed since the physician submitted the initial notification for authorization; (3) the physician must certify their capacity to refer patients for appropriate counseling and other appropriate ancillary services; and (4) the physician must certify that the total number of patients at any one time will not exceed the applicable number.

DEA emphasizes that practitioners must meet these HHS criteria before prescribing a Schedule III, IV, or V controlled substance for narcotic maintenance or detoxification treatment to more than 30 patients at any one time.

Comments Received

DEA received one comment to its NPRM published September 20, 2007 at 72 FR 53734 from an association representing physicians. The commenter supported the rulemaking as proposed. The commenter strongly supported the proposed change to conform DEA regulations to the statutory changes made by Public Law 109–56, believing that the previous requirement limiting the number of patients who could receive treatment through a group practice to 30 was a barrier to treatment access. Further, the commenter supported the proposed change to conform DEA regulations to Section 1102 of Public Law 109–469, believing that the requirement for physicians to submit a supplemental notification to the Secretary of HHS of their need and intent to treat up to 100 patients, not sooner than one year after the practitioner submitted the initial notification, is ''a reasonable compromise at this time.'' Therefore, DEA is finalizing this rulemaking as proposed.

Regulatory Certifications

Regulatory Flexibility Act

The Deputy Assistant Administrator, Office of Diversion Control, has reviewed this regulation and hereby certifies that it has been drafted in accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612) and that it will not have a significant economic impact on a substantial number of small entities. This rule relieves a restriction on practitioners desiring to treat narcotic dependent patients by removing the 30-patient limit for group practices and by permitting certain qualifying physicians to treat up to 100 patients after certain criteria are met. Thus, the changes provide greater access to care for patients due to increased patient limits.

Executive Order 12866

The Deputy Assistant Administrator further certifies that this rule has been drafted in accordance with the principles in Executive Order 12866 Section 1(b). It has been determined that this is a significant regulatory action and, therefore, this action has been reviewed by the Office of Management and Budget. This rule will not impose additional costs on practitioners as it simply increases the number of patients that a practitioner may treat for narcotic dependence. As previously noted, this change provides greater access to care for patients due to the increased patient limits.

Executive Order 12988

This rule meets the applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

Executive Order 13132

This rule does not preempt or modify any provision of State law; nor does it impose enforcement responsibilities on any State; nor does it diminish the power of any State to enforce its own laws. Accordingly, this rulemaking does not have Federalism implications warranting the application of Executive Order 13132.

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 $120,000,000 or more (adjusted for inflation) 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.

Congressional Review Act

This rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act). This rule will not result in an annual effect on the economy of $100,000,000 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.

List of Subjects in 21 CFR Part 1301

Administrative practice and procedure, Drug traffic control, Security measures.

■ For the reasons set out above, 21 CFR part 1301 is amended as follows:

PART 1301—REGISTRATION OF MANUFACTURERS, DISTRIBUTORS, AND DISPENSERS OF CONTROLLED SUBSTANCES

■ 1. The authority citation for part 1301 continues to read as follows:

Authority: 21 U.S.C. 821, 822, 823, 824, 871(b), 875, 877, 886a, 951, 952, 953, 956, 957.

■ 2. Section 1301.28 is amended by revising paragraph (b)(1)(iii) and removing paragraph (b)(1)(iv) to read as follows:

§ 1301.28 Exemption from separate registration for practitioners dispensing or prescribing Schedule III, IV, or V narcotic controlled drugs approved by the Food and Drug Administration specifically for use in maintenance or detoxification treatment.

* * * * *

(b)(1) * * *

(iii) The total number of patients to whom the individual practitioner will provide narcotic drugs or combinations of narcotic drugs under this section will not exceed 30 at any one time unless, not sooner than 1 year after the date on which the practitioner submitted the initial notification to the Secretary of Health and Human Services, the practitioner submits a second notification to the Secretary of the need and intent of the practitioner to treat up to 100 patients. A second notification under this subparagraph shall contain the certifications required by subparagraphs (i) and (ii) of this paragraph. The Secretary of Health and Human Services may promulgate regulations to change the total number of patients.

* * * * *

Dated: May 13, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control.

[FR Doc. E8–11471 Filed 5–21–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[USCG–2008–0339]

Drawbridge Operation Regulation; Illinois Waterway, Lockport, IL; Repair and Maintenance

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eighth Coast Guard District has issued a temporary deviation from the regulation governing the operation of the Elgin, Joliet, and Eastern Railroad Drawbridge, across the Illinois Waterway, Mile 290.1, at Lockport, Illinois. The deviation is necessary for the bridge to remain closed-to-navigation unless 1 hour advance notice is given. This deviation allows the bridge owner time to perform necessary repairs to the bridge.

DATES: This deviation is effective from 7 a.m. to 5 p.m., May 20, 2008, through June 2, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2008–0339 and are available online at *http://www.regulations.gov*. They are also available for inspection or copying at two locations: The Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and the Robert A. Young Federal Building, Room 2.107F, 1222 Spruce Street, St. Louis, MO 63103–2832, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Roger K. Wiebusch, Bridge Administrator, (314) 269–2378.

SUPPLEMENTARY INFORMATION: The Elgin, Joliet, and Eastern Railway requested a temporary deviation for the Elgin, Joliet, and Eastern Railroad Drawbridge, mile 290.1, at Lockport, Illinois across the Illinois Waterway to perform needed maintenance and repairs. The Elgin, Joliet, and Eastern Railroad Drawbridge currently operates in accordance with 33 CFR 117.393(d), which states the bridge is remotely operated and normally maintained in the open-to-navigation position, closing only to pass rail traffic and then reopening promptly for navigation. In order to facilitate the needed maintenance and repairs, the drawbridge must be kept in the closed-to-navigation position. This deviation allows for the bridge to remain closed-to-navigation unless 1 hour advance notice is given, from 7 a.m. to 5 p.m., May 20, 2008, through June 2, 2008.

There are no alternate routes for vessels transiting this section of the Illinois Waterway.

The Elgin, Joliet, and Eastern Railroad Drawbridge, in the closed-to-navigation position, provides a vertical clearance of 24.6 feet above pool stage. Navigation on the waterway consists primarily of commercial tows and recreational watercraft. This temporary deviation has been coordinated with waterway users. No objections were received.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: May 5, 2008.

Roger K. Wiebusch,

Bridge Administrator.

[FR Doc. E8–11441 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2008–0010]

RIN 1625–AA09

Drawbridge Operation Regulations; Mill Neck Creek, Oyster Bay, NY

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard has changed the drawbridge operation regulations that govern the operation of the Bayville Bridge, mile 0.1, across Mill Neck Creek at Oyster Bay, New York. This final rule will allow the bridge to open on signal between 7 a.m. and 11 p.m. from May 1 through October 31 and between 7 a.m. and 5 p.m., Monday through Friday, from November 1 through April 30. At all other times the bridge will open after a two-hour advance notice is

given by calling the number posted at the bridge. The purpose of this rule is to help relieve the bridge owner from the burden of crewing the bridge during time periods that the bridge receives few requests to open.

DATES: This rule is effective June 23, 2008.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket (USCG–2008–0010) and are available online at *http://www.regulations.gov.* This material is also available for inspection or copying at two locations: the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and the First Coast Guard District, Bridge Branch, One South Street, New York, NY 10004, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Judy Leung-Yee, Project Officer, First Coast Guard District, (212) 668–7195.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On March 7, 2008, we published a notice of proposed rulemaking (NPRM) entitled ''Drawbridge Operation Regulations; Mill Neck Creek, Oyster Bay, NY,'' in the **Federal Register** (73 FR 12315). We received two letters commenting on the proposed rule. No public meeting was requested, and none was held.

Background and Purpose

The Bayville Bridge has a vertical clearance of 9 feet at mean high water, and 16 feet at mean low water in the closed position. The existing drawbridge operating regulations listed at 33 CFR 117.5, require the bridge to open on signal at all times.

On March 8, 2007, the bridge owner, the County of Nassau, Department of Public Works, requested a change to the drawbridge operation regulations to help provide relief from the burden of providing a draw tender at the bridge during time periods when bridge seldom receives a request to open.

On April 13, 2007, the Coast Guard authorized a temporary deviation with a request for public comment in order to test the proposed rule change. The temporary test deviation was in effect from May 25, 2007, through November 20, 2007, with a comment period open until November 30, 2007. The Coast Guard received no comments or complaints from mariners in response to the temporary test deviation.

As a result of the above information, the Coast Guard published a notice of proposed rulemaking proposing to permanently change the drawbridge operation regulations for the Bayville Bridge. Under the notice of proposed rulemaking the bridge would be required to open on signal between 7 a.m. and 11 p.m., from May 1 through October 31, and between 7 a.m. and 5 p.m., Monday through Friday, from November 1 through April 30. At all other times the draw shall open on signal after at least a two-hour advance notice is provided by calling the number posted at the bridge.

Discussion of Comments and Changes

The Coast Guard received two comment letters from the New York State Office of Parks and Tennessee Gas Pipeline Company in response to the notice of proposed rulemaking. Both comment letters stated no objection to the proposed rule change and as a result, no changes have been made to this final rule.

Regulatory Analysis

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

Regulatory Planning and Review

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

This conclusion is based on the fact that vessel traffic will still be able to transit through the Bayville Bridge at any time provided they give a two-hour advance notice during the time periods the bridge is not crewed.

Small Entities

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

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

This conclusion is based on the fact that vessel traffic will still be able to transit through the Bayville Bridge at any time provided they give a two-hour advance notice during time periods the bridge is not crewed.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process.

No small entities requested Coast Guard assistance and none was given.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the

aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

This final rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

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

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this rule under Commandant Instruction M16475.1D, and Department of Homeland Security Management Directive 5100.1, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction, from further environmental documentation considering that it relates to the promulgation of operating regulations or procedures for drawbridges.

Under figure 2–1, paragraph (32)(e), of the instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

■ For the reasons discussed in the preamble, the Coast amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1(g); Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 117.800 to read as follows:

§ 117.800 Mill Neck Creek.

The draw of the Bayville Bridge, mile 0.1, at Oyster Bay, New York, shall open on signal between 7 a.m. and 11 p.m., from May 1 through October 31, and between 7 a.m. and 5 p.m., Monday through Friday, from November 1 through April 30. At all other times the draw shall open on signal provided at least a two-hour advance notice is given by calling the number posted at the bridge.

Dated: May 13, 2008.

Timothy S. Sullivan,

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

[FR Doc. E8–11443 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[USCG–2008–0356]

Drawbridge Operation Regulations; Thames River, New London, CT

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, First Coast Guard District, has issued a temporary deviation from the regulations governing the operation of the Amtrak Bridge, mile 3.0, across the Thames River at New London, Connecticut. While this temporary deviation is in effect, the bridge may remain in the closed position for sixteen days and operate on a temporary operating schedule for ten days.

DATES: This deviation is effective from June 1, 2008, through June 30, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2008–0356 and are available online at *http://www.regulations.gov.* They are also available for inspection or copying at two locations: the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and the First Coast Guard District, Bridge Branch Office, 408 Atlantic Avenue, Boston, Massachusetts 02110, between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Judy Leung-Yee, Project Officer, First Coast Guard District, at (212) 668–7165.

SUPPLEMENTARY INFORMATION: The Amtrak Bridge, across the Thames River at mile 3.0, at New London, Connecticut, has a vertical clearance in the closed position of 30 feet at mean

high water and 33 feet at mean low water. The existing drawbridge operation regulations are listed at 33 CFR 117.224.

The waterway has seasonal recreational vessels, fishing vessels, and U.S. Navy vessels of various sizes. The U.S. Navy and other marine facilities were notified regarding this deviation and no objections were received.

The owner of the bridge, National Railroad Passenger Corporation (Amtrak), requested a temporary deviation to facilitate rehabilitation construction at the bridge.

Under this temporary deviation the Amtrak Bridge, mile 3.0, across the Thames River at New London may remain in the closed position from June 1, 2008, through June 13, 2008, and from June 18, 2008, through June 20, 2008.

From June 21, 2008, through June 30, 2008, the draw may remain in the closed position; except that, the draw shall open for the passage of vessel traffic during the following time periods:

Monday through Friday from: 5 a.m. to 5:40 a.m.; 11:20 a.m. to 11:55 a.m.; 3:35 p.m. to 4:15 p.m.; and 8:30 p.m. to 8:55 p.m.

Saturday from: 8:30 a.m. to 9:10 a.m.; 12:35 p.m. to 1:05 p.m.; 3:40 p.m. to 4:10 p.m.; 5:35 p.m. to 6:05 p.m.; and 7:35 p.m. to 8:40 p.m.

Sunday from: 8:30 a.m. to 9:20 a.m.; 11:35 a.m. to 12:15 p.m.; 1:30 p.m. to 1:55 p.m.; 6:30 p.m. to 7:10 p.m.; and 8:30 p.m. to 9:15 p.m.

The draw shall open on signal at any time for U.S. Navy submarines and their associated escort vessels.

Vessels that can pass under the bridge without a bridge opening may do so at all times.

In accordance with 33 CFR 117.35(e), the bridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: May 9, 2008.

Gary Kassof,

Bridge Program Manager, First Coast Guard District.

[FR Doc. E8–11437 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

Requirements for Preparation, Adoption, and Submittal of Implementation Plans

CFR Correction

In title 40 of the Code of Federal Regulations, parts 50 to 51, revised as of July 1, 2007, on page 296, in § 51.357, remove paragraphs (b)(1)(i) and (b)(1)(ii).

[FR Doc. E8–11525 Filed 5–21–08; 8:45 am]

BILLING CODE 1505–01–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

Approval and Promulgation of Implementation Plans; Mississippi

CFR Correction

In title 40 of the Code of Regulations, part 52.1019 to End, revised as of July 1, 2007, on page 222, in section 52.1270, in the table in paragraph (c), under APC-S-2, the entry for Section VI, is corrected in the column titled ''EPA approval date'', is corrected to read ''7/10/2006, 71 FR 38775''.

[FR Doc. E8–11526 Filed 5–21–08; 8:45 am]

BILLING CODE 1505–01–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2002–0071; FRL–8568–7]

RIN 2060–AP13

Update of Continuous Instrumental Test Methods: Technical Amendments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to correct errors in a final rule published May 15, 2006, that updated five continuous instrumental test methods. As published, the rule contained inadvertent errors and provisions that needed to be clarified. We published a direct final rule with a parallel proposed rule on September 7, 2007 to correct the errors and to add clarifying language. However, we received an adverse comment on the direct final rule, and it was subsequently withdrawn on November 5, 2007. This action finalizes the parallel proposal. In this final rule, EPA corrects errors, clarifies certain provisions, and responds to the adverse comment received on the direct final rule published on September 7, 2007.

DATES: This final rule is effective on May 22, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2002–0071. All documents in the docket are listed on the *www.regulations.gov* Web site. 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 Update of Continuous Instrumental Test Methods Docket, Docket ID No. EPA–OAR–2002–0071, EPA Docket Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m. Monday through Friday excluding legal holidays. The Docket telephone number is (202) 566–1742. 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.

FOR FURTHER INFORMATION CONTACT: Mr. Foston Curtis, Air Quality Assessment Division, Office of Air Quality Planning and Standards (E143–02), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541–1063; fax number (919) 541–0516; e-mail address: *curtis.foston@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Does This Action Apply to Me?
II. Where Can I Obtain a Copy of This Action?
III. Background
IV. This Action
A. Method 3A—40 CFR Part 60, Appendix A–1
B. Method 6C—40 CFR Part 60, Appendix A–4
C. Method 7E—40 CFR Part 60, Appendix A–4
D. Method 20—40 CFR Part 60, Appendix A–7
V. Public Comments on the Proposed Rule
VI. Judicial Review
VII. 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 Risks and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act

I. Does This Action Apply to Me?

This rule applies to certain sources that are subject to New Source Performance Standards (40 CFR part 60), are required to conduct continuous emission monitoring pursuant to 40 CFR Part 75, or are subject to other regulations that require the use of Method 3A, of Appendix A–1, Methods 6C, 7E of Appendix A–4, and Method 20 of Appendix A–7 to 40 CFR Part 60.

Regulated Entities. Categories and entities potentially affected include the following:

Category	NAICS [a]	Examples of regulated entities
Industry	332410	Fossil Fuel Steam Generators.
Industry	332410	Industrial, Commercial, Institutional Steam Generating Units.
Industry	332410	Electric Generating Units.
Industry	333611	Stationary Gas Turbines.
Industry	324110	Petroleum Refineries.
Industry	562213	Municipal Waste Combustors.
Industry	322110	Kraft Pulp Mills.
Industry	325188	Sulfuric Acid Plants.

[a] North American Industry Classification System.

This table is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. This table lists examples of the types of entities EPA is now aware could potentially be affected by the final rule. Other types of entities not listed could also be affected. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

II. Where Can I Obtain a Copy of This Action?

In addition to being available in the docket, an electronic copy of this rule will also be available on the Worldwide Web (www) through the Technology Transfer Network (TTN). Following the Administrator's signature, a copy of the final rule will be placed on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg*. The TTN provides information and technology exchange in various areas of air pollution control.

III. Background

Methods 3A, 6C, 7E, 10, and 20 measure oxygen, carbon dioxide, sulfur dioxide, nitrogen oxides, and carbon monoxide emissions from stationary sources. They are prescribed for use in determining compliance with a number of Federal, State, and local regulations. The EPA published updates to simplify, harmonize, and update these test methods on May 15, 2006 (71 FR 28081). The rule promulgating these updates became effective August 14, 2006. As published, the rule contained inadvertent errors and provisions that needed clarification.

On September 7, 2007, EPA simultaneously published a proposed rule (72 FR 51392) and a direct final rule (72 FR 51365) to correct errors and clarify certain provisions in the May 15, 2006 rule. Because EPA received one adverse comment during the public comment period, EPA withdrew the direct final rule on November 5, 2007 (72 FR 62414). EPA is taking final action on the corrections and clarifications proposed for approval on September 7, 2007, and is responding to the adverse comment received in response to that proposal.

IV. This Action

In this final rule, EPA corrects errors and clarifies portions of the May 15, 2006 rule to reflect the intent of the rule and to make it more understandable.

Specifically, EPA is taking the following actions:

A. Method 3A—40 CFR Part 60, Appendix A–1

1. We are clearly stating that pre-cleaned or scrubbed air may be used for the high-level calibration gas provided no interfering gases are present.

2. An incorrect reference in Section 8.1 to Section 8.2 of Method 3 for sampling to determine gas molecular weight is corrected to reference Section 8.2.1 of Method 3.

B. Method 6C—40 CFR Part 60, Appendix A–4

In Section 6.2, a reference to Section 6.2.8.1 for dual-range analyzers is expanded to include Section 6.2.8.2 which also applies.

C. Method 7E—40 CFR Part 60, Appendix A–4

1. Under the descriptions for calibration gases in Section 3.3, the quality of zero gas allowed for instrument calibration is clarified. The current requirement is that all calibration gases be of EPA traceability protocol quality. However, the traceability protocol does not have a specification for zero gas. Therefore, we are adopting the specification for ''zero air material'' in 40 CFR 72.2 for zero gas in place of the traceability protocol.

2. In Section 3.4, we recommend the instrument calibration span be chosen such that emission concentrations are between 20 to 100 percent of the calibration span, ''to the extent practicable.'' We are adding a note, as an example, that meeting this 20 to 100 percent criterion may not be practicable when emissions are low relative to the emission limit and the purpose of the test is to show compliance with the emission limit.

3. Section 3.9 is clarified to note that drift is the difference between the pre- and post-run system bias checks instead of the difference between the measurement system readings for the pre- and post-run bias checks.

4. Section 3.12 is corrected to remove erroneous citations to 40 CFR 53.55 and 53.56 which have nothing to do with the manufacturer's stability test (MST).

5. In Section 6.2.2, we are specifically stating that the particulate media must be included in the system bias test only when using out-of-stack filters.

6. In Section 6.2.6, the description of the calibration gas manifold is clarified to note that blocking the sample flow is not necessary when in direct calibration

mode, as suggested in the current method, but the calibration gas may simply supply an excess of calibration gas through the system.

7. The method implies that all analyzers with calibration spans of 20 ppmv or less are required to perform the MST. In Section 6.2.8.2, we are clarifying the MST requirement to note that it is only required for those analyzers that are routinely calibrated with a calibration span of 20 ppmv or less.

8. The new converter efficiency check that was added in Section 16.2.2 requires the nitrogen dioxide (NO_2) test gas be of EPA traceability protocol quality. Subsequent discussions with the National Institute of Standards and Technology (NIST) concerning the quality of the NIST NO_2 standard revealed that this standard contains small but consistent amounts of nitric acid (HNO_3). Some converters may not be able to completely convert this HNO_3 to nitric oxide (NO) for analysis. There are also concerns about the cost and stability of certified NO_2 gas over time. We are, therefore, dropping the new requirement that the converter efficiency gas be of EPA traceability protocol quality and reverting to the previous requirement that the gas be of a manufacturer-certified concentration. In addition, for this converter check procedure, the gas is required to be in the 40 to 60 ppmv range while the two alternative procedures require gas in the mid- to high-calibration range. We are dropping the 40 to 60 ppmv requirement in favor of recommending the concentration be in the mid- to high-calibration range in order to keep the three procedures consistent. Subsequent references to the 40 to 60 ppmv requirement have been deleted from the method.

9. In Section 7.2, we are clearly stating that the appropriate test gases listed in Table 7E–3, or others not listed that can potentially interfere, as noted elsewhere, must be used for the test. We are also making it clear that the gases used should be manufacturer-certified but are not required to be prepared by the EPA traceability protocol.

10. In Section 8.1.2, we are explicitly stating that the required stratification test is to be performed at each test site except for small stacks that are less than 4 inches in diameter.

11. In Section 8.2.1, we are making it clear that testers must obtain a certificate from the gas manufacturer documenting the quality of the calibration gas.

12. In Section 8.2.4, we are clearly stating that the converter efficiency test may be performed either before or after a test or after a series of tests.

13. In Section 8.2.7, paragraph (1) is reworded to add clarity to the interference test, and paragraph (2) is corrected to note that the interference test is valid for the life of the instrument unless major components are replaced with different model parts.

14. In the sample traversing procedure in Section 8.4, we delete redundant language in paragraphs (1) and (2).

15. In paragraph (1) of Section 8.5, we clarify the handling of failed post-run bias checks by removing unnecessary wording.

16. In Section 10.0, we clearly state that analyzers which measure NO and NO_2 without using a converter must be calibrated with both NO and NO_2. The current wording is not clear to some users.

17. In Section 12.1, we are revising certain definitions to reflect the corrections being made to the calculations.

18. In Section 12.4, we correct the system calibration error equation by adding a term for the dilution factor.

19. In Section 12.6, we add a missing equation for calculating sample concentration when a non-zero gas is used as the low-level calibration gas.

20. In Section 12.9 we replace the erroneous equation added in the updates rule with the one traditionally used by the method.

21. In Section 12.11, we correct the equation for calculating the spike recovery.

22. In Section 13.5, we are adding the 2 percent limit for the alternative converter efficiency test.

23. In Section 16.2.2, we are deleting the procedures in paragraphs (2) and (3) because they are not needed for the test and are confusing.

24. In Section 16.3, the erroneous references to 40 CFR 53.55 and 53.56 are removed; only 53.53 is followed for the MST. A note is added to clarify that alternative procedures or documentation of instrument stability are acceptable.

25. In Table 7E–3, the title is edited to note that the table contains example interference gases and concentrations. We are removing a table footnote instructing dilution extractive systems to use the hot wet concentrations because it may not be applicable in all cases. In its place, a footnote is added to remind the tester to use the highest gas concentration expected at test sites for the interference test.

26. In Table 7E–5, we correct the typographical error listing the NO_X concentration at ''.80% of calibration span'' to read ''80% of calibration span.'' We have removed the note to evaluate each model by the MST at least quarterly or once per 50 production units because it is not necessary.

D. Method 20—40 CFR Part 60, Appendix A–7

1. In Section 8.4, we are adding a minimum sample run time of 21 minutes.

V. Public Comments on the Proposed Rule

Two public comment letters were received on the direct final rule that was published on September 7, 2007. Because the comments was considered adverse, the direct final rule was withdrawn on November 5, 2007 (72 FR 62414). One commenter identified an error in the definition of ''system bias.'' We inadvertently proposed to change the definition to note that system bias is calculated from the difference between the system calibration response and the manufacturer certified gas concentration and not from the difference between the system calibration response and the direct calibration responses. Therefore, we are not revising the definition of system bias as indicated in the September 7, 2007, notice.

Another commenter asked that we amend the suggested gas concentrations that were proposed for the Method 7E converter check to make it clear that gases in the 40 to 60 ppm range were not the only ones allowed but that other concentrations were acceptable if they were more appropriate for the source conditions. We agree and have made this change in the final rule.

Another error in the published equation for calculating system calibration error was pointed out. The dilution factor was not in the correct place in Equation 7E–3. This has been corrected.

VI. Judicial Review

Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of this final rule is available by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by July 21, 2008. Under section 307(d)(7)(B) of the CAA, only an objection to this final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by this action may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is, therefore, not subject to review under the Executive Order.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). These amendments do not add information collection requirements beyond those currently required under the applicable regulation. The amendments being made correct technical inaccuracies in the existing testing methodology.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business whose parent company has fewer than 100 or 1,000 employees, or fewer than 4 billion kilowatt-hr per year of electricity usage, depending on the size definition for the affected North American Industry Classification System code; (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 this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities because it does not impose any additional regulatory requirements.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 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 this final rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year, nor does this rule significantly or uniquely impact small governments, because it contains no requirements that apply to such governments or impose obligations upon them. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA. EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments because it contains no requirements that apply to such governments or impose obligations upon them. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132 entitled ''Federalism'' (64 FR 43255, August 10, 1999) requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The amendments in this rule will benefit State and local governments by clarifying and correcting provisions they currently implement. No added responsibilities or increase in implementation efforts or costs for State and local governments are being added in this action. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern

health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law No. 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 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 this final rule 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. This final rule does not relax the control measures on sources regulated by the rule and, therefore, will not cause emissions increases from these sources.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective May 22, 2008.

List of Subjects in 40 CFR Part 60

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

Dated: May 15, 2008.

Stephen L. Johnson,

Administrator.

■ For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

■ 1. The authority citation for part 60 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

Appendix A–2—[Amended] /

■ 2. Amend Method 3A as follows:

■ a. Add a sentence after the second sentence of Section 7.1.

■ b. Revise the second sentence in Section 8.1.

Method 3A—Determination of Oxygen and Carbon Dioxide Concentrations in Emissions From Stationary Sources (Instrumental Analyzer Procedure)

* * * * *

7.1 Calibration Gas. * * * Pre-cleaned or scrubbed air may be used for the O_2 high-calibration gas provided it does not contain other gases that interfere with the O_2 measurement.

* * * * *

8.1. Sampling Site and Sampling Points. * * * In that case, you may use single-point integrated sampling as described in Section 8.2.1 of Method 3.

* * * * *

Appendix A–4—[Amended]

■ 3. Amend Method 6C by revising the last sentence in Section 6.2 to read as follows:

Method 6C—Determination of Sulfur Dioxide Emissions From Stationary Sources (Instrumental Analyzer Procedure)

* * * * *

6.2 * * * The low-range and dual-range analyzer provisions in Sections 6.2.8.1 and 6.2.8.2 of Method 7E apply.

* * * * *

■ 4. Amend Method 7E as follows:

■ a. Revise Sections 3.3, 3.4, and 3.9.

■ b. Revise Section 3.12 by removing the third sentence and adding two new sentences.

■ c. Revise Section 6.2.2.

■ d. Revise the second sentence in Section 6.2.6.

■ e. Revise Section 6.2.8.2.

■ f. Add a sentence after the second sentence in Section 7.1.

■ g. Revise Section 7.1.4.

■ h. Revise Section 7.2.

■ i. Add three sentences to the beginning of Section 8.1.2.

■ j. Revise the second sentence in Section 8.2.1.

■ k. Revise the first sentence in Section 8.2.4.

■ l. Revise Section 8.2.4.1.

■ m. Revise the first and second sentences in paragraph (1) and the second sentence in paragraph (2) of Section 8.2.7.

■ n. Revise paragraphs (1) and (2) in Section 8.4.

■ o. Revise the introductory paragraph and paragraph (1) of Section 8.5.

■ p. In Section 9.0, revise the table entitled ''Summary Table of QA/QC'' by amending the entry for ''M'' ''System Performance'' ''NO_2–NO conversion efficiency'' ''≥ 90% of certified test gas concentration'' ''before each test.''

■ q. Revise the last sentence in paragraph (1) of Section 10.0.

■ r. Add definitions for ''$C_{native,}$'' ''C_{OA},'' and ''DF'' in alphabetical order to Section 12.1.

■ s. Remove the definition for ''NO_{final}'' in Section 12.1.

■ t. Revise the definitions of ''C_0'' and ''SB_f'' in Section 12.1.

■ u. Revise Section 12.4.

■ v. Revise Sections 12.6 and 12.9.

■ w. Revise Equation 7E–12 in Section 12.11.

■ x. Revise Section 13.5.
■ y. Revise the third sentence in paragraph (1) of Section 16.2.2.
■ z. Remove and reserve paragraph (2) and remove paragraph (3) of Section 16.2.2.
■ aa. Revise Section 16.3.
■ bb. Revise Table 7E–3.
■ cc. Revise Table 7E–5.

Method 7E—Determination of Nitrogen Oxides Emissions From Stationary Sources (Instrumental Analyzer Procedure)

* * * * *

3.3 Calibration Gas means the gas mixture containing NO_X at a known concentration and produced and certified in accordance with ''EPA Traceability Protocol for Assay and Certification of Gaseous Calibration Standards,'' September 1997, as amended August 25, 1999, EPA–600/R–97/121 or more recent updates. The tests for analyzer calibration error, drift, and system bias require the use of calibration gas prepared according to this protocol. If a zero gas is used for the low-level gas, it must meet the requirements under the definition for ''zero air material'' in 40 CFR 72.2 in place of being prepared by the traceability protocol.

* * * * *

3.4 Calibration Span means the upper limit of the analyzer's calibration that is set by the choice of high-level calibration gas. No valid run average concentration may exceed the calibration span. To the extent practicable, the measured emissions should be between 20 to 100 percent of the selected calibration span. This may not be practicable in some cases of low-concentration measurements or testing for compliance with an emission limit when emissions are substantially less than the limit. In such cases, calibration spans that are practicable to achieving the data quality objectives without being excessively high should be chosen.

* * * * *

3.9 Drift means the difference between the pre- and post-run system bias (or system calibration error) checks at a specific calibration gas concentration level (*i.e.* low-, mid- or high-).

3.12 * * * An MST subjects the analyzer to a range of line voltages and temperatures that reflect potential field conditions to demonstrate its stability following procedures similar to those provided in 40 CFR 53.23. Ambient-level analyzers are exempt from the MST requirements of Section 16.3. * * *

* * * * *

6.2.2 Particulate Filter. An in-stack or out-of-stack filter. The filter must be made of material that is non-reactive to the gas being sampled. The filter media for out-of-stack filters must be included in the system bias test. The particulate filter requirement may be waived in applications where no significant particulate matter is expected (*e.g.*, for emission testing of a combustion turbine firing natural gas).

* * * * *

6.2.6 Calibration Gas Manifold. * * * In system calibration mode, the system should be able to flood the sampling probe and vent excess gas. * * *

* * * * *

6.2.8.2 Low Concentration Analyzer. When an analyzer is routinely calibrated with a calibration span of 20 ppmv or less, the manufacturer's stability test (MST) is required. See Table 7E–5 for test parameters.

* * * * *

7.1 Calibration Gas. * * * If a zero gas is used for the low-level gas, it must meet the requirements under the definition for ''zero air material'' in 40 CFR 72.2.

* * *

7.1.4 Converter Efficiency Gas. What reagents do I need for the converter efficiency test? The converter efficiency gas is a manufacturer-certified gas with a concentration sufficient to show NO_2 conversion at the concentrations encountered in the source. A test gas concentration in the 40 to 60 ppm range is suggested, but other concentrations may be more appropriate to specific sources. For the test described in Section 8.2.4.1, NO_2 is required. For the alternative converter efficiency tests in Section 16.2, NO is required.

* * * * *

7.2 Interference Check. What reagents do I need for the interference check? Use the appropriate test gases listed in Table 7E–3 or others not listed that can potentially interfere (as indicated by the test facility type, instrument manufacturer, etc.) to conduct the interference check. These gases should be manufacturer certified but do not have to be prepared by the EPA traceability protocol.

* * * * *

8.1.2 Determination of Stratification. Perform a stratification test at each test site to determine the appropriate number of sample traverse points. If testing for multiple pollutants or diluents at the same site, a stratification test using only one pollutant or diluent satisfies this requirement. A stratification test is not required for small stacks that are less than 4 inches in diameter * * *

* * * * *

8.2.1 Calibration Gas Verification. * * * Obtain a certificate from the gas manufacturer documenting the quality of the gas. * * *

* * * * *

8.2.4 NO_2 to NO Conversion Efficiency. Before or after each field test, you must conduct an NO_2 to NO conversion efficiency test if your system converts NO_2 to NO before analyzing for NO_X. You may risk testing multiple facilities before performing this test provided you pass this test at the conclusion of the final facility test. A failed final conversion efficiency test in this case will invalidate all tests performed subsequent to the test in which the converter efficiency test was passed. * * *

8.2.4.1. Introduce NO_2 converter efficiency gas to the analyzer in direct calibration mode and record the NO_X concentration displayed by the analyzer. Calculate the converter efficiency using Equation 7E–7 in Section 12.7. The specification for converter efficiency in Section 13.5 must be met. The user is cautioned that state-of-the-art NO_2 calibration gases may have limited shelf lives, and this could affect the ability to pass the 90-percent conversion efficiency requirement.

8.2.7 Interference Check. * * *

(1) You may introduce the appropriate interference test gases (that are potentially encountered during a test, see examples in Table 7E–3) into the analyzer separately or as mixtures. Test the analyzer with the interference gas alone at the highest concentration expected at a test source and again with the interference gas and NO_X at a representative NO_X test concentration. * * *

(2) * * * This interference test is valid for the life of the instrument unless major analytical components (*e.g.*, the detector) are replaced with different model parts. If major components are replaced with different model parts, the interference gas check must be repeated before returning the analyzer to service.

* * * * *

8.4 Sample Collection.

(1) Position the probe at the first sampling point. Purge the system for at least two times the response time before recording any data. Then, traverse all required sampling points, sampling at each point for an equal length of time and maintaining the appropriate sample flow rate or dilution ratio (as applicable). You must record at least

one valid data point per minute during the test run.

(2) Each time the probe is removed from the stack and replaced, you must recondition the sampling system for at least two times the system response time prior to your next recording. If the average of any run exceeds the calibration span value, that run is invalid.

* * * * *

8.5 Post-Run System Bias Check and Drift Assessment.

How do I confirm that each sample I collect is valid? After each run, repeat the system bias check or 2-point system calibration error check (for dilution systems) to validate the run. Do not make adjustments to the measurement system (other than to maintain the target sampling rate or dilution ratio) between the end of the run and the completion of the post-run system bias or system calibration error check. Note that for all post-run system bias or 2-point system calibration error checks, you may inject the low-level gas first and the upscale gas last, or vice-versa. You may risk sampling for multiple runs before performing the post-run bias or system calibration error check provided you pass this test at the conclusion of the group of runs. A failed final test in this case will invalidate all runs subsequent to the last passed test.

(1) If you do not pass the post-run system bias (or system calibration error) check, then the run is invalid. You must diagnose and fix the problem and pass another calibration error test (Section 8.2.3) and system bias (or 2-point system calibration error) check (Section 8.2.5) before repeating the run. Record the system bias (or system calibration error) results on a form similar to Table 7E–2.

* * * * *

9.0 Quality Control

SUMMARY TABLE OF QA/QC

Status	Process or element	QA/QC specification	Acceptance criteria	Checking frequency
*	*	*	*	*
M	System Performance	NO_2–NO conversion efficiency.	≥ 90% of certified test gas concentration	Before or after each test.
*	*	*	*	*

* * *

10.0 Calibration and Standardization

* * *

(1) * * * Analyzers that measure NO and NO_2 separately without using a converter must be calibrated with both NO and NO_2.

* * * * *

12.1 Nomenclature. * * *

C_{native} = NO_X concentration in the stack gas as calculated in Section 12.6, ppmv.

* * *

C_O = Average of the initial and final system calibration bias (or 2-point system calibration error) check responses from the low-level (or zero) calibration gas, ppmv.

C_{OA} = Actual concentration of the low-level calibration gas, ppmv.

* * *

DF = Dilution system dilution factor or spike gas dilution factor, dimensionless.

* * *

SB_{final} = Post-run system bias, percent of calibration span.

* * * * *

12.4 System Calibration Error. Use Equation 7E–3 to calculate the system calibration error for dilution systems. Equation 7E–3 applies to both the initial 3-point system calibration error test and the subsequent 2-point calibration error checks between test runs. In this equation, the term ''C_s'' refers to the diluted calibration gas concentration measured by the analyzer.

$$SCE = \frac{(C_S \quad DF) - C_V}{CS} \times 100 \qquad \text{Eq. 7E-3}$$

* * * * *

12.6 Effluent Gas Concentration. For each test run, calculate C_{avg}, the arithmetic average of all valid NO_X concentration values (*e.g.*, 1-minute averages). Then adjust the value of C_{avg} for bias using Equation 7E–5a if you use a non-zero gas as your low-level calibration gas, or Equation 7E–5b if you use a zero gas as your low-level calibration gas.

$$C_{Gas} = \left(C_{Avg} - C_M\right)\frac{C_{MA} - C_{OA}}{C_M - C_O} + C_{MA} \qquad \text{Eq. 7E-5a}$$

$$C_{Gas} = \left(C_{Avg} - C_O\right)\frac{C_{MA}}{C_M - C_O} \qquad \text{Eq. 7E-5b}$$

* * * * *

12.9 Alternative NO_2 Converter Efficiency. If the alternative procedure of Section 16.2.2 is used, determine the NO_X concentration decrease from NO_{XPeak} after the minimum 30-minute test interval using Equation 7E–9. This decrease from NO_{XPeak} must meet the

requirement in Section 13.5 for the converter to be acceptable.

$$\%\,Decrease = \frac{NO_{XPeak} - NO_{XFinal}}{NO_{XPeak}} \times 100 \qquad \text{Eq. 7E-9}$$

* * * * *

12.11 Calculated Spike Gas Concentration and Spike Recovery for the Example Alternative Dynamic Spiking Procedure in Section 16.1.3. * * *

$$R = \frac{DF\ \left(C_{SS} - C_{native}\right) + C_{native}}{C_{spike}} \quad 100 \qquad \text{Eq. 7E-12}$$

* * * * *

13.5 NO_2 to NO Conversion Efficiency Test (as applicable). The NO_2 to NO conversion efficiency, calculated according to Equation 7E–7, must be greater than or equal to 90 percent. The alternative conversion efficiency check, described in Section 16.2.2 and calculated according to Equation 7E–9, must not result in a decrease from NO_{XPeak} by more than 2.0 percent.

* * * * *

16.2.2 Tedlar Bag Procedure. * * * Fill the remainder of the bag with mid- to high-level NO in nitrogen (or other appropriate concentration) calibration gas.

* * * * *

16.3 Manufacturer's Stability Test. A manufacturer's stability test is required for all analyzers that routinely measure emissions below 20 ppmv and is optional but recommended for other analyzers. This test evaluates each analyzer model by subjecting it to the tests listed in Table 7E–5 following procedures similar to those in 40 CFR 53.23 for thermal stability and insensitivity to supply voltage variations. If the analyzer will be used under temperature conditions that are outside the test conditions in Table B–4 of Part 53.23, alternative test temperatures that better reflect the analyzer field environment should be used. Alternative procedures or documentation that establish the analyzer's stability over the appropriate line voltages and temperatures are acceptable.

* * * * *

TABLE 7E–3.—EXAMPLE INTERFERENCE CHECK GAS CONCENTRATIONS

Potential interferent gas[1]	Concentrations[2] sample conditioning type	
	Hot wet	Dried
CO_2	5 and 15%	5 and 15%
H_2O	25%	1%
NO	15 ppmv	15 ppmv
NO_2	15 ppmv	15 ppmv
N_2O	10 ppmv	10 ppmv
CO	50 ppmv	50 ppmv
NH_3	10 ppmv	10 ppmv
CH_4	50 ppmv	50 ppmv
SO_2	20 ppmv	20 ppmv
H_2	50 ppmv	50 ppmv
HCl	10 ppmv	10 ppmv

(1) Any applicable gas may be eliminated or tested at a reduced level if the manufacturer has provided reliable means for limiting or scrubbing that gas to a specified level.

(2) As practicable, gas concentrations should be the highest expected at test sites.

* * * * *

TABLE 7E–5.—MANUFACTURER STABILITY TEST

Test description	Acceptance criteria (note 1)
Thermal Stability	Temperature range when drift does not exceed 3.0% of analyzer range over a 12-hour run when measured with NO_X present @ 80% of calibration span.
Fault Conditions	Identify conditions which, when they occur, result in performance which is not in compliance with the Manufacturer's Stability Test criteria. These are to be indicated visually or electrically to alert the operator of the problem.
Insensitivity to Supply Voltage Variations	± 10.0% (or manufacturers alternative) variation from nominal voltage must produce a drift of ≤ 2.0% of calibration span for either zero or concentration ≥ 80% NO_X present.
Analyzer Calibration Error	For a low-, medium-, and high-calibration gas, the difference between the manufacturer certified value and the analyzer response in direct calibration mode, no more than 2.0% of calibration span.

Note 1: If the instrument is to be used as a Low Range analyzer, all tests must be performed at a calibration span of 20 ppm or less.

* * * * *

Appendix A–7—[Amended]

■ 5. Amend Method 20 by adding a sentence to the end of Section 8.4 to read as follows:

Method 20—Determination of Oxygen and Carbon Dioxide Concentrations in Emissions From Stationary Sources (Instrumental Analyzer Procedure)

* * * * *

8.4 Sample Collection. * * * A test run must have a duration of at least 21 minutes.

* * * * *

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BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 412

[CMS–1493–IFC2]

RIN 0938–AP33

Medicare Program; Changes for Long-Term Care Hospitals Required by Certain Provisions of the Medicare, Medicaid, SCHIP Extension Act of 2007: 3-Year Moratorium on the Establishment of New Long-Term Care Hospitals and Long-Term Care Hospital Satellite Facilities and Increases in Beds in Existing Long-Term Care Hospitals and Long-Term Care Hospital Satellite Facilities; and 3-Year Delay in the Application of Certain Payment Adjustments

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Interim final rule with comment period.

SUMMARY: This interim final rule with comment period implements certain provisions of section 114 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 relating to long-term care hospitals (LTCHs) and LTCH satellite facilities. It implements a 3-year moratorium on the establishment of new LTCHs and LTCH satellite facilities; and on increases in beds in existing LTCHs and LTCH satellite facilities. This interim final rule with comment period also implements a 3-year delay in the application of certain payment policies which apply payment adjustments for discharges from LTCHs and LTCH satellites that were admitted from certain referring hospitals in excess of various percentage thresholds.

DATES: *Effective date:* The provisions of this interim final rule with comment period are effective on December 29, 2007. In accordance with section 1871(e)(1)(A)(i) and (ii) of the Social Security Act (the Act), the Secretary has determined that retroactive application of the provisions of this interim final rule with comment period is necessary to comply with the statute and that failure to apply the changes retroactively would be contrary to public interest.

Comment date: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on July 21, 2008.

ADDRESSES: In commenting, please refer to file code CMS–1493–IFC2. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' and enter the filecode to find the document accepting comments.

2. *By regular mail.* You may mail written comments (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1493–IFC2, P.O. Box 8013, Baltimore, MD 21244–8013.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1493–IFC2, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) before the close of the comment period to either of the following addresses:

a. Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the HHH Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–7195 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

Submission of comments on paperwork requirements. You may submit comments on this document's paperwork requirements by following instructions at the end of the ''Collection of Information Requirements'' section in this document.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Tzvi Hefter, (410) 786–4487, General information Judy Richter, (410) 786–2590, Moratorium and 25 percent patient threshold adjustment.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on the Web site to view public comments.

Comments received timely will be also available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

I. Background

A. Legislative and Regulatory Authority

Section 123 of the Medicare, Medicaid, and SCHIP [State Children's Health Insurance Program] Balanced Budget Refinement Act of 1999 (BBRA) (Pub. L. 106–113), as amended by section 307(b) of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) (Pub. L. 106–554), provides for payment for both the operating and capital–related costs of hospital inpatient stays in long-term care hospitals (LTCHs) under Medicare Part A based on prospectively set rates. The Medicare prospective payment system (PPS) for LTCHs applies to hospitals described in section 1886(d)(1)(B)(iv) of the Social Security Act (the Act), effective for cost reporting periods beginning on or after October 1, 2002.

Section 1886(d)(1)(B)(iv)(I) of the Act defines a LTCH as ''a hospital which has an average inpatient length of stay (as determined by the Secretary) of greater than 25 days.'' Section 1886(d)(1)(B)(iv)(II) of the Act also provides an alternative definition of LTCHs: Specifically, a hospital that first

received payment under section 1886(d) of the Act in 1986 and has an average inpatient length of stay (LOS) (as determined by the Secretary of Health and Human Services (the Secretary)) of greater than 20 days and has 80 percent or more of its annual Medicare inpatient discharges with a principal diagnosis that reflects a finding of neoplastic disease in the 12-month cost reporting period ending in fiscal year (FY) 1997.

Section 307(b)(1) of the BIPA, among other things, mandates that the Secretary shall examine, and may provide for, adjustments to payments under the LTCH PPS, including adjustments to diagnosis related group (DRG) weights, area wage adjustments, geographic reclassification, outliers, updates, and a disproportionate share adjustment.

In the August 30, 2002 **Federal Register**, we issued a final rule that implemented the LTCH PPS authorized under BBRA and BIPA (67 FR 55954). This system uses information from LTCH patient records to classify patients into distinct long-term care diagnosis-related groups (LTC–DRGs) based on clinical characteristics and expected resource needs. Payments are calculated for each LTC–DRG and provisions are made for appropriate payment adjustments. Payment rates under the LTCH PPS are updated annually and published in the **Federal Register**.

In the August 30, 2002 final rule, we also presented an in-depth discussion of the LTCH PPS, including the patient classification system, relative weights, payment rates, additional payments (short-stay outliers), and the budget neutrality requirements mandated by section 123 of the BBRA. The same final rule that established regulations for the LTCH PPS under 42 CFR part 412, subpart O, also contained LTCH provisions related to covered inpatient services, limitation on charges to beneficiaries, medical review requirements, furnishing of inpatient hospital services directly or under arrangement, and reporting and recordkeeping requirements. We refer readers to the August 30, 2002 final rule for a comprehensive discussion of the research and data that supported the establishment of the LTCH PPS (67 FR 55954).

The most recent annual update to the LTCH PPS was presented in the RY 2009 LTCH PPS final rule (73 FR 26788). In that final rule, among other things, we established a 2.7 percent update to the Federal rate for RY 2009, and presented other payment rate and policy changes, including revising the rate year to a year beginning October 1 and ending on September 30. (The 2009 rate year will begin on July 1, 2008 and end on September 30, 2009).

On December 29, 2007 the Medicare, Medicaid, and SCHIP Extension Act (MMSEA) (Pub. L. 110–173) was enacted. Specifically, section 114 of MMSEA, entitled ''Long-term care hospitals,'' made a number of changes affecting payments to LTCHs for inpatient services. Two of the provisions of section 114 of MMSEA are discussed in this interim final rule with comment period.

B. Criteria for Classification as a LTCH

Under the existing regulations at § 412.23(e)(1) and (e)(2)(i), which implement section 1886(d)(1)(B)(iv)(I) of the Act, to qualify to be paid as a LTCH, a hospital must have a provider agreement with Medicare and must have an average Medicare inpatient LOS of greater than 25 days. Alternatively, to be classified as a LTCH, a hospital must have a provider agreement with Medicare and meet the average LOS requirement in § 412.23(e)(2)(ii). Section 412.23(e)(2)(ii) states that for cost reporting periods beginning on or after August 5, 1997, a hospital that was first excluded from the PPS in 1986 meets the LOS criteria if it has an average inpatient LOS for all patients, including both Medicare and non-Medicare inpatients, of greater than 20 days, and can also demonstrate that at least 80 percent of its annual Medicare inpatient discharges in the 12-month cost reporting period ending in FY 1997 have a principal diagnosis that reflects a finding of neoplastic disease.

Section 412.23(e)(3) currently provides that, subject to the provisions of paragraphs (e)(3)(ii) through (e)(3)(iv) of this section, the average Medicare inpatient LOS, specified under § 412.23(e)(2)(i) is calculated by dividing the total number of covered and noncovered days of stay for Medicare inpatients (less leave or pass days; that is, days where the inpatient is not occupying a bed but has not been discharged) by the number of total Medicare discharges for the hospital's most recent complete cost reporting period. The fiscal intermediaries (FIs) or Medicare Administrative Contractors (MACs) verify that LTCHs meet the average LOS requirements. (For a more detailed explanation, see the June 6, 2003 final rule (68 FR 34123).)

II. Provisions of this Interim Final Rule with Comment Period

Section 114 of MMSEA made a number of changes affecting payments to long-term care hospitals (LTCHs) for inpatient services. This interim final rule with comment period implements the following provisions affecting LTCH PPS payments:

- Modification of payment adjustments to LTCHs and LTCH satellite discharges that were admitted from specific referring hospitals and that exceed various percentage thresholds. Sections 114(c)(1) and (2) of MMSEA mandates specific changes for 3 years, beginning with cost reporting periods beginning on or after December 29, 2007, with respect to existing § 412.534, which governs the ''25 percent threshold'' payment adjustment to LTCH hospitals-within-hospitals (HwHs) and LTCH satellite facilities for discharges that were admitted from their co-located hosts (established in the FY 2005 IPPS final rule and amended in the RY 2008 LTCH PPS final rule), and existing § 412.536, which applies a payment adjustment policy (that was in transition to 25 percent prior to the enactment of this law) to LTCH and LTCH satellite facility discharges that were admitted from any individual hospital not co-located with the LTCH or LTCH satellite facility (established in the RY 2008 LTCH PPS final rule), as discussed in section II.B. of this interim final rule with comment period.
- *Moratorium on new LTCHs, LTCH satellite facilities, and increase in beds in existing LTCHs and LTCH satellite facilities.* Section 114(d) of MMSEA established a 3-year moratorium beginning on December 29, 2007 on the establishment and classification of new LTCHs, LTCH satellite facilities, and on any increase in beds in existing LTCHs and LTCH satellite facilities, with certain exceptions.

Section 114 of MMSEA made other changes affecting LTCH PPS payments. The following is a listing of the other rulemaking documents published and respective provisions of section 114 of MMSEA that were implemented:

- In the May 1, 2008 interim final rule with comment period (73 FR 24871)—

++ *Modification of payment adjustments to certain SSO cases.* Section 114(c)(3) of MMSEA specifies that the refinement of the SSO policy implemented in RY 2008 (see § 412.529(c)(3)(i)) shall not apply for a 3-year period beginning with discharges occurring on or after December 29, 2007. Specifically, the fourth SSO payment option in § 412.529(c)(3)(i) as revised in the RY 2008 LTCH PPS final rule shall not apply for a 3-year period.

++ *Revision to the RY 2008 rate provision.* Section 114(e)(1) of MMSEA provides that the base rate for RY 2008 ''shall be the same as the base rate for discharges for the hospital occurring

during the rate year ending in 2007.'' Furthermore, in accordance with section 114(e)(2) of MMSEA, the revised rate will not be applicable to discharges occurring on or after July 1, 2007 and before April 1, 2008.

• In the January 29, 2008 proposed rule and May 9, 2008 final rule Section 114(c)(4) of MMSEA specifies that for a 3-year period beginning on December 29, 2007, the Secretary shall not make the one-time prospective adjustment to the LTCH PPS payment rates provided for in existing § 412.523(d)(3).

We also note that section 114 of MMSEA included additional provisions focusing on LTCHs but are not directly related to payment policy. The following is a list of those policies which are not included in this interim final rule with comment period:

• Section 1861 of the Act is amended by adding a new paragraph (ccc) defining LTCHs.

• The Secretary is directed to conduct a study and submit a report to the Congress within 18 months after the date of enactment of MMSEA. The Secretary will conduct a study on the establishment of national LTCH facility and patient criteria.

• The Secretary is directed to provide an expanded review of medical necessity for LTCH admission and continued stay.

A. Payment Adjustment to LTCHs and LTCH Satellite Facilities

The enactment of section 114(c) of MMSEA requires several modifications to payment provisions applicable to various types of LTCHs under the regulations at § 412.534 and § 412.536. (Throughout this section, ''LTCH'' or ''LTCH satellite facility'' refers exclusively to ''subclause (I)'' LTCHs and LTCH satellite facilities, that is, LTCHs defined by section 1886(d)(1)(B)(iv)(I) of the Act. This is the case because the policies established at § 412.534 and § 412.536 do not apply to a ''subclause (II)'' LTCH defined under section 1886(d)(1)(B)(iv)(II) (69 FR 49205 and 72 FR 26924). Currently, § 412.534 provides for a payment adjustment for a co-located LTCH (HwH or satellite), based upon the percentage of the HwH's or satellite's Medicare discharges that had been admitted from a hospital with which it is co-located (typically, an acute care hospital).

As specified in the RY 2008 LTCH PPS final rule (72 FR 26870), § 412.534 also applies to a ''grandfathered'' LTCH HwH or LTCH satellite facility, that is not required to meet the ''separateness and control'' policies at § 412.22(e) or (h)(2)(iii), respectively, regarding its relationship to the hospital with which it is co-located (see 72 FR 26926 through 26928). In the RY 2008 LTCH PPS final rule, we also established, at § 412.536, an adjustment based on the percentage of Medicare discharges that had been admitted to a LTCH or LTCH satellite facility, from an individual referring hospital with which the LTCH or LTCH satellite facility is not co-located. When we extended the policy in § 412.534 to grandfathered LTCH HwHs and LTCH satellite facilities in the RY 2008 LTCH PPS final rule, we provided for a parallel 3-year transition to the full percentage threshold for cost reporting periods beginning on or after July 1, 2007 at § 412.534(h) for ''grandfathered'' LTCHs and LTCH satellite facilities discharging patients admitted from their host hospitals and at § 412.536(f) for discharges that were admitted to a LTCH or LTCH satellite facility from any referring hospital with which they were not co-located (72 FR 26944).

In this interim final rule with comment period, we are revising our regulations at § 412.534 and § 412.536 to implement the requirements of sections 114(c)(1) and 114(c)(2) of MMSEA. Specifically, for cost reporting periods beginning on or after December 29, 2007 and before December 29, 2010, section 114(c)(1) of MMSEA generally exempts ''freestanding'' LTCHs (that is, as newly defined in § 412.23(e)(5), a LTCH that meets the requirements at § 412.23(e)(1) and (2), and does not occupy space in a building also used by another hospital or does not occupy space in one or more separate or entire buildings located on the same campus as buildings used by another hospital, and is not part of a hospital that provides inpatient services in a building also used by another hospital and ''grandfathered'' LTCH HwHs (that is, ''a long-term care hospital identified by the amendment made by section 4417(a) of the Balanced Budget Act of 1997 (Pub. L. 105–33)'') from the applicable percentage threshold policy established at § 412.536. The statutory provision also exempts grandfathered HwHs from the applicable percentage threshold at § 412.534(h). Accordingly, for cost reporting periods beginning on or after December 29, 2007, for a 3-year period, the adjustments at § 412.536 will not apply to ''freestanding'' LTCHs and the adjustments at § 412.534 and § 412.536 will not apply to ''grandfathered'' LTCH HwHs. Furthermore, the legislation prohibits the application of ''any similar provisions'' to either ''freestanding'' LTCHs or to ''grandfathered'' LTCH HwHs for that same 3-year period. Section 114(c)(2) of MMSEA also revises the current percentage thresholds at § 412.534 for applicable LTCHs HwHs and LTCH satellite facilities. We are providing two tables to illustrate the statutory and regulatory changes for LTCHs and LTCHs satellite facilities associated with the implementation of section 114(c)(1) and (2) of MMSEA. Table 1 indicates the applicability of the specific provisions of section 114(c)(1) and (2) of MMSEA by type of LTCH or LTCH satellite facility. Table 2, indicates the applicability of § 412.534 and § 412.536 by type of LTCH or LTCH satellite facility.

TABLE 1.—APPLICABILITY OF SECTION 114(C)(1) AND (2) OF MMSEA BY LTCH TYPE

LTCH type	Applicability of			
	Section 114(c)(1)(A) of MMSEA	Section 114(c)(1)(B) of MMSEA	Section 114(c)(2)(A) of MMSEA	Section 114(c)(2)(B) of MMSEA
Freestanding LTCHs	Yes	N/A	N/A	N/A.
Grandfathered HwHs (under section 4417(a) of the BBA § 412.22(f)) [1]	N/A	Yes	N/A	N/A.
Nongrandfathered HwHs Subject to Transition at § 412.534(g) [2]	N/A	N/A	Yes	Yes.
Nongrandfathered HwHs *not* Subject to Transition at § 412.534(g) [3]	N/A	N/A	N/A	N/A.
Grandfathered LTCH Satellites (§ 412.22(h)(3)(i)) [4]	N/A	N/A	N/A	N/A.
Nongrandfathered LTCH Satellites Subject to Transition at § 412.534(g) [5]	N/A	N/A	Yes	Yes.
Nongrandfathered LTCH Satellites *not* Subject to Transition at § 412.534(g) [6].	N/A	N/A	N/A	N/A.

[1] These are LTCH HwHs that were not required to meet the ''separateness and control'' policies at § 412.22(e) and were so classified by the Secretary on or before September 30, 1995.

[2] These are LTCH HwHs subject to the separateness and control policies at § 412.22(e) that were paid under the LTCH PPS as of October 1, 2004 or an LTCH HwH paid under the LTCH PPS as of October 1, 2005 whose qualifying period began on or before October 1, 2004.

[3] These are LTCH HwHs subject to the separateness and control policies at § 412.22(e) *not* paid under the LTCH PPS as of October 1, 2004, or October 1, 2005 with a qualifying period that began on or before October 1, 2004.

[4] These are LTCH satellites not subject to the separateness and control policies at§ 412.22(h)(2)(iii) and that were structured as satellite facilities on September 30, 1999 and excluded from the IPPS on that date.

[5] These are LTCH satellites subject to the separateness and control policies at § 412.22(h)(2)(iii) that were paid under the LTCH PPS as of October 1, 2004.

[6] These are LTCH satellites subject to the separateness and control policies at § 412.22(h)(2)(iii) that were *not* paid under the LTCH PPS as of October 1, 2004.

TABLE 2.—REVISIONS TO § 412.534 AND § 412.536 OF THE REGULATIONS IN ACCORDANCE WITH SECTION 114(C)(1) AND (2) OF MMSEA BY LTCH TYPE

LTCH type*	Applicability of	
	§ 412.534	§ 412.536
Freestanding (as described § 412.23(e)(5) of the regulations).	N/A	3-year delay for cost reporting periods beginning on or after 12/29/2007 and before 12/29/2010. (Section 114(c)(1)(A) of MMSEA).
Nongrandfathered HwH (as described § 412.23(e)(2)(i) that meet the criteria in § 412.22(e)).	(1) If subject to the transition at § 412.534(g) (including those located in rural areas or co-located with an MSA-dominant hospital or urban-single hospital), applicable but with *revised* thresholds. (2) If not subject to the transition at § 412.534(g) (including those located in rural areas or co-located with an MSA-dominant hospital or urban-single hospital), § 412.534 is applicable with *no change* in thresholds.	No change. Applicable subject to existing transition at § 412.536(f).
Grandfathered HwH (as described in section 4417(a) of the BBA and described in § 412.23(e)(2)(i) and meets the criteria of § 412.22(f) of the regulations).	3-year delay for cost reporting periods beginning on or after 12/29/2007 and before 12/29/2010 (as specified in section 114(c)(1)(B) of MMSEA.	3-year delay for cost reporting periods beginning on or after 12/29/2007 and before 12/29/2010 (as specified in section 114(c)(1)(B) of MMSEA).
Nongrandfathered LTCH Satellite Facility (as described in § 412.23(e)(2)(i) and meets the criteria of § 412.22(h) of the regulations).	(1) If subject to the transition in § 412.534(g) (including those located in rural areas or co-located with an MSA-dominant hospital or urban-single hospital), is applicable but with *revised* thresholds. (2) If not subject to the transition in § 412.534(g) (including those located in rural areas or co-located with an MSA-dominant hospital or urban-single hospital), is applicable with *no change* in thresholds.	No change—Applicable Subject to existing transition at § 412.536(f).
Grandfathered LTCH Satellite Facility (as described in § 412.23(e)(2)(i) that meets the criteria § 412.22(h)(3)(i)).	Applicable—subject to transition at § 412.534(h).	No change. Applicable subject to existing transition at § 412.536(f).

* Neither § 412.534 or § 412.536 apply to a section 1886(d)(1)(B)(iv)(II) of the Act ''subclause (II)'' LTCH or LTCH satellite facility.

For purposes of the requirements of section 114(c) of MMSEA, the distinction between a freestanding LTCH and a LTCH that is co-located as either an HwH or a LTCH satellite facility is significant. A ''freestanding'' LTCH is a LTCH which is not co-located with another hospital-level provider as either a HwH, defined at § 412.22(e), or as a satellite of a hospital as defined at § 412.22(h)(1). A HwH is defined at § 412.22(e) as ''* * * a hospital that occupies space in a building also used by another hospital, or in one or more separate buildings located on the same campus as buildings used by another hospital * * *'' At § 412.22(f) we describe ''grandfathered'' HwHs which meet the definition at § 412.22(e) but are exempt from the ''separateness and control'' policies at § 412.22(e)(1). The term ''satellite facilities'' defined at § 412.22(h) which addresses satellites of hospitals; is ''* * * a part of a hospital that provides inpatient services in a building also used by another hospital, or in one or more entire buildings located on the same campus as buildings used by another hospital * * *'' For purposes of the HwH regulations at § 412.22(e) and the satellite regulations at § 412.22(h), we utilize the definition of ''campus'' in the provider-based regulations at § 413.65(a)(2). Section 413.65 defines a campus as ''the physical area immediately adjacent to the provider's main buildings, other areas and structures that are not strictly contiguous to the main buildings but are located within 250 yards of the main buildings, and any other areas determined on an individual basis, by the CMS regional office, to be part of the provider's campus.''

Section 114(c) of MMSEA employs the term ''freestanding'' in identifying one group of LTCHs which the provision exempted from the 25 percent patient threshold adjustment for 3 years. The statute did not define the term freestanding LTCHs in section 114(c)(1)(A) of MMSEA which pertains to the adjustment policy in § 412.536 or any similar provision. In order to minimize confusion and ensure the MMSEA is implemented consistently, we are adding a definition for freestanding LTCH to our regulations at § 412.23(e)(5). The definition is consistent with our application of the concept under § 412.534 and § 412.536. For purposes of section 114(c) of

MMSEA, therefore, we are establishing a regulatory definition of a ''freestanding LTCH'' at § 412.23(e)(5), as a hospital that meets the requirements of § 412.23(e)(1) and (2) that does not occupy space in a building also used by another hospital, or in one or more separate or entire buildings located on the same campus as buildings used by another hospital or is not part of a hospital that provides inpatient services in a building also used by another hospital.

As noted above, section 114(c)(1)(B) of MMSEA specifies a 3-year delay, effective with cost reporting periods beginning on or after the date of enactment of MMSEA (that is, December 29, 2007), in the application of ''such section, or § 412.534 of title 42, Code of Federal Regulations, or any similar provisions to a long-term care hospital identified by the amendment made by section 4417(a) of the Balance Budget Act (BBA) of 1997 (Pub. L. 105–33).'' We believe that the phrase ''such section'' refers to § 412.536 because this provision is the main topic of the preceding subparagraph (A). We further believe that the inclusion of the phrase ''or any similar provisions'' after specifying § 412.534, in section 114(c)(1)(B) of MMSEA exempts ''grandfathered'' LTCHs from any regulatory scheme which would apply a percentage patient payment adjustment similar to that in § 412.534 or § 412.536 for a 3-year period. As noted above, the type of LTCH identified by section 4417(a) of the BBA is limited to a ''grandfathered'' LTCH HwH. Section 4417(a) of the BBA (which amended section 1886(d)(1)(B) of the Act) specifies that ''[a] hospital that was classified by the Secretary on or before September 30, 1995, as a hospital described in clause (iv) shall continue to be so classified notwithstanding that it is located in the same building as, or on the same campus as, another hospital.'' (Section 1886(d)(1)(B)(iv) of the Act sets forth the definition of LTCHs.) Section 4417(a) of BBA effectively exempted this particular group of LTCH HwHs from the ''separateness and control'' policies at § 412.22(e)(2) which govern the relationship between a HwH and the hospital with which it is co-located. These ''grandfathered'' LTCHs are allowed to maintain their IPPS-exclusions so long as they continue to comply with applicable Medicare requirements. As noted above, section 114(c)(1)(B) of MMSEA provides that the Secretary shall not apply the percentage thresholds established at § 412.536 and § 412.534 (or any similar provisions) for a 3-year period, for cost reporting periods beginning on or after the date of enactment, December 29, 2007, to ''grandfathered'' LTCH HwHs. Section 114(c)(1)(A) of MMSEA also specifies that the Secretary shall not apply the provisions at § 412.536 (or any similar provision) to ''freestanding'' LTCHs for the 3-year period for cost-reporting periods beginning on or after December 29, 2007. However, it is important to note that both ''grandfathered'' LTCH HwHs and ''freestanding'' LTCHs for cost reporting periods beginning *before* December 29, 2007, *remain* subject to the applicable payment adjustments specified in § 412.534(h) and § 412.536, for that particular cost reporting period. Section 412.534(h), with respect to ''grandfathered'' LTCHs, and § 412.536 with respect to all LTCHs were implemented for cost-reporting period beginning on or after July 1, 2007. The policy modifications mandated by section 114(c) of MMSEA are effective'' * * * for cost reporting periods beginning on or after the date of enactment of this Act for a 3-year period.'' Therefore, a ''grandfathered'' or a ''freestanding'' LTCH with a cost reporting period that begins on or after July 1, 2007 but before December 29, 2007, would be subject to the provisions of § 412.534 and § 412.536, as appropriate, until the start of its next cost reporting period. For example, for a LTCH with a cost reporting period beginning on July 1, 2007, the changes required by section 114(c) of MMSEA would only apply beginning on or after July 1, 2008. The 3 years of relief available to such a facility would continue until the end of its cost reporting period that began before December 29, 2010 (that is, the LTCH's last cost reporting period affected by this provision would begin July 1, 2010 and end June 30, 2011). In another example, for a LTCH that had a September 1 through August 31 cost reporting period, the first cost reporting period for which it would be granted the relief specified in section 114(c) of MMSEA, would be its cost reporting period beginning on September 1, 2008 and the last cost reporting period would be the period beginning on September 1, 2010 and ending on August 31, 2011.

Although section 114(c)(1) of MMSEA exempts ''grandfathered'' LTCH HwHs from the ''25 percent patient threshold payment adjustment'' at § 412.534 and § 412.536, a ''grandfathered'' satellite of a LTCH, under § 412.22(h)(3) continues to be subject to the applicable percentage thresholds outlined in § 412.536 for patients admitted from any individual hospital with which it is not co-located because there are no exceptions under the MMSEA for such entities for purposes of § 412.536. Also, grandfathered LTCH satellites continue to be subject to the applicable existing percentage thresholds in § 412.534(h) for patients admitted from their co-located hospital because there are no exceptions for these entities under the MMSEA for purposes of § 412.534. The existing transitions to the full payment adjustments for ''grandfathered'' LTCH satellites at § 412.534(h)(2) also continue to apply. The revision to the percentages made by section 114(c)(2) of MMSEA were limited to a hospital a LTCH satellite subject to the transition rules at § 412.534(g). Grandfathered LTCH satellites are subject to the transition at § 412.534(h), not to those at § 412.534(g). Specifically, in the case of a satellite of a LTCH that is described under paragraph (h)(1), the thresholds applied at (c), (d), and (e) will not be less than the percentage specific below:

- For cost reporting periods beginning on or after July 1, 2007 and before July 1, 2008 a threshold of the lesser of 75 percent of the total number of Medicare discharges that were admitted to the LTCH satellite facility from its co-located hospital during the cost reporting period or the percentage of Medicare discharges that had been admitted to the LTCH satellite facility from that co-located hospital during the satellite's RY 2005 cost reporting period.
- For cost reporting periods beginning on or after July 1, 2008 and before July 1, 2009, we use the formula in the paragraph above except that we substitute 50 percent for 75 percent; and
- For cost reporting periods beginning on or after July 1, 2009, the 25 percent adjustment is applied.

Similarly, the transition to the full 25 percent threshold or applicable threshold provided at § 412.536(f) continues to be applicable for discharges that were admitted to a nongrandfathered HwH or a nongrandfathered LTCH satellite facility or grandfathered satellite facility from any hospital with which the HwH or LTCH satellite facility is not co-located, because section 114(c)(1) of MMSEA provides no exceptions for such entities. This transition at § 412.536 parallels the transition at § 412.534(h)(2).

With respect to LTCH HwHs and LTCH satellite facilities that are not grandfathered, the applicable percentage thresholds established at § 412.536, continue to apply because the MMSEA provides no exceptions for such entities. In addition, nongrandfathered HwHs and both grandfathered and nongrandfatered LTCH satellite facilities continue to be subject to § 412.534.

However, to the extent a nongrandfathered LTCH HwH or LTCH satellite facility meets the definition of an ''applicable long-term care hospital or satellite facility,'' the *revised* percentage thresholds in section 114(c)(2)(A) and (B)(i) of MMSEA apply for cost reporting periods beginning on or after December 29, 2007 and before December 29, 2010.

Specifically, section 114(c)(2)(B)(i) of MMSEA of 2007 modifies the percentage thresholds specified in existing § 412.534(c) from 25 percent to 50 percent for ''an applicable'' LTCH HwH or LTCH satellite facility described below, for 3 years, for cost reporting periods beginning on or after December 29, 2007. Therefore, payment to an applicable LTCH or LTCH satellite facility which is co-located with another hospital shall not be subject to any payment adjustment under § 412.534 if no more than 50 percent of the hospital's Medicare discharges during the hospital's fiscal year (other than discharges described in § 412.534(c)(3)) are admitted from the co-located hospital. (We note that § 412.534(c)(3) expressly excludes patients who had achieved high cost outlier status at the discharging co-located hospital.) Section 114(c)(2)(B)(ii) of MMSEA defines ''an applicable long-term care hospital or satellite facility'' as ''* * * a hospital or satellite facility that is subject to the transition rules under § 412.534(g) * * *'' The transition rules in § 412.534(g) apply to LTCH HwH and satellites that had been paid under the LTCH PPS as of October 1, 2004 or a LTCH HwH that is paid under the LTCH PPS on October 1, 2005 whose qualifying period under § 412.23(e) began on or before October 1, 2004 (see 69 FR 49206). Accordingly, an applicable LTCH HwH and LTCH satellite facility for purposes of section 114(c)(2)(ii) of the MMSEA is ''* * * a long-term care hospital or a satellite facility that is paid under the provisions of subpart O on October 1, 2004 or of a hospital that is paid under the provisions of subpart O and whose qualifying period under § 412.23(e) began on or before October 1, 2004 * * *'' (§ 412.534(g)). (For a more detailed explanation, see the FY 2005 IPPS final rule.)

Therefore, if a nongrandfathered LTCH or LTCH satellite facility does not meet the definition of an ''applicable long-term care hospital or satellite facility'', the thresholds established under existing § 412.534 are not modified by section 114(c)(2) of MMSEA.

The revised thresholds under section 114(c)(2)(A) of MMSEA for ''applicable'' LTCH HwHs and LTCH satellite facilities are as follows: The provision raises the existing 50 percent ceiling on percentage thresholds for ''applicable'' LTCH HwHs or LTCH satellite facilities that are located either in rural areas or that are co-located with an urban single or metropolitan statistical area (MSA-dominant) hospital (under § 412.534 (d)(1), (e)(1), and (e)(4) of the regulations) to 75 percent. (We note that § 412.534(d)(2) and (e)(3), which expressly excludes patients who had achieved high cost outlier status at the discharging co-located hospital prior to admission to the LTCH or LTCH satellite from being counted towards the threshold has not been modified.) In other words, payment to an applicable LTCH or satellite facility which is located in a rural area or which is co-located with an urban single or MSA dominant hospital under § 412.534(d)(1), (e)(1), and (e)(4) is not subject to any payment adjustment under such section if no more than 75 percent of the hospital's Medicare discharges (other than discharges described in § 412.534(d)(2) or (e)(3)) are admitted from a co-located hospital. Section 114(c)(2) of MMSEA also raises the existing 25 percent patient threshold payment adjustment to ''applicable'' LTCH HwHs and LTCH satellites, defined previously, from 25 percent to 50 percent. Furthermore, we would also emphasize that since this modification only applies to ''applicable'' LTCHs and LTCH satellites, as defined in paragraph section 114(c)(2)(B)(ii) of MMSEA, those LTCH HwHs and LTCH satellites that were not subject to the transition policy set forth at § 412.534(g), will continue to have the existing patient percentage threshold applied.

In accordance with the transition policy specified at § 412.534(g), for cost reporting periods beginning on or after October 1, 2007, the percentage threshold even for ''applicable'' LTCH HwHs and LTCH satellite facilities decreased from 50 percent to 25 percent for LTCH HwHs and LTCH satellite facilities and the thresholds for rural, MSA-dominant, and urban single LTCHs and LTCH satellite facilities were held at 50 percent (see § 412.534(d) and (e)). Since the percentage threshold modifications established under section 114(c)(2) of MMSEA are implemented for cost reporting periods beginning on or after December 29, 2007, if an ''applicable'' LTCH HwH and LTCH satellite had a cost reporting period beginning before that date (specifically, a cost reporting period beginning on or after October 1, 2007 and before December 29, 2007), the facility would be subject to the 25 percent threshold that was in effect at the start of that cost reporting period or a 50 percent threshold if the facility was located in a rural area or is co-located with an MSA-dominant or urban single hospital. However, for 3 years, beginning with the ''applicable'' HwH's or LTCH satellite's first cost reporting period beginning on or after December 29, 2007 the percentage thresholds increase to 50 percent and for an ''applicable'' LTCH HwHs and satellites located in a rural area, or co-located with an MSA-dominant, or urban single hospital for that 3-year period, the 50 percent threshold increases to 75 percent.

In compliance with section 114(c) of MMSEA, we have revised § 412.534 and § 412.536 to implement the 3-year delay in the application of the percentage patient threshold payment adjustment to ''freestanding and grandfathered LTCHs'' and the 3-year revision in the percentage payment thresholds adjustments for ''applicable'' LTCHs and satellite facilities. We have also made technical corrections to § 412.534(b) in order to clarify the effective dates of the percentage patient threshold policy for discharges from a LTCH HwH or from a LTCH satellite that were admitted from the hospital with which it is co-located.

B. Moratorium on the Establishment of Long-Term Care Hospitals, Long-Term Care Hospital Satellite Facilities, and on the Increase in Number of Beds in Existing Long-Term Care Hospitals or Long-Term Care Hospital Satellite Facilities

1. Overview

Section 114(d) of MMSEA provides a 3-year moratorium with two distinct aspects, one for the establishment of new LTCHs and LTCH satellite facilities, and the other for the increase of hospital beds in existing LTCHs and LTCH satellite facilities. Specifically, section 114(d)(1)(A) of MMSEA provides that the Secretary shall impose a moratorium ''subject to paragraph (2), on the establishment and classification of a long-term care hospital or satellite facility, other than an existing long-term care hospital or facility.'' Section 114 (d)(1)(B) of MMSEA provides that, the Secretary shall impose a moratorium ''subject to paragraph (3), on an increase of long-term care hospital beds in existing long-term care hospitals or satellite facilities.''

Sections 114(d)(2) and (d)(3) of MMSEA provide for exceptions to the moratorium imposed by section 114(d)(1) of MMSEA. It is important to

note that the two categories of exceptions are mutually exclusive. The three exceptions specified in section 114(d)(2) of MMSEA, discussed below, are only applicable to the moratorium provision at section 114(d)(1)(A) of MMSEA, which applies exclusively to the establishment and classification of a LTCH or LTCH satellite facility. The three exceptions in section 114(d)(2) do not apply to the moratorium on an increase in beds at section 114(d)(1)(B) of MMSEA. Similarly, the exception at section 114(d)(3)(A) of MMSEA only applies to the moratorium on increases in beds at existing LTCHs or LTCH satellites facilities, and not to the moratorium on the establishment of LTCHs and LTCH satellite facilities.

2. Analysis of Exceptions to the Moratorium on the Establishment of New LTCHs and LTCH Satellite Facilities

In section 114(d)(1)(A) of MMSEA, the statute specifically provides for a 3-year moratorium effective on the date of enactment of the MMSEA on the establishment and classification of a long-term care hospital or satellite facility, other than an existing LTCH or facility. (The term ''existing,'' with respect to a hospital or satellite facility, is defined in the legislation at section 114(d)(4) of MMSEA as ''a hospital or satellite facility that received payment under the provisions of subpart O of part 412 of title 42, Code of Federal Regulations, as of the date of the enactment of this Act.'') The MMSEA was enacted on December 29, 2007. Therefore, the moratorium will be effective from December 29, 2007 through December 28, 2010. Section 114(d)(2) of MMSEA specifies that the moratorium on the establishment and classification of a LTCH or LTCH satellite facility does not apply to a LTCH that, as of December 29, 2007, met one of the following three exceptions:

- The LTCH began ''its qualifying period for payment as a long-term care hospital under section 412.23(e) of title 42, Code of Federal regulations, on or before the date of enactment of this Act'' (section 114(d)(2)(A)).
- The LTCH has a binding written agreement with an outside, unrelated party for the actual construction, renovation, lease, or demolition for a LTCH and has expended before December 29, 2007 at least 10 percent of the estimated cost of the project or, if less, $2,500,000 (section 114(d)(2)(B)).
- The LTCH has obtained an approved certificate of need in a State where one is required on or before December 29, 2007 (section 114(d)(2)(C)).

In implementing the provisions of section 114(d) of MMSEA, we found that, in light of the unique nature of LTCHs as a category of Medicare provider, some of the terminology in the provision is internally inconsistent. Therefore, we were required to interpret the provisions in the way we believe reasonably reconciles seemingly inconsistent provisions and that results in an application of the provisions that is logical and workable. We discuss our interpretations below.

Specifically, section 114(d)(1)(A) of MMSEA indicates that the moratorium on the establishment and classification of a LTCH or satellite facility, other than an existing LTCH or satellite facility, is ''subject to paragraph (2).'' In contrast paragraph (2) is titled, ''Exception for Certain Long-Term Care Hospitals'' and it begins with ''[t]he moratorium under paragraph (1)(A) shall not apply to a long-term care hospital that as of the date of the enactment of this Act.'' We note that the term ''satellite'' is omitted in paragraph (2) even though satellites are entities subject to the moratorium provision. Because section 114(d)(1)(A) of MMSEA appears to contemplate an exception to the moratorium for both qualifying LTCHs and qualifying satellite facilities, we believe that it is appropriate to apply paragraph (2) to new LTCH satellite facilities just as it applies to LTCHs. Our interpretation of the statute is premised on this presumption.

An additional problem with paragraph (2) of section 114(d) of MMSEA is that a strictly literal reading of the statutory language in that paragraph presents practical challenges for implementation in light of the established LTCH classification criteria in section 412.23(e).

Below, we examine the exceptions to the moratorium on the establishment and classification of a long-term care hospital or satellite facility in light of the classification criteria for LTCHs at § 412.23(e) and the presumption that the provision allows, where practicable in limited situations, a new LTCH satellite facility to qualify for an exception under section 114(d)(2) of MMSEA. The first exception in section 114(d)(2)(A) of MMSEA applies to ''a long-term care hospital that as of the date of the enactment of this Act* * * began its qualifying period for payment as a long-term care hospital under section 412.23(e) of title 42, Code of Federal Regulations, on or before the date of the enactment of this Act.'' We believe this exception regarding the qualifying period refers to the period established in our regulations at § 412.23(e)(3) during which the predecessor hospital is collecting LOS data to be used to demonstrate that the hospital meets the LOS requirements (explained in more detail below) to be classified as a LTCH. Specifically in order for a hospital to be designated as a LTCH, the LTCH classification criteria regulations at § 412.23(e) stipulate the following:

(e) *Long-term care hospitals.* A long-term care hospital must meet the requirements of paragraph (e)(1) and (e)(2) of this section and, when applicable, the additional requirement of § 412.22(e), to be excluded from the prospective payment system specified in § 412.1(a)(1) and to be paid under the prospective payment system specified in § 412.1(a)(4) and in Subpart O of this part.

(1) *Provider agreements.* The hospital must have a provider agreement under Part 489 of this chapter to participate as a hospital; and

(2) *Average length of stay.* (i) The hospital must have an average Medicare inpatient length of stay of greater than 25 days; * * *

As provided by § 412.23(e)(1), the qualifying period for a ''new'' or ''planned'' LTCH may not begin before the facility has obtained a provider agreement, under 42 CFR part 489, to participate in the Medicare program as a hospital. Typically, when a new hospital is established, after operating as a hospital, such a facility could present patient LOS data from a short (6 months) cost report using data from at least 5 months of the 6-month period immediately preceding the start of the cost reporting period for which the hospital is seeking LTCH designation.

In light of how we view the qualifying period under section 412.23(e), we note that it is not possible for a LTCH, as of the date of enactment of MMSEA, to begin its qualifying period as a LTCH. Technically, under the LTCH classification criteria regulations at 412.23(e), it is an existing hospital, not a LTCH, that has a qualifying period for LTCH status. Therefore, we believe that the exception specified at section 114(c)(2)(A) of MMSEA applies to an existing hospital that began its qualifying period on or before December 29, 2007 for LTCH status. To qualify for the exception to the moratorium, the LOS data used to demonstrate that the hospital has an average LOS greater than 25 days must be from its cost reporting period that began on or before December 29, 2007. In addition, we note that the exception at section 114(d)(2)(A) of MMSEA would not be applicable to satellite facilities since there is no ''qualifying period'' for the establishment of a satellite facility for payment as a LTCH under § 412.23(e).

Next, under section 114(d)(2)(B) of MMSEA, an exception to the

moratorium is made for a long-term care hospital that, as of the date of the enactment of the MMSEA (December 29, 2007), satisfies the two prongs of the exception: (1) it has a binding written agreement with an outside, unrelated party for the actual construction, renovation, lease, or demolition for a long-term care hospital; and (2) It has expended, before the date of enactment of this Act, at least 10 percent of the estimated cost of the project (or, if less, $2,500,000). As drafted, this provision is problematic in light of § 412.23(e). For example, where a hospital has not even been built, but there is a binding written agreement for the actual construction of a hospital that intends to be classified as a LTCH, technically it is not a LTCH that is party to the binding written agreement. In such a situation, no LTCH would yet exist. Prior to the existence of a LTCH, a hospital must first be established, certified, and complete the procedures specified in § 412.23(e) in order to qualify as a LTCH, at which point the hospital would be classified as a LTCH.

In light of the LTCH classification criteria in § 412.23(e), and our presumption that new LTCH satellite facilities are included in the exceptions in section 114(d)(2) of MMSEA, the exception in section 114(d)(2)(B) of MMSEA applies in the following three circumstances: (1) As of the date of enactment of the MMSEA, an existing hospital (that is, one that was certified as a hospital as of December 29, 2007) that will become an LTCH has a binding written agreement with an outside unrelated party for the actual construction, renovation, lease, or demolition for converting the hospital to a LTCH and has expended, before December 29, 2007, at least 10 percent of the estimated cost of the project (or, if less, $2,500,000); (2) as of the date of enactment of the MMSEA, an entity that will develop a hospital that will ultimately become a LTCH has a binding written agreement with an outside unrelated party for the actual construction, renovation, lease, or demolition for a hospital and that entity has expended, before December 29, 2007, at least 10 percent of the estimated cost of the project (or, if less, $2,500,000); and (3) an existing LTCH, as of December 29, 2007, has a binding written agreement with an outside unrelated party for the actual construction, renovation, lease or demolition for a new LTCH satellite facility and the LTCH has expended before December 29, 2007 at least 10 percent of the estimated cost of the project (or, if less, $2,500,000).

With regard to the first prong, we believe that the use of the term ''actual'' in the context of the ''actual construction, renovation, lease, or demolition,'' indicates that the the provision focuses only on the specific accomplishments cited in the statute and does not include those that are contemplated or have not yet been executed. Although we are aware that a hospital or entity may enter into binding written agreements regarding services and items (for example, feasibility studies or land purchase) and incur costs for those services and items prior to actual construction, renovation, lease or demolition, we believe those services or items are not included in the statute as a basis for the exception.

With respect to the second prong, the statute specifies that the hospital or entity must have expended before December 29, 2007, at least 10 percent of the estimated cost of the project (or, if less, $2.5 million). By ''cost of the project,'' we believe the statute refers to the activities enumerated in the first prong: ''The actual construction, renovation, lease, or demolition for a long-term care hospital.'' The statute requires that the hospital or entity has spent the amount specified in the statute on the actual construction, renovation, lease, or demolition for the contemplated LTCH. Furthermore, because the statute uses the phrase ''has expended'' we believe that the statute requires that hospital or entity would have actually transferred funds as payment for the project as opposed to merely obligating capital and posting the cost of the project on its books as of December 29, 2007. We believe that the provision addressed the concept of ''obligate'' in the first prong of the test where the statute specifies ''a binding written agreement * * * for the actual construction, renovation, lease, or demolition of the long-term care hospital. . .'' and there is no reason to believe that the second prong of the test, which requires the ''expenditure'' of 10 percent of the project or if less, $2,500,000, was intended as a redundancy. The ability to post the expense on the hospital's or entity's books could be satisfied by merely having a binding written agreement under the first prong of section 114(d)(2)(B) of MMSEA. The fact that a second requirement is included that involves an expenditure indicates that an additional threshold must be met.

Finally, section 114(d)(2)(C) of MMSEA provides an exception for a long-term care hospital that, as of the date of the enactment of the Act, ''has obtained an approved certificate of need in a State where one is required on or before the date of the enactment of this Act.'' We do not believe that the provision limits the exception to only an existing long-term care hospital that has obtained an approved certificate of need to create a new satellite of the LTCH. We note that in many instances, prior to being classified as a LTCH, a hospital is to be built by an entity with the express intention of making it into a LTCH as soon as possible. In those instances, it is not uncommon for the entity to obtain a certificate of need from the State prior to the development of the hospital.

We believe that the certificate of need exception applies to a hospital or entity that was actively engaged in developing a LTCH, as evidenced by the fact that either an entity that wanted to create a LTCH but did not exist as a hospital as of December 29, 2007, had obtained a certificate of need for a hospital by the date of enactment, or an existing hospital had obtained a certificate of need to convert the hospital into a new LTCH by that date. However, this exception would not apply to a hospital that was already in existence prior to the date of enactment and that had previously obtained an approved certificate of need for a hospital (other than a LTCH) on or before December 29, 2007. The fact that a hospital may have had a certificate of need issued to it years before December 29, 2007, to operate a hospital (other than a LTCH) would not be a reason to grant it an exception, unless that certificate of need was specifically for a LTCH. Since the certificate of need process is controlled at the State level, in determining whether the hospital or entity has obtained an approved certificate of need on or before December 29, 2007, we will look to the State for that determination.

2. Analysis of Exception to the Moratorium on the Increase in Number of Long-Term Care Hospital Beds in Existing Long-Term Care Hospitals and Satellite Facilities

In section 114(d)(1)(B) of MMSEA, a moratorium is also imposed on existing LTCHs or LTCH satellite facilities for the 3-year period beginning December 29, 2007 through December 28, 2010. The moratorium is on an increase of LTCH beds in existing LTCHs or LTCH satellite facilities. Therefore, during the 3-year moratorium, an existing LTCH or LTCH satellite facility may not increase the number of beds in excess of the number of Medicare-certified beds at the hospital on December 29, 2007. We are using the number of beds certified by Medicare, because this number can be verified by CMS and its contractors and this is currently referenced in our

regulations at § 412.22(h)(2)(i), and similarly referenced in § 412.22(f)(1). The moratorium on an increase of beds is subject to the exception at section 114(d)(3) of MMSEA. Specifically, section 114(d)(3) of the MMSEA states that the moratorium on an increase in beds shall not apply if an existing LTCH or LTCH satellite facility is ''located in a State where there is only one other long-term care hospital; and requests an increase in beds following the closure or the decrease in the number of beds of another long-term care hospital in the State.'' Section 114 (d)(3)(B) of the MMSEA also provides that the exception to the moratorium on the increase in bed numbers for existing LTCHs or LTCH satellite facilities does not apply to the limit on the number of beds in ''grandfathered'' LTCH HwHs as specified at § 412.22(f) and LTCH satellite facilities as specified at § 412.22(h)(3). Under § 412.22(f) and § 412.22(h)(3), respectively, ''grandfathered'' LTCH HwHs and LTCH satellite facilities (that is, HwHs that were in existence on or before September 30, 1995 and LTCH satellite facilities that were in existence on or before September 30, 1999 and that meet certain specified conditions) are exempted from compliance with ''separateness and control'' policies as long as they do not increase their bed numbers. (See the FY 2007 IPPS final rule (71 FR 48106 through 48115).) Therefore, even if a ''grandfathered'' LTCH HwH or LTCH satellite facility is located in a State where there is only one other LTCH and it requests an increase in beds following the closure or the decrease in the number of beds of another long-term care hospital in the State, it would not be able to maintain its grandfathered status if it would increase the number of beds at the LTCH under this exception.

Decisions regarding whether a specific situation will be considered to meet the exceptions to the establishment and classification of new LTCHs or new LTCH satellite facilities or the exceptions on increasing the number of beds in existing LTCHs or LTCH satellite facilities will be determined on a case-by-case basis by the applicant's FI/MAC and the CMS Regional Office (RO).

In compliance with section 114(d) of MMSEA, we are revising our regulations at § 412.23 to include a description of the moratorium on the establishment of new LTCHs and LTCH satellites and the moratorium on increasing the number of beds in existing LTCHs and existing LTCH satellites. Additionally, in § 412.23(e)(5) we have established a definition of a freestanding LTCH.

III. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

IV. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking and invite public comment on a proposed rule in accordance with 5 U.S.C. 553(b) of the Administrative Procedure Act (APA). In addition, section 1871(b)(1) of the Act provides that the Secretary shall provide for notice of the proposed regulation in the **Federal Register** and a period of not less than 60 days for public comment thereon. Section 1871(b)(2) of the Act provides for an exception to the requirement that the Secretary provide for notice of a proposed rulemaking and a period of not less than 60 days for public comment. Specifically, section 1871(b)(2)(B) of the Act provides an exception to these requirements when a law establishes a specific deadline for the implementation of a provision and the deadline is less than 150 days after the date of the enactment of the statute in which the deadline is contained. Several provisions of the MMSEA changed existing LTCH PPS policies (it affected the adjustment policies in § 412.534 and § 412.536; and placed a moratorium on new LTCHs and LTCH satellite facilities, as well as a moratorium on bed increases in existing LTCHs and LTCH satellite facilities). These changes were required to be implemented: (1) Beginning December 29, 2007 (section 114(d) of MMSEA); or (2) beginning with cost reporting periods beginning on or after December 29, 2007 (section 114(c)(1) and (2) of MMSEA). Thus, the statute's deadline for implementation of the MMSEA-related policies contained in this interim final regulation was less than 150 days after the date of the enactment of the statute in which the deadline was contained. We also note that we established a definition of ''freestanding LTCH'' at § 412.23(e)(5) consistent with our application of § 412.534 and § 412.536 in order to ensure consistent implementation of section 114(c)(1) of the MMSEA. Therefore, under the authority of section 1871(b)(2)(B) of the Act, we are waiving notice and comment procedures for the MMSEA policy changes pertaining to § 412.534 and § 412.536 (including the addition of the definition of freestanding LTCH at § 412.23(e)(5)) as well as the moratorium on new LTCHs and LTCH satellite facilities, and the moratorium on increasing beds at an existing LTCH and an existing satellite facility of a LTCH.

Moreover, we also find good cause to waive the requirement for publication of a notice of proposed rulemaking and comment on the grounds that it is unnecessary, impracticable and contrary to the public interest under the authority of 5 U.S.C. 553(b)(B). In general, this interim final rule with comment period sets forth nondiscretionary provisions of the MMSEA with respect to a moratorium on the establishment of new long-term care hospitals and long-term care satellite facilities and on the increase of long-term care hospital beds in existing LTCHs or LTCH satellite facilities, and payment policies pertaining to § 412.534 and § 412.536. Therefore, we believe pursuing notice and comment is unnecessary. Moreover, because that process would prevent timely implementation of congressionally mandated policy changes that are to be effective, as described previously in this section, we believe notice and comment procedures are impracticable and contrary to the public interest. In addition, notice and comment would delay significantly the issuance of essential guidance to the public which is necessary to assist them in making complex, time-sensitive business decisions of significant financial consequence with respect to their efforts to comply with section 114 of the MMSEA. Failure to provide this guidance would impede such business decisions.

Section 1871(e)(1)(A) of the Act provides that a substantive change in regulations, manual instructions, interpretative rules, statements of policy, or guidelines of general applicability under this title shall not be applied (by extrapolation or otherwise) retroactively to items and services furnished before the effective date of the change unless the Secretary determines that (i) such retroactive application is necessary to comply with statutory requirements; or (ii) failure to apply the change retroactively would be contrary to the public interest. As explained in the paragraph above, the MMSEA requires the Secretary to implement various policy changes either contemporaneously with the enactment of the MMSEA on December 29, 2007 or beginning with cost reporting periods beginning on or after December 29, 2007 as applicable. Therefore, under the authority of section 1871(e)(1)(A)(i) of

the Act, we are making the provisions of this interim final rule with comment period that implement sections 114(d) of MMSEA retroactive to December 29, 2007. The statute also requires that section 114(c)(1) and (2) be implemented beginning with cost reporting periods beginning on or after December 29, 2007. Therefore, under the authority of section 1871(e)(1)(A)(i) of the Act, we are making the provisions of this interim final rule with comment period that implement section 114(c)(1) and (2) effective for cost reporting periods beginning on or after December 29, 2007. Additionally, as explained previously, the Secretary also finds that it would be contrary to the public interest if these provisions were not made effective on December 29, 2007 or for cost reporting periods beginning on or after December 29, 2007, as indicated above. Therefore, under the authority of section 1871(e)(1)(A)(ii) of the Act, we are making these changes effective under the timeframe noted above.

For the same reasons noted above, we find good cause under section 553(d)(3) of the APA to waive the 30-day delay in effective date.

V. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995.

VI. Regulatory Impact Analysis

We have examined the impacts of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism, and the Congressional Review Act (5 U.S.C. 804 (2)).

Executive Order 12866 (as amended by Executive Order 13258) 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 (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year).

The enactment of section 114(c) of MMSEA requires several modifications to the regulations at § 412.534 and § 412.536, which, as discussed in section II.A of this interim final rule with comment period, address the percentage thresholds between referring hospitals (typically acute care hospitals) and LTCHs and satellites of LTCHs. We estimate that the implementation of MMSEA provisions pertaining to § 412.534 and § 412.536 will result in a projected increase of approximately $30 million in estimated aggregate LTCH PPS payments for RY 2008. We note that at this time, we are unable to quantify the impact of the provision at section 114(d) of MMSEA which provides for a moratorium on the establishment of LTCHs, LTCH satellite facilities, and on the increase of LTCH beds in existing LTCHs or satellite facilities for a period of 3 years. We are unable to provide an estimate of the impact of the moratorium provisions in section II.B. of this interim final rule with comment period because we have no way of determining how many LTCHs would have opened in the absence of the moratorium, nor do we have sufficient information at this time to determine how many new LTCHs will meet the exceptions criteria provided for in the statute. Because the distributional effects and estimated changes to the Medicare program payments would not be greater than $100 million, this interim final rule with comment period would not be considered a major economic rule, as defined in this section.

The 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 small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $6.5 million to $31.5 million in any 1 year. (For further information, see the Small Business Administration's regulation at 70 FR 72577, December 6, 2005.) Individuals and States are not included in the definition of a small entity. Because we lack data on individual hospital receipts, we cannot determine the number of small proprietary LTCHs. Therefore, we assume that all LTCHs are considered small entities for the purpose of this impact discussion. Medicare FIs and MACs are not considered to be small entities. As we discuss in detail throughout the preamble of this interim final rule with comment period, we believe that the provisions specified by the MMSEA presented in this rule would result in an increase in estimated aggregate LTCH PPS payments. Accordingly, the Secretary certifies that this interim final rule with comment period would not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. As stated above, implementing the provisions specified by the MMSEA that are discussed in this interim final rule with comment period will result in an increase in estimated aggregate LTCH PPS payments. Therefore, we believe this rule will not have a significant impact on small rural hospitals. Accordingly, the Secretary certifies that this interim final rule with comment period would not have a significant economic impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2008, that threshold level is currently approximately $130 million. This interim final rule with comment period would not mandate any requirements for State, local, or tribal governments, nor would it result in expenditures by the private sector of $130 million or more in any 1 year.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Since this regulation does not impose any costs on State or local governments, the requirements of Executive Order 13132 are not applicable.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 412

Administrative practice and procedure, Health facilities, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble of this interim final rule with comment period, the Centers for Medicare & Medicaid Services is amending 42 CFR Chapter IV as follows:

PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT HOSPITAL SERVICES

■ 1. The authority citation for part 412 is revised to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

■ 2. Section 412.23 is amended by adding new paragraphs (e)(5) through (e)(7) to read as follows:

§ 412.23 Excluded hospitals: Classifications.

* * * * *

(e) * * *

(5) *Freestanding long-term care hospital.* For purposes of this paragraph, a freestanding long-term care hospital means a hospital that meets the requirements of paragraph (e)(1) and (2) of this section and all of the following:

(i) Does not occupy space in a building also used by another hospital.

(ii) Does not occupy space in one or more separate or entire buildings located on the same campus as buildings used by another hospital.

(iii) Is not part of a hospital that provides inpatient services in a building also used by another hospital.

(6) *Moratorium on the establishment of new long-term care hospitals and long-term care hospital satellite facilities.*

(i) *General rule.* Except as specified in paragraph (e)(6)(ii) of this paragraph, for the period beginning December 29, 2007 and ending December 28, 2010, a moratorium applies to the establishment and classification of a long-term care hospital or long-term care hospital satellite facility as described in § 412.23(e).

(ii) *Exception.* The moratorium specified in paragraph (e)(6)(i) of this section is not applicable to the establishment and classification of a long-term care hospital that meets the requirements in paragraph (e) of this section or a long-term care hospital satellite facility that meets the requirements in § 412.22(h), if the long-term care hospital met one of the following criteria on or before December 29, 2007:

(A) Began its qualifying period for payment in accordance with paragraph (e) of this section.

(B)(*1*) Has a binding written agreement with an outside, unrelated party for the actual construction, renovation, lease or demolition for a long-term care hospital; and

(*2*) Has expended, before December 29, 2007, at least 10 percent (or, if less, $2.5 million) of the estimated cost of the project specified in paragraph (ii)(B)(1) of this paragraph.

(C) Had obtained an approved certificate of need from the State, when required by State law.

(7) *Moratorium on increasing the number of beds in existing long-term care hospitals and existing long-term care hospital satellite facilities.*

(i) For purposes of this paragraph, an existing long-term care hospital or long-term care hospital satellite facility means a long-term care hospital that meets the requirements of paragraph (e) of this section or long-term care hospital satellite facility that meets the requirements of § 412.22(h) of this part and received payment under the provisions of subpart O of this part on or before December 29, 2007.

(ii) Effective for the period beginning December 29, 2007 and ending December 28, 2010—

(A) Except as specified in paragraph (e)(7)(ii)(B) of this section, the number of Medicare-certified beds in an existing long-term care hospital or an existing long-term care hospital satellite facility as defined in paragraph (e)(7)(i) of this section must not be increased beyond the number of Medicare-certified beds on December 29, 2007.

(B) Except as specified in paragraph (e)(7)(ii)(C) of this section, the moratorium specified in paragraph (e)(7)(ii)(A) of this section is not applicable to an existing long-term care hospital or existing long-term care hospital satellite facility as defined in paragraph (e)(7)(i) of this section that meets both of the following requirements:

(*1*) Is located in a State where there is only one other long-term care hospital that meets the criteria specified in § 412.23(e) of this subpart.

(*2*) Requests an increase in the number of Medicare-certified beds after the closure or decrease in the number of Medicare-certified beds of another long-term care hospital in the State.

(C) The exception specified in paragraph (e)(7)(ii)(B) of this section does not effect the limitation on increasing beds under § 412.22(f) and § 412.22(h)(3) of subpart.

* * * * *

■ 4. Section 412.534 is amended by revising paragraphs (b) through (e), and (h) to read as follows.

§ 412.534 Special payment provisions for long-term care hospitals within hospitals and satellites of long-term care hospitals.

* * * * *

(b) *Patients admitted from hospitals not located in the same building or on the same campus as the long-term care hospital or long-term care hospital satellite.*

(1) *For cost reporting periods beginning on or after October 1, 2004 and before July 1, 2007.* Payments to the long-term care hospital as described in § 412.23(e)(2)(i) meeting the criteria in § 412.22(e)(2) for patients admitted to the long-term care hospital or to a long-term care hospital satellite facility as described in § 412.23(e)(2)(i) that meets the criteria of § 412.22(h) from another hospital that is not the co-located hospital are made under the rules in this subpart with no adjustment under this section.

(2) *For cost reporting periods beginning on or after July 1, 2007.* For cost reporting periods beginning on or after July 1, 2007, payments to one of the following long-term care hospitals or long-term care hospital satellites are subject to the provisions of § 412.536 of this subpart:

(i) A long-term care hospital as described in § 412.23(e)(2)(i) of this part that meets the criteria of § 412.22(e) of this part.

(ii) Except as provided in paragraph (h) of this section, a long-term care hospital as described in § 412.23(e)(2)(i) of this part that meets the criteria of § 412.22(f) of this part.

(iii) A long-term care hospital satellite facility as described in § 412.23(e)(2)(i) of this part that meets the criteria in § 412.22(h) or § 412.22(h)(3)(i) of this part.

(c) *Patients admitted from the hospital located in the same building or on the same campus as the long-term care hospital or satellite facility.* Except for a long-term care hospital or a long-term care hospital satellite facility that meets the requirements of paragraphs (d) or (e) of this section, payments to the long-term care hospital for patients admitted to it or to its long-term care hospital satellite facility from the co-located hospital are made under either of the following:

(1) *For cost reporting periods beginning on or after October 1, 2004 and before December 29, 2007 and for cost reporting periods beginning on or after December 29, 2010.*

(i) Except as provided in paragraphs (g) and (h) of this section, for any cost reporting period beginning on or after October 1, 2004 and before December 29, 2007 and for cost reporting periods beginning on or after December 29, 2010

in which the long-term care hospital or its satellite facility has a discharged Medicare inpatient population of whom no more than 25 percent were admitted to the hospital or its satellite facility from the co-located hospital, payments are made under the rules at §§ 412.500 through 412.541 in this subpart with no adjustment under this section.

(ii) Except as provided in paragraph (g) or (h) of this section, for any cost reporting period beginning on or after October 1, 2004 and before December 29, 2007 and for cost reporting periods beginning on or after December 29, 2010 in which the long-term care hospital or satellite facility has a discharged Medicare inpatient population of whom more than 25 percent were admitted to the hospital or satellite facility from the co-located hospital, payments for the patients who are admitted from the co-located hospital and who cause the long-term care hospital or satellite facility to exceed the 25 percent threshold for discharged patients who have been admitted from the co-located hospital are the lesser of the amount otherwise payable under this subpart or the amount payable under this subpart that is equivalent, as set forth in paragraph (f) of this section, to the amount that would be determined under the rules at § 412.1(a). Payments for the remainder of the long-term care hospital's or satellite facility's patients are made under the rules in this subpart at §§ 412.500 through 412.541 with no adjustment under this section.

(iii) In determining the percentage of patients admitted to the long-term care hospital or its satellite from the co-located hospital under paragraphs (c)(1)(i) and (c)(1)(ii) of this section, patients on whose behalf an outlier payment was made to the co-located hospital are not counted towards the 25 percent threshold.

(2) *For cost reporting periods beginning on or after December 29, 2007 and before December 29, 2010.*

(i) Except for a long-term care hospital and long-term care hospital satellite facility subject to paragraphs (g) or (h) of this section, payments are determined using the methodology specified in paragraph (c)(1) of this section.

(ii) Payments for a long-term care hospital and long-term care hospital satellite facility subject to paragraph (g) of this section are determined using the methodology specified in paragraph (c)(1) of this section except that 25 percent is substituted with 50 percent.

(d) Special treatment of rural hospitals.

(1) *For cost reporting periods beginning on or after October 1, 2004 and before December 29, 2007 and for cost reporting periods beginning on or after December 29, 2010.*

(i) Subject to paragraphs (g) and (h) of this section, in the case of a long-term care hospital or satellite facility that is located in a rural area as defined in § 412.503 and is co-located with another hospital for any cost reporting period beginning on or after October 1, 2004 and before December 29, 2007 and for any cost reporting period beginning on or after December 29, 2010 in which the long-term care hospital or long-term care satellite facility has a discharged Medicare inpatient population of whom more than 50 percent were admitted to the long-term care hospital or satellite facility from the co-located hospital, payments for the patients who are admitted from the co-located hospital and who cause the long-term care hospital or satellite facility to exceed the 50 percent threshold for discharged patients who were admitted from the co-located hospital are the lesser of the amount otherwise payable under this subpart or the amount payable under this subpart that is equivalent, as set forth in paragraph (f) of this section, to the amount that were otherwise payable under § 412.1(a). Payments for the remainder of the long-term care hospital's or long-term care hospital satellite facility's patients are made under the rules in this subpart at §§ 412.500 through 412.541 with no adjustment under this section.

(ii) In determining the percentage of patients admitted from the co-located hospital under paragraph (d)(1)(i) of this section, patients on whose behalf outlier payment was made at the co-located hospital are not counted toward the 50 percent threshold.

(2) For cost reporting periods beginning on or after December 29, 2007 and before December 29, 2010.

(i) Except for long-term care hospitals and long-term care hospital satellite facilities subject to paragraphs (g) or (h) of this section, payments are determined using the methodology specified in paragraph (d)(1) of this paragraph.

(ii) Payments for long-term care hospitals and long-term care hospital satellite facilities subject to paragraph (g) of this section are determined using the methodology specified in paragraph (d)(1) of this section except that 50 percent is substituted with 75 percent.

(e) Special treatment of urban single or MSA-dominant hospitals.

(1) *For cost reporting periods beginning on or after October 1, 2004 and before December 29, 2007 and for cost reporting periods beginning on or after December 29, 2010.*

(i) Subject to paragraphs (g) and (h) of this section, in the case of a long-term care hospital or a long-term care hospital satellite facility that is co-located with the only other hospital in the MSA or with a MSA-dominant hospital as defined in paragraph (e)(1)(iv) of this paragraph, for any cost reporting period beginning on or after October 1, 2004 and before December 29, 2007 and for any cost reporting periods beginning on or after December 29, 2010 in which the long-term care hospital or long-term care hospital satellite facility has a discharged Medicare inpatient population of whom more than the percentage calculated under paragraph (e)(1)(ii) of this paragraph were admitted to the hospital from the co-located hospital, payments for the patients who are admitted from the co-located hospital and who cause the long-term care hospital to exceed the applicable threshold for discharged patients who have been admitted from the co-located hospital are the lesser of the amount otherwise payable under this subpart or the amount under this subpart that is equivalent, as set forth in paragraph (f) of this section, to the amount that otherwise would be determined under § 412.1(a). Payments for the remainder of the long-term care hospital's or satellite facility's patients are made under the rules in this subpart with no adjustment under this section.

(ii) For purposes of paragraph (e)(1)(i) of this paragraph, the percentage used is the percentage of total Medicare discharges in the Metropolitan Statistical Area in which the hospital is located that are from the co-located hospital for the cost reporting period for which the adjustment was made, but in no case is less than 25 percent or more than 50 percent.

(iii) In determining the percentage of patients admitted from the co-located hospital under paragraph (e)(1)(i) of this section, patients on whose behalf outlier payment was made at the co-located hospital are not counted toward the applicable threshold.

(iv) For purposes of this paragraph, an ''MSA-dominant hospital'' is a hospital that has discharged more than 25 percent of the total hospital Medicare discharges in the MSA in which the hospital is located.

(2) For cost reporting periods beginning on or after December 29, 2007 and before December 29, 2010.

(i) Except for long-term care hospitals and long-term care hospital satellite facilities subject to paragraphs (g) or (h) of this section, payments are determined using the methodology specified in paragraph (e)(1) of this section.

(ii) Payments for long-term care hospitals and long-term care hospital satellite facilities subject to paragraph

(g) of this section are determined using the methodology specified in paragraph (e)(1) of this section except that 75 percent is substituted for 50 percent.

* * * * *

(h) *Effective date of policies in this section for certain co-located LTCH hospitals and satellites of LTCHs.* The policies set forth in this section apply to Medicare patient discharges that were admitted from a hospital located in the same building or on the same campus as a long-term care hospital described in § 412.23(e)(2)(i) that meets the criteria in § 412.22(f) and a satellite facility of a long-term care hospital as described at § 412.22(h)(3)(i) for discharges occurring in cost reporting periods beginning on or after July 1, 2007.

(1) Except as specified in paragraph (h)(4) of this section, in the case of a long-term care hospital or long-term care hospital satellite facility that is described under paragraph (h) of this section, the thresholds applied at paragraphs (c), (d), and (e) of this section are not less than the following percentages:

(i) For cost reporting periods beginning on or after July 1, 2007 and before July 1, 2008, the lesser of 75 percent of the total number of Medicare discharges that were admitted to the long-term care hospital or long-term care hospital satellite facility from its co-located hospital during the cost reporting period or the percentage of Medicare discharges that had been admitted to the long-term care hospital or satellite from that co-located hospital during the long-term care hospital's or satellite's RY 2005 cost reporting period.

(ii) For cost reporting periods beginning on or after July 1, 2008 and before July 1, 2009, the lesser of 50 percent of the total number of Medicare discharges that were admitted to the long-term care hospital or the long-term care hospital satellite facility from its co-located hospital or the percentage of Medicare discharges that had been admitted from that co-located hospital during the long-term care hospital's or satellite's RY 2005 cost reporting period.

(iii) For cost reporting periods beginning on or after July 1, 2009, 25 percent of the total number of Medicare discharges that were admitted to the long-term care hospital or satellite from its co-located hospital during the cost reporting period.

(2) In determining the percentage of Medicare discharges admitted from the co-located hospital under this paragraph, patients on whose behalf a Medicare high cost outlier payment was made at the co-located referring hospital are not counted toward this threshold.

(3) Except as specified in paragraph (h)(4) of this section, for cost reporting periods beginning on or after July 1, 2007, payments to long term care hospitals described in § 412.23(e)(2)(i) that meet the criteria in § 412.22(f) and satellite facilities of long-term care hospitals described at § 412.22(h)(3)(i) are subject to the provisions of § 412.536 for discharges of Medicare patients who are admitted from a hospital not located in the same building or on the same campus as the LTCH or LTCH satellite facility.

(4) For a long-term care hospital described in § 412.23(e)(2)(i) that meets the criteria in § 412.22(f), the policies set forth in this paragraph and in § 412.536 of this part do not apply for discharges occurring in cost reporting periods beginning on or after December 29, 2007 and before December 29, 2010.

■ 5. Section 412.536 is amended by revising paragraph (a) to read as follows:

§ 412.536 Special payment provisions for long-term care hospitals and satellites of long-term care hospitals that discharged Medicare patients admitted from a hospital not located in the same building or on the same campus as the long-term care hospital or satellite of the long-term care hospital.

(a) *Scope.* (1) Except as specified in paragraph (a)(2) of this section, for cost reporting periods beginning on or after July 1, 2007, the policies set forth in this section apply to discharges from the following:

(i) Long-term care hospitals as described in § 412.23(e)(2)(i) that meet the criteria in § 412.22(e).

(ii) Long-term care hospitals as described in § 412.23(e)(2)(i) and that meet the criteria in § 412.22(f).

(iii) Long-term care hospital satellite facilities as described in § 412.23(e)(2)(i) and that meet the criteria in § 412.22(h).

(iv) Long-term care hospitals as described in § 412.23(e)(5).

(2) For cost reporting periods beginning on or after December 29, 2007 and before December 29, 2010, the policies set forth in this section are not applicable to discharges from a long-term care hospital described in § 412.23(e)(5) of this part or described in § 412.23(e)(2)(i) of this part and that meet the criteria specified in § 412.22(f) of this part.

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: May 8, 2008.

Kerry Weems,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: May 15, 2008.

Michael O. Leavitt,

Secretary.

[FR Doc. 08–1285 Filed 5–16–08; 4:00 pm]

BILLING CODE 4120–01–P

COMMISSION OF FINE ARTS

45 CFR Part 2102

Procedures and Policies

AGENCY: The Commission of Fine Arts.

ACTION: Final rule.

SUMMARY: This document amends the procedures and policies governing the administration of the U.S. Commission of Fine Arts. It serves to modify the time limit on a recommendation for concept approval for projects submitted to the Commission under the Old Georgetown Act and the Shipstead-Luce Act in order to address more consistently the requirements and procedures of the District of Columbia government.

DATES: Effective June 16, 2008.

FOR FURTHER INFORMATION CONTACT: Thomas Luebke, Secretary, (202) 504–2200.

SUPPLEMENTARY INFORMATION: As established by Congress in 1910, the Commission of Fine Arts is a small independent advisory body made up of seven Presidentially appointed ''well qualified judges of the arts'' whose primary role is architectural review of designs for buildings, parks, monuments and memorials erected by the Federal or District of Columbia governments in Washington, DC. In addition to architectural review, the Commission considers and advises on the designs for coins, medals, and U.S. memorials on foreign soil. The Commission also advises the District of Columbia government on private building projects within the Georgetown Historic District, the Rock Creek Park perimeter, and the Monumental Core area. The Commission advises Congress, the President, Federal agencies, and the District of Columbia government on the general subjects of design, historic preservation, and on orderly planning on matters within its jurisdiction.

Specific items this document amends clarify the procedure. Therefore, as these changes clarify established procedures and are minor in nature, the Commission determines that notice and comment are unnecessary and that, in accordance with 5 U.S.C. 553(b)(B),

good cause to waive notice and comment is established.

List of Subjects in 45 CFR Part 2102

Administrative practice and procedure, Sunshine Act.

This document was prepared under the direction of Thomas Luebke, Secretary, U.S. Commission of Fine Arts, 401 F Street, NW., Suite 312, Washington, DC 20001.

■ For the reasons stated in the preamble, the Commission of Fine Arts hereby amends 45 CFR part 2102 to read as follows:

PART 2102—MEETINGS AND PROCEDURES OF THE COMMISSION

■ 1. The authority citation for part 2102 continues to read as follows:

Authority: 5 U.S.C., App. 1.

■ 2. In § 2102.12 revise paragraphs (b) and (c) to read as follows:

§ 2102.12 Responses of Commission to submissions.

* * * * *

(b) In the case of plans submitted with a permit application subject to the Old Georgetown Act (§ 2101.1(c)), if the Commission does not respond with a report on such plans within forty-five days after their receipt by the Commission, its approval shall be assumed and a permit may be issued by the government of the District of Columbia.

(1) In the case of a concept application submitted for a project subject to the Old Georgetown Act (§ 2101.1(c)), the Commission's approval is valid for two years. At the end of the two years, the original owner for the project may submit a new concept application requesting to extend the approval for one more year. The Commission, however, may decline to extend its approval.

(2) [Reserved]

(c) In the case of plans submitted with a permit application subject to the Shipstead-Luce Act (§ 2101.1(b)), if the Commission does not respond with a report on such plans within thirty days after their receipt by the Commission, its approval shall be assumed and a permit may be issued by the government of the District of Columbia.

(1) In the case of a concept application for a project subject to the Shipstead-Luce Act (§ 2101.1(b)), the Commission's approval is valid for two years. At the end of the two years, the original owner for the project may submit a concept application requesting to extend the approval for one more year. The Commission, however, may decline to extend its approval.

(2) [Reserved]

* * * * *

Dated: May 12, 2008.

Thomas Luebke,

Secretary, U.S. Commission of Fine Arts.

[FR Doc. E8–11238 Filed 5–21–08; 8:45 am]

BILLING CODE 6330–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[CC Docket Nos. 96–45, 96–262, 97–121; WC Docket No. 06–122; FCC 08–101]

Universal Service Fund Contribution

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition on reconsideration.

SUMMARY: In this document, the Commission denies the petitions filed by BellSouth Corporation (BellSouth), Arya International Communications Corporation (Arya), Cable Plus L.P. and MultiTechnology Services, L.P., Pan Am Wireless, Inc., and USA Global Link with respect to the Commission's *Fifth Circuit Remand Order*, and confirms the conclusions by the Wireline Competition Bureau (Bureau) in the *Fifth Circuit Clarification Order*.

DATES: Effective June 23, 2008.

FOR FURTHER INFORMATION CONTACT: Thomas Buckley, Senior Deputy Chief or Carol Pomponio, Attorney, Wireline Competition Bureau, Telecommunications Access Policy Division at (202) 418–7400 (voice), (202) 418–0484 (TTY).

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Order on Reconsideration*, in CC Docket Nos. 96–45, 96–262, 97–121 and WC Docket No. 06–122, released April 11, 2008. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554.

I. Introduction

1. In this *Order on Reconsideration*, the Commission denies the petitions for reconsideration filed by BellSouth and Arya with respect to the Commission's *Fifth Circuit Remand Order*, 64 FR 60349–01, November 5, 1999 and confirms the conclusions by the Bureau in the *Fifth Circuit Clarification Order*. Specifically, the Commission reconfirms that Commercial Mobile Radio Services (CMRS) providers may recover their universal service contributions through rates charged for all of their services; rejects the suggestion that the Commission's eight percent Limited International Revenues Exception (LIRE) is arbitrary and capricious; and denies petitioners' request for refund of universal service contributions remitted from January 1, 1998 to October 31, 1999, that were based on intrastate telecommunications revenues or international telecommunications revenues in excess of the eight percent LIRE. In addition to the petitions filed by BellSouth and Arya, several carriers sought refunds or excuse from payment for universal service fund contributions following the *Texas Office of Public Utility Counsel* (*TOPUC*) decision, 183 F.3d 393 (5th Cir. 1999), by filing appeals with the Universal Service Administrative Company (USAC) or directly with the Commission. In the Cable Plus L.P. and MultiTechnology Services, L.P., and Pan Am Wireless, Inc. appeals, the petitioners, like BellSouth in its petition for reconsideration, seek refund of their universal service contributions based on intrastate revenues. In the USA Global Link appeal, the petitioner, like Arya in its petition for reconsideration, seeks refund of its universal service contribution based on international revenues. The Commission denies these requests as well.

II. Discussion

2. In response to BellSouth's petition requesting clarification of the Commission's rules, the Commission clarified previously that the *TOPUC* decision did not undermine the validity of the Commission's decision that CMRS providers may recover their contributions from customers through rates charged for all services. The relevant portion of the Fifth Circuit's decision in *TOPUC* related to the manner in which the Commission may require carriers to contribute to the universal service fund (USF). The manner in which carriers may recover their universal service contributions through assessments on customers was not before the court. Thus, the Bureau clarified that the *TOPUC* decision did not affect the Commission's finding in the *Fourth Reconsideration Order*, 63 FR 2094–01, January 13, 1998, that CMRS providers may ''recover their contributions through rates charged for all their services.'' In fact, the Commission has made clear that carriers have significant flexibility in the manner in which they may recover universal service contribution costs. Carriers are not required to recover their universal service costs from subscribers at all. If they choose to do so, carriers

may recover these costs through their standard service charges or through a separate line-item. The Commission does not alter that conclusion here.

3. The Commission reiterates that providers that choose to recover universal service costs through a separate line-item may express the charge as a flat amount or as a percentage. Because of the inherent difficulty in defining and ascertaining which calls over a mobile wireless system are ''interstate,'' the Commission has long permitted CMRS providers to assume for purposes of calculating their USF contributions that a prescribed percentage of their total end user telecommunications revenues is interstate. The Commission's rules allow ''wireless telecommunications providers [to] continue to recover contribution costs in a manner that is consistent with the way in which companies report revenues to [USAC]'' on their USF Worksheets. Thus, CMRS providers may include a universal service line-item on a subscriber's bill that does not reflect that particular subscriber's interstate usage.

4. In the *Fifth Circuit Remand Order*, the Commission established a limited exception to universal service contribution requirements for entities with interstate end-user telecommunications revenues that constitute less than eight percent of their combined interstate and international end-user telecommunications revenues. Arya does not challenge the establishment of the LIRE *per se*, but asserts that the Commission's *Fifth Circuit Remand Order* failed to articulate a satisfactory explanation for adopting the eight percent threshold, thus rendering the decision arbitrary and capricious. Arya asserts that the Commission ''offered no explanation'' for its choice of eight percent, and accordingly its decision should be reconsidered. The Commission disagrees.

5. As explained in the *Fifth Circuit Remand Order*, a provider of interstate and international telecommunications is not required to contribute based on its international telecommunications end-user revenues if its interstate telecommunications end-user revenues constitute less than eight percent of its combined interstate and international end-user telecommunications revenues. The Commission further stated that the rule is intended to exclude from the contribution base the international end-user telecommunications revenues of any telecommunications provider whose annual contribution, based on the provider's interstate and international end-user telecommunications revenues, would exceed the amount of its interstate end-user telecommunications revenues. The Commission concluded that the rule is consistent with the determination of the Fifth Circuit that requiring a carrier to pay more universal service contributions than it derives from interstate revenues violates the requirement in section 254(d) of the Act that universal service contributions be equitable and nondiscriminatory.

6. In selecting the relevant threshold, the Commission explained that selection of eight percent provided sufficient margin of safety based on the contribution factors at the time, such that a provider's contribution would not exceed the amount of its interstate end-user telecommunications revenues. Selecting a fixed percentage for the LIRE rather than tying it to the established contribution factor, which fluctuates quarterly, also ensured that the Commission could meet the statutory requirement that the USF contribution mechanism remain specific and predictable. Moreover, in 2002 the Commission revised the LIRE to address certain changes in the telecommunications marketplace, and increased the exception threshold to twelve percent. Accordingly, the Commission finds that Arya's argument that the Commission failed to articulate its rationale for selecting the eight percent threshold is without merit, and the Commission declines to reconsider the LIRE threshold.

7. In the *Fifth Circuit Clarification Order*, the Bureau clarified that the *Fifth Circuit Remand Order* applied the Fifth Circuit decision prospectively from the effective date of the Fifth Circuit's mandate. Upon further consideration, the Commission confirms the conclusion of the Bureau and denies BellSouth's request to apply the *Fifth Circuit Remand Order* on a retroactive basis. Further, the Commission denies the request by Arya to retroactively apply the LIRE to contributions made prior to the Fifth Circuit's mandate.

8. In considering whether to give retroactive application to a new rule, the courts have held that when there is a ''substitution of new law for old law that was reasonably clear,'' the new rule may justifiably be given solely prospective effect in order to ''protect the settled expectations of those who had relied on the preexisting rule.'' By contrast, retroactive effect is appropriate for ''new applications of [existing] law, clarifications, and additions.'' In cases in which there are ''new applications of existing law, clarifications, and additions,'' the courts start with a presumption in favor of retroactivity. However, retroactivity may be denied ''when to apply the new rule to past conduct or to prior events would work a 'manifest injustice.' '' Based on the equitable factors discussed below, the Commission concludes that retroactive application would work a manifest injustice that defeats the presumption of retroactivity. Accordingly, the Commission affirms the *Fifth Circuit Remand Order*.

9. At the outset, the Commission recognizes that this case involves conflicting equitable considerations that are somewhat novel. Unlike recent Commission precedent in which the DC Circuit has applied the ''manifest injustice'' standard, this case does *not* involve the more common situation that pits one group of carriers against another. Rather, at its essence, the decision of whether to give retroactive effect to the Fifth Circuit decision requires the Commission to assess the equities of significantly increasing collection from current USF contributors *and their customers* in order to attempt to flow refunds to millions of customers of an earlier decade. Thus, this is ultimately a complicated dispute about how to handle a transaction that affects customer groups over different time periods. In evaluating whether retroactivity would produce a manifest injustice, the Commission focuses its analysis on the benefits and burdens to the affected parties. To do this, the Commission necessarily considers how the refund mechanisms would function and the potential effect of any refund on its statutory obligations under section 254 of the Act.

10. First, a decision to compel refunds would require USAC to refund to the contributing carriers more than one billion dollars in monies already disbursed to thousands of schools, libraries and rural health care providers. Because of the resulting shortfall in current USAC funds, USAC would, in turn, have to significantly increase collections from current USF contributors and their customers by raising the contribution factor applied to today's interstate and international revenue. Indeed, some estimates show that USAC would need to collect an additional $1.6 billion from current contributors, which likely would be passed through by the carriers to today's consumers. The net effect of any such refund would be that 2008 consumers subsidize charges that should have been paid by consumers in 1998 and 1999 had the Commission assessed only interstate and international revenue (and excluded intrastate revenue). In the Commission's view, such an outcome—

higher USF charges to today's customers—would be fundamentally at odds with its section 254 mandate to preserve and advance universal service. Today's consumers would have to shoulder the burden of the refunds while having no responsibility for causing the underlying problem. The harms to today's end-users and to the universal service system itself would be undeniable should retroactive effect be given to the Fifth Circuit decision.

11. Ironically, despite the hardships of a refund on current consumers, those end-users who bore the erroneous costs in 1998–99 would not necessarily reap benefits from refunds. As a practical matter, because USF contribution charges are generally passed through by the contributing entity to its customers, contributors would have to use 1998 and 1999 billing information to ensure that the consumers who paid the USF received the refunds. This effort, which would be difficult in even the best of times, is here further complicated because many of the carriers that contributed to the USF based on intrastate and international revenue no longer exist; they would thus be unavailable to receive the refund and disburse it to the appropriate 1998 and 1999 consumers. Even those carriers who still conduct business may have great difficulties tracking customers from this earlier period, given customer churn.

12. At the same time, those customers who could be successfully identified would not be assured of obtaining their money from the carriers. As even BellSouth concedes, attempting to facilitate refunds would be ''a bit like unscrambling eggs.'' The Commission's rules focus on carrier contributions rather than cost recovery, and the rules afford carriers discretion on how to pass through these costs to their customers. As a result, with costs passed along in a variety of ways, it would be extraordinarily difficult for the Commission to develop an effective framework for directing carriers' refund efforts. Moreover, any individual refunds to former customers (to the extent these customers can be identified and located) are likely to be small amounts, which would be further reduced by the offset from increased universal service charges on their current telephone bills. The only realistic conclusion the Commission can draw is that the potential benefits of refunds for contributors or end-user customers are extremely speculative.

13. In contrast, the costs and burdens of a refund requirement are concrete. Although the amount of any consumer refund would be minute, the number of customers potentially affected would run into the millions. As a result, the carriers' administrative burdens to disburse such refunds would be enormous. Potentially carriers' administrative costs could overwhelm the amounts available for distribution as refunds; just as bad, those administrative costs might be passed along to end-users through other increased charges. Further, the likelihood for significant confusion in administering any refund program has been repeatedly recognized by commenters. The anticipated confusion would, in turn, impinge on the Commission's obligation to ensure the ''sufficiency'' of the USF based on ''equitable'' contributions. In the Commission's view, imposing an unworkable refund obligation for only the most speculative of benefits does not serve the public interest or comport with the Commission's statutory obligations under section 254.

14. The Commission concludes that considerations of fairness and equity militate strongly against retroactive application and defeat the presumption of retroactivity. Requiring refunds of this magnitude would compel USAC to raise the USF contribution factor. That would cause manifest injustice for today's consumers, as they shoulder higher bills while bearing no culpability for the refund problem. At the same time, the Commission strongly doubts it would be possible to ensure that the refunds provided by USAC be passed through appropriately to end-users. Moreover, any customers who received a small refund check would benefit little because they, too, would be saddled with higher USF charges going forward. In contrast, some carriers could conceivably obtain windfalls where payments are not flowed through to their former customers. Neither logic nor fairness supports such a result, which works a ''manifest injustice'' not only upon current end-users, but upon the universal service program as a whole. Under these circumstances, the Commission declines to order retroactive application of the Fifth Circuit's decision.

15. The Commission also disagrees with BellSouth that a series of Supreme Court decisions culminating in *Reynoldsville Casket Co.* v. *Hyde*, 514 U.S. 749 (1995), mandates retroactive application of the Fifth Circuit's decision here. The Fifth Circuit did not specifically mandate that its decision be applied to the litigants before it, Cincinnati Bell and COMSAT Corporation (COMSAT), and neither party sought a refund from the Commission of its universal service contributions. As the Fifth Circuit did not apply the new rule to the litigants before it, there is no selective retroactivity here. Accordingly, the Commission affirms its decision in the *Fifth Circuit Remand Order* to apply the Fifth Circuit decision prospectively. Thus, the Commission denies BellSouth's petition for reconsideration and request for refund of its individual assessments based on its intrastate contributions.

16. Further, with respect to Arya's request, the Fifth Circuit's determination regarding contributions based on international revenues was not based on lack of Commission jurisdiction. Rather, the Fifth Circuit found that requiring carriers to contribute on international telecommunications revenues without any limiting principle would result in instances in which predominantly international carriers would be forced to incur prohibitive costs. The Fifth Circuit accordingly found the Commission's decision to be contrary to section 254's ''equitable and nondiscriminatory'' language. The Fifth Circuit remanded that portion of the *1997 Universal Service Order* to the Commission for further consideration. In seeking refunds of amounts assessed on international revenues in excess of the eight percent threshold, however, Arya is not seeking retroactive application of the Fifth Circuit's decision. Rather, it is seeking retroactive application of the Commission's *Fifth Circuit Remand Order*, in which the Commission established the LIRE. Retroactive rulemaking is generally not favored. For that reason and for the same reasons that justify prospective-only effect of the Fifth Circuit's *TOPUC* decision discussed above, the Commission declines to give the *Fifth Circuit Remand Order* retroactive effect as to contributions based on international telecommunications revenues.

17. In addition to the petitions filed by BellSouth and Arya, several carriers sought refunds or excuse from payment for USF contributions following the *TOPUC* decision by filing appeals with USAC or directly with the Commission. In the Cable Plus and Pan Am Appeals, the appellants, like BellSouth in its petition for reconsideration, seek refund of their universal service contributions based on intrastate revenues. In the USA Global Appeal, the appellant, like Arya in its petition for reconsideration, seeks refund of its universal service contribution based on international revenues. The Commission denies these requests as well for the reasons stated above.

III. Paperwork Reduction Act of 1995 Analysis

18. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

IV. Final Regulatory Flexibility Certification

19. The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

20. The Commission sought written public comment on the initial regulatory flexibility analysis (IRFA) incorporated into the *NPRM*, 61 FR 10499–01, March 14, 1996, and the *Recommended Decision*, 61 FR 63778–01, December 2, 1996, on the final regulatory flexibility analysis incorporated into the *1997 Universal Service Order*, and on the supplemental final regulatory flexibility analysis incorporated into the *Fifth Circuit Remand Order*.

21. In the IRFAs, the Commission sought comment on possible exemptions from the proposed rules for small telecommunications companies and measures to avoid significant economic impact on small entities, as defined by the RFA. No comments in response to the IRFAs, other than those summarized in the *1997 Universal Service Order*, were filed. In response to the FRFA contained in the *1997 Universal Service Order*, one commenter argued that the Commission did not satisfy the requirements of the RFA by considering alternatives to the cap on recovery of corporate operations expenses. Those comments were fully addressed in the *Fourth Order on Reconsideration*.

22. No comments or petitions for reconsideration in response to the IRFAs or FRFA, other than those described above, were filed and none of the comments filed pertain to the issues raised in the *Fifth Circuit Remand Order*. The Commission in that order nonetheless addressed small business concerns by giving incumbent LECs greater flexibility in structuring their recovery of universal service contributions and by creating an exception from the contribution requirements for certain providers of international telecommunications services.

23. In this order, the Commission reconfirms that CMRS providers may recover their universal service contributions through rates charged for all of their services; rejects the suggestion that the Commission's eight percent LIRE is arbitrary and capricious; and denies petitioners' request for refund of universal service contributions remitted from January 1, 1998 to October 31, 1999, that were based on intrastate telecommunications revenues or international telecommunications revenues in excess of the eight percent LIRE. This has no new effect on any party and does not create any additional burden on small entities.

24. Therefore, the Commission certifies that the requirements of the order will not have a significant economic impact on a substantial number of small entities.

25. In addition, the order and this final certification will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the **Federal Register**. The Commission will not send a copy of this Order on Reconsideration pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because this order does not change previously adopted rules.

V. Ordering Clauses

26. Accordingly, *It is ordered*, pursuant to sections 1, 2, 4(i), 4(j), 201, 202, 218–220, 254 and 303(r)of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i)–(j), 201, 202, 21–220, 254, and 303(r) that BellSouth Corporation's Petition for Reconsideration and Clarification, Arya International Communications Corporation's Petition for Reconsideration of the Commission's *Fifth Circuit Remand Order*, Cable Plus L.P. and MultiTechnology Services, L.P.'s Joint Request for Review, PanAm Wireless, Inc.'s Request for Review, and USA Global Link, Inc.'s Request for Review *are denied*.

27. *It is further ordered that* this order *shall become effective* June 23, 2008.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–11258 Filed 5–21–08; 8:45 am]

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Proposed Rules

Federal Register
Vol. 73, No. 100
Thursday, May 22, 2008

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–29227; Directorate Identifier 2007–NM–100–AD]

RIN 2120–AA64

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

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: We are revising an earlier proposed airworthiness directive (AD) for certain Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–300, 747–400, 747–400D, and 747SR series airplanes. For certain airplanes, the original NPRM would have required a material type inspection to determine if the lower forward corner reveal of the number 3 main entry doors (MEDs) is a casting. If the reveals are castings, the original NPRM would have required repetitive inspections of the reveals for cracking, and corrective action if necessary. If the reveals are not castings, the original NPRM would have required a detailed inspection of the reveals for a sharp edge and repetitive inspections of the reveals for cracking, and corrective action if necessary. For certain other airplanes, the original NPRM would have required only a detailed inspection of the reveals for a sharp edge and repetitive inspections of the reveals for cracking, and corrective action if necessary. For certain other airplanes, the original NPRM would have required repetitive inspections of the reveals for cracking only, and corrective action if necessary. The original NPRM resulted from reports of cracking and/or a sharp edge in the lower forward corner reveal of the number 3 MEDs. This action revises the original NPRM by reducing the compliance times for doing certain inspections and allowing a certain replacement as an optional action for the material type inspection for certain airplanes. We are proposing this supplemental NPRM to detect and correct fatigue cracking of the lower forward corner reveal of the number 3 MEDs, which could lead to the door escape slide departing the airplane when the door is opened and the slide is deployed, and consequent injuries to passengers and crew using the door escape slide during an emergency evacuation.

DATES: We must receive comments on this supplemental NPRM by June 16, 2008.

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

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

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

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Ivan Li, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 917–6437; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2007–29227; Directorate Identifier 2007–NM–100–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We issued a notice of proposed rulemaking (NPRM) (the ''original NPRM'') to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to certain Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–300, 747–400, 747–400D, and 747SR series airplanes. That original NPRM was published in the **Federal Register** on September 19, 2007 (72 FR 53498). For certain airplanes, that original NPRM proposed to require a material type inspection to determine if the lower forward corner reveal of the number 3 main entry doors (MEDs) is a casting. If the reveals are castings, that original NPRM proposed to require repetitive inspections of the reveals for cracking, and corrective action if necessary. If the reveals are not castings, that original NPRM proposed to require a detailed inspection of the reveals for a sharp edge and repetitive inspections of the reveals for cracking, and corrective action if necessary. For certain other airplanes, that original NPRM proposed to require only a detailed inspection of the reveals for a sharp edge and repetitive inspections of the reveals for cracking, and corrective action if necessary. For certain other airplanes,

that original NPRM proposed to require repetitive inspections of the reveals for cracking only, and corrective action if necessary.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comments received from the commenter.

Request To Clarify No Further Action Statement

Boeing requests that we clarify the statement ''No further action is required by this paragraph for that location only after the replacement'' specified in paragraphs (g)(1), (j)(1), (j)(2)(i), (j)(3)(i), (k)(2)(i), and (k)(2)(ii)(B) of the NPRM. Boeing suggests that we add the phrase ''with a two-piece reveal'' to the statement. Boeing states that the referenced service bulletin (Boeing Special Attention Service Bulletin 747–53–2460, Revision 1, dated February 13, 2007) gives two options for the replacement, with either a one-piece reveal or a two-piece reveal. Boeing states that only a replacement with a two-piece reveal terminates the inspections for that location.

We agree that only replacement with a two-piece reveal would terminate the inspections for that location. However, we do not agree that clarification is necessary for all paragraphs. In paragraphs (j)(2)(i), (j)(3)(i), and (k)(2)(ii)(B) of the supplemental NPRM, we specify replacing the reveal with a new or reworked two-piece reveal in accordance with Part 2 of Boeing Special Attention Service Bulletin 747–53–2460, Revision 1. We do not mention installation of a one-piece reveal as an option in these paragraphs. Part 2 of the service bulletin describes procedures for installing two-piece reveals. Therefore, in paragraphs (j)(2)(i), (j)(3)(i), and (k)(2)(ii)(B) of the supplemental NPRM where we state that no further action is required after the replacement, the replacement is the two-piece reveal replacement specified in those paragraphs. No change is necessary for paragraphs (j)(2)(i), (j)(3)(i), and (k)(2)(ii)(B) of this supplemental NPRM in regard to this issue.

Also, for paragraphs (g)(1) and (k)(2)(i) of this supplemental NPRM, we specify to repeat inspections until a new or re-worked two-piece reveal is installed. The replacement is the two-piece reveal installation specified in those paragraphs. No change is necessary for paragraphs (g)(1) and (k)(2)(i) of this supplemental NPRM in regard to this issue.

However, we have revised paragraph (j)(1) of this supplemental NPRM for clarity as suggested by the commenter.

Request To Allow Optional Action for Material Type Inspection

Boeing requests that we allow doing a replacement with a new two-piece reveal as an optional action for the material type inspection specified in paragraph (k) of the original NPRM. Boeing states that if an existing reveal is to be reworked to a two-piece reveal, the material type inspection is necessary; however, if the reveal is replaced with a new two-piece reveal, a material type inspection is not necessary. Boeing states if an operator replaces all the reveals with new two-piece reveals, the original NPRM would still require that the material type inspection be done.

We agree to allow replacing the reveal with a new two-piece reveal as an option for the reasons stated by the commenter. In addition, we have determined it is acceptable to replace the reveal with a re-worked reveal as an option to doing the material type inspection; re-worked reveals are machined from 6061 aluminum. We have revised paragraph (k) of this supplemental NPRM accordingly.

Request To Reduce Compliance Time in Paragraph (j)(1) of the Original NPRM

Boeing requests that we reduce the compliance time ''before the accumulation of another 10,000 flight cycles on the lower forward corner reveal'' to '' before the accumulation of 10,000 flight cycles on the lower forward corner reveal since new (for Group 2 airplanes) or since replacement (for Group 1 Configuration 2 airplanes).'' Boeing states that the first inspection should be at 1,500 flight cycles and then the interval should be 6,000 flight cycles.

We agree with the commenter that the next repeat inspection after the initial inspection done in accordance with paragraph (j) of the supplemental NPRM should be reduced. We intended to match the compliance times specified in the service bulletin but the compliance times in the service bulletin are unclear. Figure 16 of the service bulletin specifies a compliance time of ''10,000 flight cycles after the reveal was last replaced'' but does not refer to a compliance time of 10,000 flight cycles on the reveal since new. In addition, the commenter gives conflicting statements. The commenter's statement that the interval should be 6,000 flight cycles after the first 1,500 flight cycle inspection conflicts with its statement that the compliance time should be revised to state 10,000 flight cycles on the reveal since new or replaced. We have revised paragraph (j)(1) to reduce the compliance time as follows: Before the accumulation of 10,000 flight cycles on the lower forward corner reveal since new, or within 6,000 flight cycles after doing the inspection required by paragraph (j) of this AD, whichever occurs later.

In addition, we have revised paragraphs (g)(2)(ii), (j)(2)(ii), (j)(3)(ii), and (k)(2)(ii)(C) of the supplemental NPRM to clarify the 10,000-flight-cycle compliance time is on the replacement reveal instead of since replacement of the reveal.

Request To Revise Reference

Boeing requests that we revise the reference for doing the detailed inspection specified in paragraph (j)(1) of the original NPRM. Boeing states that instead of doing the detailed inspection as specified in paragraph (j) of the original NPRM, the paragraph should specify doing the detailed inspection in accordance with Part 5 of the service bulletin. Boeing notes that paragraph (j) refers to paragraphs (h) and (i) of the original NPRM for compliance times. Boeing contends that because paragraphs (h) and (i) include a compliance time of ''before the accumulation of 1,500 total flight cycles'' operators may interpret that the inspection interval is 1,500 flight cycles.

We disagree with the commenter's assertion that the compliance time interval can be interpreted as 1,500 flight cycles because the compliance time is specified in paragraph (j)(1) of the supplemental NPRM and the reference to paragraph (j) of the supplemental NPRM is for the details of how to do the inspection. However, we have revised paragraph (j)(1) of the supplemental NPRM for clarity. Although the commenter suggests pointing to Part 5 of the service bulletin for doing the inspection, Part 5 of the service bulletin refers to Part 8 of the service bulletin for doing the inspection. Therefore, we have revised paragraph (j)(1) of the supplemental NPRM to refer directly to Part 8 of the service bulletin. We have also revised paragraph (j)(1) of the supplemental NPRM to refer to paragraph (j)(3) of the supplemental NPRM for doing corrective action if any cracking is found.

In addition, we have revised paragraphs (g)(2)(ii), (j)(2)(ii), (j)(3)(ii), and (k)(2)(ii)(C) of the supplemental NPRM to clarify the references for doing the inspections.

FAA's Determination and Proposed Requirements of the Supplemental NPRM

We are proposing this supplemental NPRM because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design. Certain changes described above expand the scope of the original NPRM. As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this supplemental NPRM.

Costs of Compliance

There are about 715 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs for U.S. operators to comply with this supplemental NPRM.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Inspections	4	$80	$320, per inspection cycle	119	$38,080, per inspection cycle.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Boeing: Docket No. FAA–2007–29227; Directorate Identifier 2007–NM–100–AD.

Comments Due Date

(a) We must receive comments by June 16, 2008.

Affected ADs

(b) Certain requirements of this AD terminate certain requirements of AD 2007–12–11, amendment 39–15089.

Applicability

(c) This AD applies to Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–300, 747–400, 747–400D, and 747SR series airplanes, certificated in any category, as identified in Boeing Special Attention Service Bulletin 747–53–2460, Revision 1, dated February 13, 2007, except airplanes that have been converted to an all-cargo configuration. The requirements of this AD also become applicable at the time when a converted airplane operating in an all-cargo configuration is converted back to a passenger or passenger/cargo configuration.

Unsafe Condition

(d) This AD results from reports of cracking and/or a sharp edge in the lower forward corner reveal of the number 3 main entry doors (MEDs). We are issuing this AD to detect and correct fatigue cracking of the lower forward corner reveal of the number 3 MEDs, which could lead to the door escape slide departing the airplane when the door is opened and the slide is deployed, and consequent injuries to passengers and crew using the door escape slide during an emergency evacuation.

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.

Service Bulletin Reference

(f) The term ''service bulletin,'' as used in this AD, means the Accomplishment Instructions of Boeing Special Attention Service Bulletin 747–53–2460, Revision 1, dated February 13, 2007.

Actions for Group 3 Airplanes

(g) For airplanes identified as Group 3 airplanes in the service bulletin: Before the accumulation of 10,000 total flight cycles, or within 1,000 flight cycles after the effective date of this AD, whichever occurs later, do a detailed inspection for cracking of the lower forward corner reveals in accordance with Part 8 of the service bulletin.

(1) If no cracking is found, repeat the inspection thereafter at intervals not to exceed 6,000 flight cycles until a new or reworked two-piece reveal is installed in accordance with Part 2 of the service bulletin. No further action is required by this paragraph for that location only after the replacement.

Note 1: For the purpose of this AD, a one-piece machined aluminum reveal may be reworked into a two-piece reveal in accordance with Part 7 of the service bulletin after it was verified to be crack free and without a sharp edge in accordance with Part 5 of the service bulletin, or after it was confirmed to be crack free in accordance with Part 5 of the service bulletin and reworked to remove a sharp edge in accordance with Part 6 of the service bulletin.

(2) If cracking is found, do the replacement specified in paragraph (g)(2)(i) or (g)(2)(ii) of this AD.

(i) Before further flight, replace the reveal with a new or reworked two-piece reveal in accordance with Part 2 of the service bulletin. No further action is required by this paragraph for that location only after the replacement.

(ii) Before further flight, replace the reveal with a new or reworked one-piece machined aluminum reveal without a sharp edge in accordance with Part 3 of the service bulletin. Before the accumulation of 10,000 flight cycles on the replacement reveal since new, do the inspection for cracking specified in Part 8 of the service bulletin and repeat the inspection thereafter at intervals not to exceed 6,000 flight cycles until a new or reworked two-piece reveal is installed in accordance with Part 2 of the service bulletin. If any cracking is found during any inspection required by this paragraph, before further flight, do the action specified in paragraph (g)(2) of this AD. No further action is required by this paragraph for that location only after the replacement with a two-piece reveal.

Note 2: For the purpose of this AD, a one-piece machined aluminum reveal with a sharp edge may be reworked into a one-piece machined aluminum reveal without a sharp edge in accordance with Part 6 of the service bulletin after it is confirmed to be crack free in accordance with Part 5 of the service bulletin. After the sharp edge is removed, the one-piece machined aluminum reveal without a sharp edge may be further reworked into a two-piece reveal in accordance with Part 7 of the service bulletin.

Actions for Group 2 Airplanes and Group 1, Configuration 2 Airplanes

(h) For airplanes identified as Group 2 airplanes in the service bulletin: Before the accumulation of 1,500 total flight cycles, or within 1,000 flight cycles after the effective date of this AD, whichever occurs later, do the inspection specified in paragraph (j) of this AD.

(i) For airplanes identified as Group 1, Configuration 2 airplanes in the service bulletin: Within 1,500 flight cycles after the lower forward corner reveal was last replaced or 1,000 flight cycles after the effective date of this AD, whichever occurs later, do the inspection specified in paragraph (j) of this AD.

(j) At the applicable times specified in paragraphs (h) and (i) of this AD: Do a detailed inspection of the lower forward corner reveals for cracking and a sharp edge in accordance with Part 5 of the service bulletin.

(1) If no cracking and no sharp edge are found, before the accumulation of 10,000 flight cycles on the lower forward corner reveal since new, or within 6,000 flight cycles after doing the inspection required by paragraph (j) of this AD, whichever occurs later, do the detailed inspection for cracking in accordance with Part 8 of the service bulletin and inspect thereafter at intervals not to exceed 6,000 flight cycles, until a new or reworked two-piece reveal is installed in accordance with Part 2 of the service bulletin. If any cracking is found during any inspection required by this paragraph, before further flight, do the action specified in paragraph (j)(3) of this AD. No further action is required by this paragraph for that location only after the replacement with a two-piece reveal.

(2) If no cracking is found but a sharp edge is found, do the action specified in paragraph (j)(2)(i) or (j)(2)(ii) of this AD.

(i) Before further flight, replace the lower forward corner reveal with a new or reworked two-piece reveal, in accordance with Part 2 of the service bulletin. No further action is required by this paragraph for that location only after the replacement.

(ii) Before further flight, replace the reveal with a new or reworked one-piece machined aluminum reveal without a sharp edge, in accordance with Part 3 of the service bulletin. Before the accumulation of 10,000 flight cycles on the replacement reveal since new, do the inspection for cracking in accordance with Part 8 of the service bulletin and inspect thereafter at intervals not to exceed 6,000 flight cycles, until a new or reworked two-piece reveal is installed in accordance with Part 2 of the service bulletin. If any cracking is found during any inspection required by this paragraph, before further flight, do the action required by paragraph (j)(3) of this AD. No further action is required by this paragraph for that location only after the replacement with a two-piece reveal.

(3) If cracking is found, do the action specified in paragraph (j)(3)(i) or (j)(3)(ii) of this AD.

(i) Before further flight, replace the reveal with a new or reworked two-piece reveal, in accordance with Part 2 of the service bulletin. No further action is required by this paragraph for that location only after the replacement.

(ii) Before further flight, replace the lower forward corner reveal with a new or reworked one-piece machined aluminum reveal without a sharp edge, in accordance with Part 3 of the service bulletin. Before the accumulation of 10,000 flight cycles on the replacement reveal since new, do the inspection for cracking in accordance with Part 8 of the service bulletin and inspect thereafter at intervals not to exceed 6,000 flight cycles, until a new or reworked two-piece reveal is installed in accordance with Part 2 of the service bulletin. If any cracking is found during any inspection required by this paragraph, before further flight, do the action required by paragraph (j)(3) of this AD. No further action is required by this paragraph for that location only after the replacement with a two-piece reveal.

Actions for Group 1, Configuration 1 Airplanes

(k) For airplanes identified as Group 1, Configuration 1 airplanes in the service bulletin: Before the accumulation of 1,500 total flight cycles, or within 1,000 flight cycles after the effective date of this AD, whichever occurs later, do a material type inspection to determine if the lower forward corner reveals are castings, in accordance with the service bulletin. As an alternative to the material type inspection, replacing a reveal with a new or reworked two-piece lower forward corner reveal in accordance with Part 2 of the service bulletin is terminating action for the requirements of this paragraph for that location only.

(1) If the forward corner reveal is not a casting: Before further flight, do the actions specified in paragraph (j) of this AD except for the inspection for a sharp edge.

(2) If the forward corner reveal is a casting: Before the accumulation of 7,000 total flight cycles, within 2,000 flight cycles after the effective date of this AD, or within 3,000 flight cycles since the forward corner reveal was inspected in accordance with Boeing Service Bulletin 747–53A2378, whichever is latest, do a detailed inspection for cracking of the lower forward corner reveal, in accordance with Part 1 of Boeing Special Attention Service Bulletin 747–53–2460, Revision 1, dated February 13, 2007.

(i) If no cracking is found: Repeat the inspection specified in paragraph (k)(2) of this AD thereafter at intervals not to exceed 3,000 flight cycles until a new or reworked two-piece lower forward corner reveal is installed in accordance with Part 2 of the service bulletin. No further action is required by this paragraph for that location only after the replacement.

(ii) If cracking is found: Do the actions specified in paragraph (k)(2)(ii)(A), (k)(2)(ii)(B), or (k)(2)(ii)(C) of this AD.

(A) Before further flight, weld repair the reveal in accordance with Part 4 of the service bulletin. Repeat the inspection specified in paragraph (k)(2) of this AD thereafter at intervals not to exceed 3,000 flight cycles until a new or reworked two-piece reveal is installed in accordance with Part 2 of the service bulletin. No further action is required by this paragraph for that location only after the replacement.

(B) Before further flight, replace the reveal with a new or reworked two-piece reveal, in accordance with Part 2 of the service bulletin. No further action is required by this paragraph for that location only after the replacement.

(C) Before further flight, replace the reveal with a new or reworked one-piece machined aluminum reveal without a sharp edge, in accordance with Part 3 of the service bulletin. Before the accumulation of 10,000 flight cycles on the replacement reveal since new, do the inspection for cracking in accordance with Part 8 of the service bulletin and inspect thereafter at intervals not to exceed 6,000 flight cycles, until a new or reworked two-piece reveal is installed in accordance with Part 2 of the service bulletin. If any cracking is found during any inspection required by this paragraph, before further flight, do the action required by paragraph (k)(2)(ii)(B) or (k)(2)(ii)(C) of this AD. No further action is required by this paragraph for that location only after the replacement with a two-piece reveal.

Operator's Equivalent Procedure

(l) Although Step 5 of Figure 8 of the service bulletin specifies that operators may accomplish the actions in accordance with ''an operator's equivalent procedure,'' this AD requires operators to accomplish Step 5 of Figure 8 in accordance with only the procedures specified in Boeing Standard Overhaul Practices Manual (SOPM) 20–20–

02 as given in the service bulletin. An ''operator's equivalent procedure'' may be used only if approved as an alternative method of compliance in accordance with paragraph (p) of this AD.

Compliance With AD 2007–12–11, Amendment 39–15089, for MED 3 Only

(m) Accomplishment of the applicable repair required by this AD constitutes compliance with the repair of the lower forward corner casting (reveal) of the number 3 MEDs only, as required by paragraph (q)(2)(ii) of AD 2007–12–11 (which specifies the actions be done in accordance with Boeing Service Bulletin 747–53A2378, Revision 1, dated March 10, 1994; or Boeing Service Bulletin 747–53A2378, Revision 3, dated August 11, 2005). Accomplishment of the actions of this AD does not terminate the remaining requirements of AD 2007–12–11.

Parts Installation

(n) As of the effective date of this AD, no person may install a door lower forward corner reveal made of cast 356 aluminum on any airplane at a location specified by this AD.

(o) As of the effective date of this AD, no person may install a door lower forward corner reveal made of machined 6061 aluminum on any airplane at a location specified by this AD, unless it has been confirmed/reworked to be without a sharp edge in accordance with the service bulletin.

Alternative Methods of Compliance (AMOCs)

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

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

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

Issued in Renton, Washington, on May 7, 2008.

Michael J. Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–11474 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0584; Directorate Identifier 2007–NM–315–AD]

RIN 2120–AA64

Airworthiness Directives; Dornier Model 328–100 Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede an existing airworthiness directive (AD) that applies to all AvCraft Dornier Model 328–100 airplanes. The existing AD currently requires modifying the electrical wiring of the fuel pumps; installing insulation at the hand flow control and shut-off valves, and other components of the environmental control system; and installing markings at fuel wiring harnesses. The existing AD also requires revising the Airworthiness Limitations section (ALS) of the Instructions for Continued Airworthiness to incorporate new inspections of the fuel tank system. This proposed AD would replace the flight-hour-based threshold for conducting certain initial inspections, with an 8-year threshold. This proposed AD results from fuel system reviews conducted by the manufacturer. We are proposing this AD to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

DATES: We must receive comments on this proposed AD by June 23, 2008.

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

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

For service information identified in this AD, contact 328 Support Services GmbH, P.O. Box 1252, D–82231 Wessling, Germany.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Tom Groves, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1503; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–0584; Directorate Identifier 2007–NM–315–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

On June 15, 2005, we issued AD 2005–13–24, amendment 39–14161 (70 FR 36470, June 24, 2005), for all AvCraft Dornier Model 328–100 airplanes. That AD requires modifying the electrical wiring of the fuel pumps; installing insulation at the flow control and shut-off valves, and other components of the environmental control system; and installing markings at fuel wiring harnesses. That AD also requires revising the Airworthiness Limitations section (ALS) of the Instructions for Continued Airworthiness to incorporate new inspections of the fuel tank system. That AD resulted from fuel system reviews conducted by the manufacturer.

We issued that AD to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

Actions Since Existing AD Was Issued

Since we issued AD 2005–13–24, the European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has assumed responsibility for the airplane model subject to this AD, and has issued EASA Airworthiness Directive 2006–0197 [Corrected], dated July 11, 2006. The EASA airworthiness directive revises the threshold for conducting the initial inspections specified in the ALS. That threshold was originally specified in the German airworthiness directive that corresponds to AD 2005–13–24: German airworthiness directive D–2005–001, dated January 26, 2005.

Relevant Service Information

AvCraft Dornier has issued Service Bulletin SB–328–00–445, Revision 1, dated June 17, 2005. We referred to the original issue of the service bulletin, dated August 23, 2004, as the appropriate source of service information for accomplishing certain actions required by AD 2005–13–24. The procedures in Revision 1 of the service bulletin are essentially the same as those in the original issue. However, Figure 4, a wiring harness diagram, is corrected in Revision 1 of the service bulletin. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition.

We have also reviewed Section F, ''Fuel Tank System Limitations,'' of the Dornier 328 Airworthiness Limitations Document (hereafter referred to as ''the ALD''), Revision 15, dated January 15, 2005. The limitations in the document are divided into two sections as follows:

- System Code 28–00–00 (sub-tasks 28–00–00–02 and 28–00–00–03) specifies the scheduled maintenance tasks, which are detailed inspections of the outer and inner internal fuel tank harness.
- System Code 28–00–99–00 (sub-tasks 28–00–99–01, 28–00–99–02, and 28–00–99–03) specifies critical design configuration control limitations (CDCCLs).

FAA's Determination and Requirements of the Proposed AD

These airplanes are manufactured in Germany and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. As described in FAA Order 8100.14A, ''Interim Procedures for Working with the European Community on Airworthiness Certification and Continued Airworthiness,'' dated August 12, 2005, the EASA has kept the FAA informed of the situation described above. We have examined the EASA's findings, evaluated all pertinent information, and determined that we need to issue an AD for airplanes of this type design that are certificated for operation in the United States.

This proposed AD would supersede AD 2005–13–24 and would retain the requirements of the existing AD. This proposed AD would also replace the flight-hour-based threshold for conducting certain initial inspections, with a calendar-based threshold.

Costs of Compliance

This proposed AD would affect about 16 airplanes of U.S. registry. The actions that are required by AD 2005–13–24 and retained in this proposed AD take about 70 work hours per airplane, at an average labor rate of $80 per work hour. Required parts cost about $14,118 per airplane. Based on these figures, the estimated cost of the currently required actions is $315,488, or $19,718 per airplane.

The new proposed action to revise the Airworthiness Limitations section would take about 1 work hour per airplane. Based on these figures, the estimated cost of the new actions specified in this proposed AD for U.S. operators is $1,280, or $80 per airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–14161 (70 FR 36470, June 24, 2005) and adding the following new airworthiness directive (AD):

328 Support Services GmbH (Formerly Avcraft Aerospace GmbH): Docket No. FAA–2008–0584; Directorate Identifier 2007–NM–315–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by June 23, 2008.

Affected ADs

(b) This AD supersedes AD 2005–13–24.

Applicability

(c) This AD applies to all Dornier Model 328–100 airplanes, certificated in any category.

Unsafe Condition

(d) This AD results from fuel system reviews conducted by the manufacturer. We are issuing this AD to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

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.

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

Restatement of the Requirements of AD 2005–13–24

Modification and Installations

(f) Within 12 months after July 29, 2005 (the effective date of AD 2005–13–24), do the actions in Table 1 of this AD in accordance with the Accomplishment Instructions of AvCraft Service Bulletin SB–328–00–445, dated August 23, 2004; or Revision 1, dated June 17, 2005.

TABLE 1.—REQUIREMENTS

Do the following actions—	By accomplishing all the actions specified in—
(1) Modify the electrical wiring of the left-hand and right-hand fuel pumps	Paragraph 2.B(1) of the service bulletin.
(2) Install insulation at the left-hand and right-hand flow control and shut-off valves, and other components of the environmental control system.	Paragraph 2.B(2) of the service bulletin.
(3) Install markings at fuel wiring harnesses	Paragraph 2.B(3) of the service bulletin.

Revision to Airworthiness Limitations

(g) Within 12 months after July 29, 2005, revise the Airworthiness Limitations section of the Instructions for Continued Airworthiness by inserting a copy of Dornier Temporary Revision ALD–080, dated October 15, 2003, into the Dornier 328 Airworthiness Limitations Document. Thereafter, except as provided in paragraphs (i) and (j) of this AD, no alternative inspection intervals may be approved for this fuel tank system.

New Requirements of This AD

Revised Initial Compliance Time

(h) For Tasks 28–00–00–02 and 28–00–00–03 (''Detailed Inspection of Outer Fuel Tank harness internal, LH/RH,'' and ''Detailed Inspection of Inner Fuel Tank harness internal, LH/RH''), as identified in Dornier Temporary Revision ALD–080, dated October 15, 2003, or Section F, ''Fuel Tank System Limitations,'' of the Dornier 328 Airworthiness Limitations Document (ALD), Revision 15, dated January 15, 2005; the initial compliance time is within 8 years after the effective date of this AD. Thereafter, except as provided by paragraphs (i) and (j) of this AD, these tasks must be accomplished at the repetitive interval specified in Section F, ''Fuel Tank System Limitations,'' of the Dornier 328 ALD, Revision 15, dated January 15, 2005.

Later Revisions of the ALD

(i) After accomplishing the actions specified in paragraphs (g) and (h) of this AD, no alternative inspections, inspection intervals, or CDCCLs may be used unless the inspections, intervals, or CDCCLs are part of a later revision of Section F, ''Fuel Tank System Limitations,'' of the Dornier 328 ALD, Revision 15, dated January 15, 2005, that is approved by the Manager, International Branch, ANM–116, FAA, or the European Aviation Safety Agency (EASA) (or its delegated agent); or unless the inspections, intervals, or CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (j) of this AD.

Alternative Methods of Compliance (AMOCs)

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

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

Related Information

(k) EASA airworthiness directive 2006–0197 [Corrected], dated July 11, 2006, also addresses the subject of this AD.

Issued in Renton, Washington, on May 14, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–11469 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2008–0229, Formerly CGD05–07–021]

RIN 1625–AA09

Drawbridge Operation Regulations; Atlantic Intracoastal Waterway (AIWW), Albemarle and Chesapeake Canal, Chesapeake, VA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking; withdrawal.

SUMMARY: The Coast Guard is withdrawing its notice of proposed rulemaking concerning the proposed change to the regulations that govern the operation of the Centerville Turnpike (SR 170) Bridge, at AIWW mile 15.2, across the Albemarle and Chesapeake Canal in Chesapeake, Virginia. The requested change would have allowed the bridge to open on signal every hour on the half hour from 6:30 a.m. to 6:30 p.m., year round. The withdrawal is based on further investigation indicating that this change would not improve the schedule for both roadway and waterway users.

DATES: The proposed rule published on April 6, 2007 (72 FR 17065), is withdrawn on May 22, 2008.

ADDRESSES: The docket for this withdrawn rulemaking is available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice, call Bill H. Brazier, Bridge Management Specialist, Fifth Coast Guard District, at (757) 398–6422.

SUPPLEMENTARY INFORMATION:

Background

On April 6, 2007, we published a notice of proposed rulemaking (NPRM) entitled ''Drawbridge Operation

Regulations; Atlantic Intracoastal Waterway (AIWW), Albemarle and Chesapeake Canal, Chesapeake, VA'' in the **Federal Register** (72 FR 17065). This rulemaking would have allowed the bridge to open on signal every hour on the half hour from 6:30 a.m. to 6:30 p.m., year round.

Withdrawal

The City of Chesapeake, which owns and operates this swing-type bridge, had requested a change to the existing regulations in an effort to improve the travel for mariners to arrive at the Great Bridge (S168) Bridge across the Albemarle and Chesapeake, at AIWW mile 12.0 at Chesapeake, (approximately three miles away).

The Coast Guard conducted a lengthy and thorough investigation with both roadway and waterway users. Our investigation revealed that the proposal would not improve the transit of waterway users because it would impose possibly hazardous and unnecessary delays on slower vessels, such as sailboats and trawlers, that are probably most of the transient vessels needing openings at the bridge. Additionally, all of the comments received during the comment period were in favor of keeping the current schedule.

Authority

This action is taken under the authority of 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

Dated: May 12, 2008.

Fred M. Rosa, Jr.,

Rear Admiral, United States Coast Guard, Commander, Fifth Coast Guard District.

[FR Doc. E8–11405 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2008–0256]

RIN 1625–AA09

Drawbridge Operation Regulation; Duwamish Waterway, Seattle, WA, Schedule Change

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to modify the drawbridge operation regulation for the Spokane Street Bridge across the Duwamish Waterway, mile 0.3, in Seattle, Washington, by establishing two daily closed draw periods Monday through Friday. The change is necessary to help alleviate roadway traffic and will do so by preventing traffic stoppages on either side of the bridge during high volume traffic periods. Large vessels would be exempted from the closed draw periods.

DATES: Comments and related material must reach the Coast Guard on or before July 21, 2008.

ADDRESSES: You may submit comments identified by the Coast Guard docket number USCG–2008–0256 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Online: http://www.regulations.gov*.

(2) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(3) *Hand delivery:* Room W12–140 on the Ground Floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call Austin Pratt, Chief, Bridge Section, Waterways Management Branch, 13th Coast Guard District, telephone 206–220–7282. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided. We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see DOT's ''Privacy Act'' paragraph below.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking USCG–2008–0256, indicate the specific section of this document to which each comment applies, and give the reason for each comment. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov* at any time. Enter the docket number for this rulemaking (USCG–2008–0256) in the search box, and click ''Go>>.'' You may also visit either the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays or the 13th Coast Guard District Waterways Management Branch at 915 Second Avenue, Seattle, WA 98174–1067 between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://DocketsInfo.dot.gov*.

Public Meeting

We do not now plan to hold a public meeting, but you may submit a request for one to the Docket Management Facility at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that a public meeting would aid this rulemaking, we will hold one at a time and place

announced by a later notice in the **Federal Register**.

Background and Purpose

The proposed rule would enable the Seattle Department of Transportation (SDOT), the owner of the Spokane Street Bridge, to keep the draws of that bridge in the closed position in order to help alleviate roadway traffic Monday through Friday from 7 a.m. to 9 a.m. and from 4 p.m. to 6 p.m., with the proviso that openings shall be provided at any time for vessels of 5000 gross tons or more.

The operating regulations currently in effect for the Spokane Street Bridge are found at 33 CFR 117. The drawspan currently operates under the general requirements of 33 CFR 117.1041 such that it must open on signal for the passage of vessels at any time. The bridge was constructed in 1991 and has never been subject to any special operating regulations.

The bridge provides a minimum of 44 feet of vertical clearance above mean high water (elevation 10.47) in the closed position, but 55 feet for the central 130 feet of span width. The horizontal clearance is 250 feet. In the fully open position the bridge allows unlimited vertical clearance over the channel.

For a 12-month period in 2007 and 2008 the draw opened for vessels an average of about 10 times per month in each of the morning and afternoon periods proposed for closure. The draw opens approximately 2 or 3 times per week in each of the periods proposed for closure. Openings for vessels occur around the clock at this bridge with no frequency pattern apparent to particular times. Since 1996 the total monthly openings have ranged from 103 to 360. The traffic transiting through the bridge opening includes oceangoing ships, container barges, derrick barges and other large vessels that require the drawspan to open. Most openings are for commercial vessels. Single openings sometimes accommodate several vessels. Based on drawspan records, this proposed rule will reduce the current number of openings up to 60 percent in the periods proposed for closure. Vessels of 5000 gross tons or more would still be accommodated during the periods proposed for closure.

The draw is open for periods of 10 to 17 minutes for the above cited operations. Roadway traffic then takes several minutes to regain the flow that existed prior to the draw opening. SDOT studied a period from July through September of 2007 during which the average weekday daily traffic ranged from 10,900 to 11,400 vehicles. Of this number, 500 to 1500 vehicles or more are passing over the bridge in each period proposed for closure. Halted vehicle counts are not available.

Discussion of Proposed Rule

The Coast Guard proposes to amend 33 CFR 117.1041 by renumbering the current paragraphs (a)(1) and (2) to (a)(2) and (3), respectively, and adding a new paragraph (a)(1) establishing that ''the draw of the Spokane Street Bridge, mile 0.3, need not open for vessels of less than 5000 gross tons from 7 a.m. to 9 a.m. and 4 p.m. to 6 p.m., Monday through Friday.'' The periods of closure will help alleviate road traffic by preventing traffic stoppages on either side of the bridge during high volume traffic periods.

Regulatory Evaluation

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

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. We reached this conclusion based on the fact that most vessel operators can plan their passage in accordance with the closed periods to minimize any impact on their activities.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which might be small entities: the owners or operators of vessels needing to transit under the Spokane Street Bridge between 7 a.m. to 9 a.m. and 4 p.m. to 6 p.m., Monday through Friday. The economic impact on these entities will not be significant, however, because the closures are limited to two, two-hour periods each day, Monday through Friday, most vessel operators can plan their passage in accordance with the closed periods to minimize impact on their activities.

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

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Austin Pratt, Chief, Bridge Section, Waterways Management Branch, 13th Coast Guard District, at (206) 220–7282. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

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

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is not likely to have a significant effect on the human environment because it simply promulgates the operating regulations or procedures for drawbridges. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 117

Bridges.

Words of Issuance and Proposed Regulatory Text

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

2. In (§ 117.1041 redesignate paragraphs(a)(1) and (a)(2) as (a)(2) and (a)(3) and add a new paragraph (a)(1) to read as follows:

§ 117.1041 Duwamish Waterway.

(a) * * *

(1) The draw of the Spokane Street Bridge, mile 0.3, need not open for vessels of less than 5,000 gross tons from 7 a.m. to 9 a.m. and from 4 p.m. to 6 p.m., Monday through Friday.

* * * * *

Dated: April 30, 2008.

J.P. Currier,

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

[FR Doc. E8–11439 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[USCG–2008–0218]

RIN 1625–AA00

Safety Zones: Annual Events Requiring Safety Zones in the Captain of the Port Detroit Zone

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes establishment of safety zones for annual events in the Captain of the Port Detroit zone. This proposed rule consolidates current regulations establishing safety zones for annual fireworks events in the former Captain of the Port Toledo Zone and the former Captain of the Port Detroit Zone. In addition, it adds events not previously published in Coast Guard regulations. These safety zones are necessary to protect spectators, participants, and vessels from the hazards associated with fireworks displays or other events.

DATES: Comments and related materials must reach the Coast Guard on or before June 23, 2008.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2008–0218 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Online: http://www.regulations.gov.*

(2) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(3) *Hand delivery:* Room W12–140 on the Ground Floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251.

FOR FURTHER INFORMATION CONTACT: LT Jeff Ahlgren, Waterways Management, U.S. Coast Guard Sector Detroit, 110 Mount Elliot Ave., Detroit, MI 48207; (313) 568–9580.

I. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All

comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided. We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see DOT's ''Privacy Act'' paragraph below.

A. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2008–0218), indicate the specific section of this document to which each comment applies, and give the reason for each comment. We recommend that you include your name, mailing address, and an e-mail address or other contact information in the body of your document to ensure that you can be identified as the submitter. This also allows us to contact you in the event further information is needed or if there are questions. For example, if we cannot read your submission due to technical difficulties and you cannot be contacted, your submission may not be considered. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

B. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov* at any time, click on ''Search for Dockets,'' and enter the docket number for this rulemaking (USCG–2008–0218) in the Docket ID box, and click enter. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

C. Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://DocketsInfo.dot.gov.*

SUPPLEMENTARY INFORMATION:

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to Commander, Coast Guard Sector Detroit at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

In 2005, the Coast Guard consolidated the Captain of the Port Toledo zone and the Captain of the Port Detroit zone into one zone re-defining the Captain of the Port Detroit zone. This proposed rule will consolidate the regulations found in 33 CFR 165.907, Safety Zones; Annual Fireworks Events in the Captain of the Port Detroit Zone with additional events not previously published in the CFR.

These safety zones are necessary to protect vessels and people from the hazards associated with fireworks displays or other events. Such hazards include obstructions to the waterway that may cause marine casualties and the explosive danger of fireworks and debris falling into the water that may cause death or serious bodily harm.

Discussion of Proposed Rule

The proposed rule and associated safety zones are necessary to ensure the safety of vessels and people during annual firework events in the Captain of the Port Detroit area of responsibility that may pose a hazard to the public. This new section unites all the annual Firework events in the recently consolidated COTP Detroit zone into one section of the CFR. In addition, there are several events that are added and some events that have been deleted in this new section.

This proposed rule would add the following events to those already occurring annually: (1) Roostertail Fireworks (land); (2) Roostertail Fireworks (barge); (3) Celebrate America Fireworks; (4) Target Fireworks; (5) Washington Township Summerfest Fireworks; (6) Au Gres City Fireworks; (7) The Old Club Fireworks; (8) Alpena Fireworks; (9) Put-In-Bay Fourth of July Fireworks; (10) Gatzeros Fireworks; (11) Harrisville Fireworks; (12) Harbor Beach Fireworks; (13) Trenton Rotary Roar on the River Fireworks; (14) Nautical Mile Venetian Festival Fireworks; (15) Cheeseburger Festival Fireworks; (16) Detroit International Jazz Festival Fireworks; (17) Marine City Maritime Festival Fireworks; (18) Schoenith Family Foundation Fireworks; (19) Toledo Country Club Memorial Celebration and Fireworks; (20) Luna Pier Fireworks Show; (21) Toledo Country Club 4th of July Fireworks; (22) Pharm Lights Up The Night Fireworks; (23) Perrysburg/Maumee 4th of July Fireworks; (24) Lakeside July 4th Fireworks; (25) Catawba Island Club Fireworks; (26) Red, White and Blues Bang Fireworks; (27) Huron Riverfest Fireworks; (28) Kellys Island, Island Fest Fireworks; (29) Riverfest at the International Docks; (30) Rossford Labor Day Fireworks; (31) Lakeside Labor Day Fireworks; and (32) Catawba Island Club Fireworks.

The following events in the proposed rule already exist in the current regulation and are only being reorganized in this proposed rule: (33) Bay-Rama Fishfly Festival Fireworks; (34) Jefferson Beach Marina Fireworks; (35) Sigma Gamma Association Fireworks; (36) Lake Erie Metropark Fireworks; (37) City of St. Clair Fireworks; (38) Oscoda Township Fireworks; (39) Port Austin Fireworks; (40) City of Wyandotte Fireworks; (41) Grosse Point Farms Fireworks; (42) Caseville Fireworks; (43) Algonac Pickerel Tournament Fireworks; (44) Port Sanilac Fireworks; (45) St. Clair Shores Fireworks; (46) Port Huron 4th of July Fireworks; (47) Grosse Point Yacht Club 4th of July Fireworks; (48) Lexington Independence Festival Fireworks; (49) City of Ecorse Water Festival Fireworks; (50) Grosse Isle Yacht Club Fireworks; (51) Trenton Fireworks; (52) Belle Maer Harbor 4th of July Fireworks; (53) Tawas City 4th of July Fireworks; and (54) Venetian Festival Boat Parade and Fireworks.

The proposed safety zones will be enforced only immediately before, during, and after events that pose hazard to the public, and only upon notice by the Captain of the Port.

The Captain of the Port Detroit will notify the public that the zones in this proposal are or will be enforced by all appropriate means to the affected segments of the public including publication in the **Federal Register** as practicable, in accordance with 33 CFR 165.7(a). Such means of notification may also include, but are not limited to Broadcast Notice to Mariners or Local Notice to Mariners. The Captain of the

Port will issue a Broadcast Notice to Mariners notifying the public when enforcement of the safety zone established by this section is cancelled.

All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated representative. Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Detroit, or his designated representative. The Captain of the Port or his designated representative may be contacted via VHF Channel 16.

Regulatory Evaluation

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

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation is unnecessary.

The Coast Guard's use of these safety zones will be periodic, of short duration, and designed to minimize the impact on navigable waters. These safety zones will only be enforced immediately before, during, and after the time the events occur. Furthermore, these safety zones have been designed to allow vessels to transit unrestricted to portions of the waterways not affected by the safety zones. The Coast Guard expects insignificant adverse impact to mariners from the activation of these safety zones.

Small Entities

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

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

This proposed rule would affect the following entities, some of which might be small entities: The owners of operators of vessels intending to transit or anchor in the areas designated as safety zones in subparagraphs (1) through (49) during the dates and times the safety zones are being enforced.

These safety zones would not have a significant economic impact on a substantial number of small entities for the following reasons: This proposed rule would be in effect for short periods of time, and only once per year, per zone. The safety zones have been designed to allow traffic to pass safely around the zone whenever possible and vessels will be allowed to pass through the zones with the permission of the Captain of the Port.

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

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact LT Jeff Ahlgren, Waterways Management, U.S. Coast Guard Sector Detroit, 110 Mount Elliot Ave., Detroit, MI 48207; (313) 568–9580. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

Environment

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

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

2. Add § 165.941 to read as follows:

§ 165.941 Safety Zones; Annual Fireworks Events in the Captain of the Port Detroit Zone.

(a) *Safety Zones.* The following areas are designated Safety zones:

(1) *Roostertail Fireworks (barge), Detroit, MI:* (i) *Location:* All waters of the Detroit River within a 300-foot radius of the fireworks launch site located at position 42°21′16.67″ N, 082°58′20.41″ W. (NAD 83). This area is located between Detroit and Belle Isle near the Roostertail restaurant.

(ii) *Expected date:* One evening during the third week in July. The exact dates and times for this event will be determined annually.

(2) *Washington Township Summerfest Fireworks, Toledo, OH:* (i) *Location:* All waters of the Ottawa River within a 600-foot radius of the fireworks launch site located at position 41°43′29″ N, 083°28′47″ W (NAD 83). This area is located at the Fred C. Young Bridge, Toledo, OH.

(ii) *Expected date:* One evening during the last week in June or the first week in July. The exact dates and times for this event will be determined annually.

(3) *Au Gres City Fireworks, Au Gres, MI:* (i) *Location:* All waters of Saginaw Bay within a 700-foot radius of the fireworks launch site located at position 44°1.4′ N, 083°40.4′ W (NAD 83). This area is located at the end of the pier near the end of Riverside Drive in Au Gres, MI.

(ii) *Expected date:* One evening during the last week in June or the first week in July. The exact dates and times for this event will be determined annually.

(4) *The Old Club Fireworks, Harsens Island, MI:* (i) *Location:* All waters of Lake St. Clair within an 850-foot radius of the fireworks launch site located at position 42°32.4′ N, 082°40.1′ W (NAD 83). This area is located near the southern end of Harsens Island, MI.

(ii) *Expected date:* One evening during the last week in June or the first week in July. The exact dates and times for this event will be determined annually.

(5) *Alpena Fireworks, Alpena, MI:* (i) *Location:* All waters of Lake Huron within an 800-foot radius of the fireworks launch site located at position 45°2.7′ N, 083°26.8′ W (NAD 83). This area is located near the end of Mason Street, South of State Avenue, in Alpena, MI.

(ii) *Expected date:* One evening during the last week of June or the first week of July. The exact dates and times for this event will be determined annually.

(6) *Put-In-Bay Fourth of July Fireworks, Put-In-Bay, OH:* (i) *Location:* All waters of Lake Erie within a 1000-foot radius of the fireworks launch site located at position 41°39.7′ N, 082°48.0′ W (NAD 83). This area is located in Put-In-Bay Harbor.

(ii) *Expected date:* One evening during the first week of July. The exact dates and times for this event will be determined annually.

(7) *Gatzeros Fireworks, Grosse Point Park, MI:* (i) *Location:* All waters of Lake St. Clair within a 300-foot radius of the fireworks launch site located at position 42°22.6′ N, 082°54.8′ W (NAD 83). This area is located near Grosse Point Park, MI.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(8) *Harrisville Fireworks, Harrisville, MI:* (i) *Location:* All waters of Lake Huron within a 450-foot radius of the fireworks launch site located at position 44°39.7′ N, 083°17.0′ W (NAD 83). This area is located at the end of the break wall at the Harrisville harbor in Harrisville, MI.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(9) *Harbor Beach Fireworks, Harbor Beach, MI:* (i) *Location:* All waters of Lake Huron within a 700-foot radius of the fireworks launch site located at position 4°50.8′ N, 082°38.6′ W (NAD 83). This area is located at the end of the railroad pier east of the end of State Street in Harbor Beach, MI.

(ii) *Expected date:* One evening during the second week in July. The exact dates and times for this event will be determined annually.

(10) *Trenton Rotary Roar on the River Fireworks, Trenton, MI:* (i) *Location:* All waters of the Detroit River within a 420-foot radius of the fireworks launch site located at position 42°7.8′ N, 083°10.4′ W (NAD 83). This area is located between Grosse Ile and Elizabeth Park in Trenton, MI.

(ii) *Expected date:* One evening during the third week in July. The exact dates and times for this event will be determined annually.

(11) *Nautical Mile Venetian Festival Fireworks, St. Clair Shores, MI:* (i) *Location:* All waters of Lake St. Clair within a 210-foot radius of the fireworks launch site located at position 42°28.2′ N, 082°52.5′ W (NAD 83). This area is located near Jefferson Beach Marina in St. Clair Shores, MI.

(ii) *Expected date:* One evening during the second week in August. The exact dates and times for this event will be determined annually.

(12) *Cheeseburger Festival Fireworks, Caseville, MI:* (i) *Location:* All waters of Lake Huron within a 300-foot radius of the fireworks launch site located at position 43°56.9′ N, 083°17.2′ W (NAD 83). This area is located near the break wall located at Caseville County Park, Caseville, MI.

(ii) *Expected date:* One evening during the second week in August. The exact dates and times for this event will be determined annually.

(13) *Detroit International Jazz Festival Fireworks, Detroit, MI:* (i) *Location:* All waters of the Detroit River within a 560-foot radius of the fireworks launch site located at position 42°19.6′ N, 83°2.6′ W (NAD 83). This area is located in the Detroit River between Cobo Hall and the GM Headquarters in Detroit, MI.

(ii) *Expected date:* One evening during the last week in August or the first week in September. The exact dates and times for this event will be determined annually.

(14) *Marine City Maritime Festival Fireworks, Marine City, MI:* (i) *Location:* All waters of the St. Clair River within an 840-foot radius of the fireworks launch site located at position 42°42.9′ N, 082°29.1′ W (NAD 83). This area is located east of Marine City.

(ii) *Expected date:* One evening during the third week in September. The exact dates and times for this event will be determined annually.

(15) *Schoenith Family Foundation Fireworks, Detroit, MI:* (i) *Location:* All waters of the Detroit River, within a 210-foot radius of the fireworks launch site located at position 42°21.2′ N, 82°58.4′ W. (NAD 83). This area is located between Detroit and Belle Isle.

(ii) *Expected date:* One evening during the third week in September. The exact dates and times for this event will be determined annually.

(16) *Toledo Country Club Memorial Celebration and Fireworks, Toledo, OH:* (i) *Location:* All waters of the Maumee River, within a 250-yard radius of the fireworks launch site located on shore at position 41°35′12.58″ N, 83°36′16.58″ W. (NAD 83). This area is located at the Toledo Country Club's 18th Green and encompasses the fireworks launch site.

(ii) *Expected date:* One evening during the last week in May. The exact dates and times for this event will be determined annually.

(17) *Luna Pier Fireworks Show, Luna Pier, MI:* (i) *Location:* All waters of Lake Erie, within a 300-yard radius of the fireworks launch site located at position 41°48′32″ N, 83°26′23″ W. (NAD 83). This area is located at the Clyde E. Evens Municipal Pier.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(18) *Toledo Country Club 4th of July Fireworks, Toledo, OH:* (i) *Location:* All waters of the Maumee River, within a 250-yard radius of the fireworks launch site located on shore at position 41°35′12.58″ N, 83°36′16.58″ W. (NAD 83). This area is located at the Toledo Country Club's 18th Green and encompasses the fireworks launch site.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(19) *Pharm Lights Up The Night Fireworks, Toledo, OH:* (i) *Location:* All waters of the Maumee River, within a 300-yard radius of the fireworks launch site located at position 41°38′35″ N, 83°31′54″ W. (NAD 83). This position is located at the bow of the museum ship SS WILLIS B. BOYER.

(ii) *Expected date:* One day or evening during the first or second weeks in July. The exact dates and times for this event will be determined annually.

(20) *Perrysburg/Maumee 4th of July Fireworks, Perrysburg, OH:* (i) *Location:* All waters of the Maumee River, within an 850-foot radius of the fireworks launch site located at position 41°33′27″ N, 83°38′59″ W. (NAD 83). This position is located at the Perrysburg/Maumee Hwy 20 Bridge.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(21) *Lakeside July 4th Fireworks, Lakeside, OH:* (i) *Location:* All waters of Lake Erie, within a 560-foot radius of the fireworks launch site located at position 41°32′52″ N, 82°45′03″ W. (NAD 83). This position is located at the Lakeside Association Dock.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(22) *Catawba Island Club Fireworks, Catawba Island, OH:* (i) *Location:* All waters of Lake Erie, within a 300-yard radius of the fireworks launch site located at position 41°34′20″ N, 82°51′18″ W. (NAD 83). This position is located at the northwest end of the Catawba Cliffs Harbor Light Pier.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(23) *Red, White and Blues Bang Fireworks, Huron, OH:* (i) *Location:* All waters of the Huron River, within a 300-yard radius of the fireworks launch site located at position 41°23′29″ N, 82°32′55″ W. (NAD 83). This position is located at the Huron Ore Docks in Huron, OH.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(24) *Huron Riverfest Fireworks, Huron, OH:* (i) *Location:* All waters of Huron Harbor, within a 350-foot radius of the fireworks launch site located at the Huron Ore Docks at position 41°23′38″ N, 82°32′59″ W. (NAD 83).

(ii) *Expected date:* One evening during the second week in July. The exact dates and times for this event will be determined annually.

(25) *Kellys Island, Island Fest Fireworks, Kellys Island, OH:* (i) *Location:* All waters of Lake Erie, within a 300-yard radius of the fireworks launch site located at position 41°35′43″ N, 82°43′30″ W. (NAD 83). This position is located at the old Neuman Boat Line Dock.

(ii) *Expected date:* One evening during the third or fourth weeks in July. The exact dates and times for this event will be determined annually.

(26) *Riverfest at the International Docks, Toledo, OH:* (i) *Location:* All waters of the Maumee River, extending from the bow of the museum ship SS WILLIS B. BOYER (41°38′35″ N, 83°31′54″ W), then north/north-east to the south end of the City of Toledo Street (41°38′51″ N, 83°31′50″ W), then south-west to the red nun buoy #64 (41°38′48″ N, 83°31′58″ W), then south/south-east back to the point of origin at the bow of the museum ship SS WILLIS B. BOYER. (NAD 83).

(ii) *Expected date:* One evening during the first week in September. The exact dates and times for this event will be determined annually.

(27) *Rossford Labor Day Fireworks, Rossford, OH:* (i) *Location:* All waters of the Maumee River, within a 350-yard radius of the fireworks launch site located at position 41°36′58″ N, 83°33′56″ W. (NAD 83). This position is located at Veterans Memorial Park.

(ii) *Expected date:* One evening during the first week in September. The

exact dates and times for this event will be determined annually.

(28) *Lakeside Labor Day Fireworks, Lakeside, OH:* (i) *Location:* All waters of Lake Erie, within a 560-foot radius of the fireworks launch site located at position 41°32′52″ N, 82°45′03″ W. (NAD 83). This position is located at the Lakeside Association Dock.

(ii) *Expected date:* One evening during the first week in September. The exact dates and times for this event will be determined annually.

(29) *Catawba Island Club Fireworks, Catawba Island, OH:* (i) *Location:* All waters of Lake Erie, within a 300-yard radius of the fireworks launch site located at position 41°34′20″ N, 82°51′18″ W. (NAD 83). This position is located at the northwest end of the Catawba Cliffs Harbor Light Pier.

(ii) *Expected date:* One evening during the first week in September. The exact dates and times for this event will be determined annually.

(30) *Bay-Rama Fishfly Festival Fireworks, New Baltimore, MI:*

(i) *Location:* All waters of Lake St. Clair-Anchor Bay, off New Baltimore City Park, within a 300-yard radius of the fireworks launch site located at position 42°41′ N, 082°44′ W (NAD 83).

(ii) *Expected date:* One evening during the first week in June. The exact dates and times for this event will be determined annually.

(31) *Lake Erie Metropark Fireworks, Gibraltar, MI:* (i) *Location:* All waters of Lake Erie, off Lake Erie Metro Park, within a 300-yard radius of the fireworks launch site located at position 42°03′ N, 083°11′ W (NAD 83). This position is located off the Brownstown Wave pool area.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(32) *City of St. Clair Fireworks, St. Clair, MI:* (i) *Location:* All waters off the St. Clair River near St. Clair City Park, within a 300-yard radius of the fireworks launch site located at position 42°49′ N, 082°29′ W (NAD 83).

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(33) *Oscoda Township Fireworks, Oscoda, MI:* (i) *Location:* All waters of Lake Huron, off the DNR Boat Launch near the mouth of the Au Sable River within a 300-yard radius of the fireworks launch site located at position 44°19′ N, 083°25′ W (NAD 83).

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(34) *Port Austin Fireworks, Port Austin, MI:* (i) *Location:* All waters of Lake Huron, off the Port Austin break wall within a 300-yard radius of the fireworks launch site located at position 42°03′ N, 082°40′ W. (NAD 83).

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(35) *City of Wyandotte Fireworks, Wyandotte, MI:* (i) *Location:* All waters of the Detroit River, off the break wall between Oak and Van Alstyne St., within a 300-yard radius of the fireworks launch site located at position 42°12′ N, 083°09′ W. (NAD 83).

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(36) *Grosse Pointe Farms Fireworks, Grosse Point Farms, MI:*

(i) *Location:* All waters of Lake St. Clair, within a 300-yard radius of the fireworks barge located at position 42°23′ N, 082°52′ W. (NAD 83). This position is located 300 yards east of Grosse Pointe Farms, MI.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(37) *Caseville Fireworks, Caseville, MI:* (i) *Location:* All waters of Saginaw Bay, within a 300-yard radius of the fireworks launch site located at position 43°56.9′ N, 083°17.2′ W. (NAD 83). This position is located off the Caseville break wall.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(38) *Algonac Pickerel Tournament Fireworks, Algonac, MI:* (i) *Location:* All waters of the St. Clair River, within a 300-yard radius of the fireworks barge located at position 41°37′ N, 082°32′ W. (NAD 83). This position is located between Algonac and Russel Island, St. Clair River-North Channel.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(39) *Port Sanilac Fireworks, Port Sanilac, MI:* (i) *Location:* All waters of Lake Huron within a 300-yard radius of the fireworks launch site located at position 43°25′ N, 082°31′ W. (NAD 83). This position is located at the South Harbor Break wall in Port Sanilac.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(40) *St. Clair Shores Fireworks, St. Clair Shores, MI:* (i) *Location:* All waters of Lake St. Clair within a 300-yard radius of the fireworks barge located at position 42°32′ N, 082°51′ W. (NAD 83). This position is located 1000 yards east of Veteran's Memorial Park, St. Clair Shores.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(41) *Port Huron 4th of July Fireworks, Port Huron, MI:* (i) *Location:* All waters of the Black River within a 300-yard radius of the fireworks barge located at position 42°58′ N, 082°25′ W. (NAD 83). This position is located 300 yards east of 223 Huron Ave., Black River.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(42) *Grosse Point Yacht Club 4th of July Fireworks, Grosse Point Shores, MI:* (i) *Location:* All waters of Lake St. Clair within a 300-yard radius of the fireworks barge located at position 42°25′ N, 082°52′ W. (NAD 83). This position is located 400 yards east of the Grosse Point Yacht Club seawall, Lake St. Clair.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(43) *Lexington Independence Festival Fireworks, Lexington, MI:* (i) *Location:* All waters of Lake Huron within a 300-yard radius of the fireworks barge located at position 43°13′ N, 082°30′ W. (NAD 83). This position is located 300 yards east of the Lexington break wall, Lake Huron.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(44) *City of Ecorse Water Festival Fireworks, Ecorse, MI:* (i) *Location:* All waters of the Detroit River within a 300-yard radius of the fireworks barge located at position 41°14′ N, 083°09′ W. (NAD 83). This position is located in the Ecorse Channel at the northern end of Mud Island.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(45) *Grosse Isle Yacht Club Fireworks, Grosse Isle, MI:* (i) *Location:* All waters of the Detroit River within a 300-yard radius of the fireworks launch site located at position 42°05′ N, 083°09′ W. (NAD 83). This position is located in front of the Grosse Isle Yacht Club.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(46) *Trenton Fireworks, Trenton, MI:* (i) *Location:* All waters of the Detroit River within a 300-yard radius of the fireworks barge located at position 42°09′ N, 083°10′ W. (NAD 83). This position is located 200 yards east of Trenton in the Trenton Channel near Trenton, MI.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(47) *Belle Maer Harbor 4th of July Fireworks, Harrison Township, MI:* (i) *Location:* All waters of Lake St. Clair within a 300-yard radius of the fireworks barge located at position 42°36′ N, 082°47′ W. (NAD 83). This position is located 400 yards east of Belle Maer Harbor, Lake St. Clair.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(48) *Tawas City 4th of July Fireworks, Tawas, MI:* (i) *Location:* All waters of Lake Huron within a 300-yard radius of the fireworks launch site located at position 44°13′ N, 083°30′ W. (NAD 83). This position is located off the Tawas City Pier.

(ii) *Expected date:* One evening during the first week in July. The exact dates and times for this event will be determined annually.

(49) *Venetian Festival Boat Parade and Fireworks, St. Clair Shores, MI:* (i) *Location:* All waters of Lake St. Clair within a 300-yard radius of the fireworks barge located at position 42°28′ N, 082°52′ W. (NAD 83). This position is located 600 yards off Jefferson Beach Marina, Lake St. Clair.

(ii) *Expected date:* One evening during the second week in August. The exact dates and times for this event will be determined annually.

(b) *Definitions.* The following definitions apply to this section: (1) *Designated Representative* means any Coast Guard commissioned, warrant, or petty officer designated by the Captain of the Port Detroit to monitor a safety zone, permit entry into the zone, give legally enforceable orders to persons or vessels within the zones, and take other actions authorized by the Captain of the Port.

(2) *Public vessel* means vessels owned, chartered, or operated by the United States, or by a State or political subdivision thereof.

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

(2)(i) These safety zones are closed to all vessel traffic, except as may be permitted by the Captain of the Port Detroit or his designated representative.

(ii) All persons and vessels must comply with the instructions of the Coast Guard Captain of the Port or his designated representative.

(iii) Upon being hailed by the U.S. Coast Guard by siren, radio, flashing light or other means, the operator of a vessel shall proceed as directed.

(3)(i) All vessels must obtain permission from the Captain of the Port or his designated representative to enter, move within, or exit the safety zone established in this section when this safety zone is enforced.

(ii) Vessels and persons granted permission to enter the safety zone must obey all lawful orders or directions of the Captain of the Port or a designated representative.

(iii) While within a safety zone, all vessels must operate at the minimum speed necessary to maintain a safe course.

(d) *Exemption.* Public vessels, as defined in paragraph (b) of this section, are exempt from the requirements in this section.

(e) *Waiver.* For any vessel, the Captain of the Port Detroit or his designated representative may waive any of the requirements of this section, upon finding that operational conditions or other circumstances are such that application of this section is unnecessary or impractical for the purposes of public or environmental safety.

(f) *Notification.* The Captain of the Port Detroit will notify the public that the safety zones in this section are or will be enforced by all appropriate means to the affected segments of the public including publication in the **Federal Register** as practicable, in accordance with 33 CFR 165.7(a). Such means of notification may also include, but are not limited to Broadcast Notice to Mariners or Local Notice to Mariners. The Captain of the Port will issue a Broadcast Notice to Mariners notifying the public when enforcement of the safety zone established by this section is cancelled.

§ 165.907 [Removed]

3. Remove and reserve § 165.907.

Dated: May 7, 2008.

P.W. Brennan,

Captain, U.S. Coast Guard, Captain of the Port Detroit.

[FR Doc. E8–11408 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2008–0115–200806; FRL–8570–1]

Approval and Promulgation of Implementation Plans South Carolina: Interstate Transport of Pollution

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the South Carolina Department of Health and Environmental Control (SC DHEC), on June 25, 2007, pursuant to the requirements of section 110(a)(2)(D)(i) of the Clean Air Act (CAA). Section 110(a)(2)(D)(i) of the CAA requires each state to submit a SIP revision within three years of a revision to the national ambient air quality standards (NAAQS). The SIP revision must include provisions adequate to address emissions that may adversely affect another state's air quality through interstate transport of the revised NAAQS pursuant to the CAA. On July 18, 1997, EPA published revisions to the NAAQS for ozone and fine particulate matter ($PM_{2.5}$). SC DHEC's June 25, 2007, SIP revision addresses the elements required by section 110(a)(2)(D)(i) of the CAA with regard to ozone and $PM_{2.5}$, and as a result, it is approvable.

DATES: Comments must be received on or before June 23, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2008–0115, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: Harder.Stacy@epa.gov.*
3. *Fax:* (404) 562–9019.
4. *Mail:* EPA–R04–OAR–2008–0115, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.
5. *Hand Delivery or Courier:* Stacy Harder, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official

hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R04–OAR–2008–0115. 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 through *http://www.regulations.gov* or e-mail information that you consider to be CBI or otherwise protected. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Stacy Harder of the Regulatory Development Section at the Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Ms. Harder's telephone number is (404) 562–9042. She can also be reached via electronic mail at *harder.stacy@epa.gov.* For further information relating to the South Carolina SIP, please contact Ms. Nacosta Ward. Ms. Ward can be reached at (404) 562–9140, or *ward.nacosta@epa.gov.*

Table of Contents

I. What Is the Background for EPA's Action?
II. Proposed Action
III. Statutory and Executive Order Reviews

SUPPLEMENTARY INFORMATION:

I. What Is the Background for EPA's Action?

EPA is proposing to approve a SIP revision submitted by SC DHEC on June 25, 2007. This SIP revision addresses the requirements of CAA section 110(a)(2)(D)(i). This SIP revision was public noticed on April 25, 2007, and a public hearing was held on May 30, 2007; no comments were received.

Section 110(a)(1) of the CAA requires that each state submit to EPA a SIP revision within three years after promulgation of a NAAQS. Section 110(a)(2)(D)(i) requires that the aforementioned SIP contain adequate provisions to prohibit any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will:

> (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility * * *

CAA section 110(a)(2)(D)(i)(I) and (II). The provision quoted above can be described as including four separate but related elements that an applicable SIP revision should include: (1) Provisions prohibiting a state from contributing significantly to nonattainment of the NAAQS for areas in another state; (2) provisions prohibiting interference with maintenance of the NAAQS in another state; (3) provisions prohibiting interference with measures required to meet implementation plan requirements related to prevention of significant deterioration (PSD) for any other state; and (4) provisions prohibiting interference with measures required to meet implementation plan requirements related to regional haze for any other state.

On July 18, 1997, EPA published revisions to the NAAQS for ozone (62 FR 2) and $PM_{2.5}$ (62 FR 38652). The current SIP revision by South Carolina is intended to satisfy the requirements of Section 110(a)(2)(D)(i) of the CAA for the 1997 ozone and $PM_{2.5}$ NAAQS. As is described below, the current SIP revision by South Carolina adequately addresses all four sub-elements of section 110(a)(2)(D)(i) of the CAA, and is therefore approvable.

The first two sub-elements of section 110(a)(2)(D)(i) of the CAA regard the prohibition of one state from interfering with maintenance or attainment of a NAAQS in another state. These first two sub-elements of Section 110(a)(2)(D)(i) were met by South Carolina's SIP revision regarding EPA's Clean Air Interstate Rule (CAIR). EPA promulgated CAIR on May 12, 2005 (70 FR 25162). CAIR requires certain states to reduce emissions of sulfur dioxide (SO_2) and nitrogen oxides (NO_X) that significantly contribute to, and interfere with maintenance of, the NAAQS for $PM_{2.5}$ and/or ozone in any downwind state, thus addressing the two revised NAAQS pollutants at issue as well as the issue of interstate interference with maintenance or attainment of the NAAQS. CAIR established state budgets for SO_2 and NO_X and requires states to submit SIP revisions that implement these budgets in states that EPA concluded did contribute to nonattainment in other states.

South Carolina is a CAIR-State for both ozone and $PM_{2.5}$ (see 60 FR 25162, May 12, 2005). Because South Carolina adopted CAIR, EPA has already concluded that South Carolina can meet its section 110(a)(2)(D)(i) obligations to address the significant contribution and interference with maintenance requirements by complying with the CAIR requirements. EPA published a direct final action approving the South Carolina CAIR SIP revision for its allocation methodology on October 9, 2007 (72 FR 57257). In addition, South Carolina remains covered by the CAIR Federal Implementation Plan (FIP) for the remainder of its trading program. Therefore, EPA has determined that through the above actions, South Carolina has adequately addressed the first two sub-elements of the CAA section 110(a)(2)(D)(i) requirements (i.e.,

to prevent emissions that contribute significantly to other state's nonattainment of, or interfere with the maintenance of, the NAAQS).

The third CAA section 110(a)(2)(D)(i) sub-element addressed by South Carolina in its June 25, 2007, submittal relates to the prevention of significant deterioration (PSD) program. For ozone and $PM_{2.5}$, South Carolina has met its obligation by confirming that major sources in the State are currently subject to PSD and/or Nonattainment New Source Review programs that implement the 1997 8-hour ozone standard and the $PM_{2.5}$ standard.

The fourth CAA section 110(a)(2)(D)(i) sub-element regards visibility. South Carolina addressed this fourth sub-element through its SIP submittal describing its Regional Haze Implementation Plan. This revision was submitted to EPA on December 17, 2007.

II. Proposed Action

EPA is now proposing to approve South Carolina's CAA section 110(a)(2)(D)(i) SIP revision submitted on June 25, 2007. EPA has reviewed South Carolina's 110(a)(2)(D)(i) revision and has found that it is consistent with the relevant CAA requirements as discussed above.

III. Statutory and Executive Order Reviews

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

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

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

List of Subjects in 40 CFR Part 52

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

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

Dated: May 9, 2008.

J.I. Palmer, Jr.,

Regional Administrator, Region 4.

[FR Doc. E8–11484 Filed 5–21–08; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register

Vol. 73, No. 100

Thursday, May 22, 2008

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

May 19, 2008.

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) 720–8958.

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.

Animal Plant and Health Inspection Service

Title: Self Certification Medical Statement.

OMB Control Number: 0579–0196.

Summary of Collection: The United States Department of Agriculture is responsible for ensuring consumers that food and farm products are moved from producer to consumer in the most efficient, dependable, economical, and equitable system possible. 5 CFR Part 339 authorizes an agency to obtain medical information about the applicant's health status to assist management in making employment decisions concerning positions that have specific medical standards or physical requirements in order to determine medical/physical fitness. The Animal Plant and Health Inspection Service (APHIS) of the U.S. Department of Agriculture hires individuals each year in commodity grading and inspection positions. These positions involve arduous duties and work under conditions, around moving machinery, slippery surfaces, and high noise level noise. APHIS will collect information using the MRP–5 form (Self-Certification Medical Statement).

Need and Use of the Information: The information collected from the prospective employees assists the Marketing and Regulatory Programs officials, administrative personnel, and servicing Human Resources Offices in determining an applicant's physical fitness and suitability for employment in positions with approved medical standards and physical requirements and direct contact with meat, dairy, fresh or processed fruits and vegetables, and poultry intended for human consumption and cotton and tobacco products intended for consumer use.

Denial of the information would greatly hamper APHIS recruiting capability and adversely affect management's ability to facilitate hiring, placement, and utilization of qualified individuals into positions that have specific medical standards and physical requirements.

Description of Respondents: Individuals or households.

Number of Respondents: 600.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 100.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E8–11477 Filed 5–21–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

May 19, 2008.

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: RUS Form 87, Request for Mail List Data.

OMB Control Number: 0572–0051.

Summary of Collection: The Rural Utilities Service (RUS) is a credit agency of the U.S. Department of Agriculture. The agency makes loans (direct and guaranteed) to finance electric and telecommunications facilities in rural areas in accordance with the Rural Electrification Act of 1936, 7 U.S.C. 901 as amended, (ReAct). RUS Electric Program provides support to the vast rural American electric infrastructure. RUS' Telecommunications Program makes loans to furnish and improve telephone services and other telecommunications purposes in rural areas.

Need and Use of the Information: RUS will collect information using RUS Form 87, Request for Mail List Data. The information is used for the RUS Electric and Telephone programs to obtain the name and addresses of the borrowers' officers/board of directors and corporate officials, who are authorized to sign official documents. RUS uses the information to assure that (1) accurate, current, and verifiable information is available; (2) correspondence with borrowers is properly directed; and (3) the appropriate officials have signed the official documents submitted.

Description of Respondents: Not-for-profit institutions; Business or other for-profit.

Number of Respondents: 1,182.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 296.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E8–11481 Filed 5–21–08; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Plumas National Forest; California; Moonlight and Wheeler Fires Recovery and Restoration Project

AGENCY: Forest Service, USDA.

ACTION: Revised notice of intent to prepare an Environmental Impact Statement (EIS).

Introduction: A notice of intent to prepare an EIS for the Moonlight Fire Recovery and Restoration Project was published in the **Federal Register** on Monday, January 7, 2008 (Vol. 73, No.4, pp. 1201–1202). After scoping the Moonlight Fire and Wheeler Fire Recovery and Restoration Projects separately in December 2007, the Forest Service, Plumas National Forest, has merged the two projects together. In December 2007, the Mt. Hough Ranger District of the Plumas National Forest began the process to determine the scope (the depth and breadth) of the environmental analysis. At that time, it was anticipated that the Moonlight Fire Recovery and Restoration Project analysis would be documented in an EIS and the Wheeler Fire Recovery and Restoration Project analysis would be documented in an Environmental Assessment. From comments received it was determined to document the analysis for both projects in one EIS. The new project name is Moonlight and Wheeler Fires Recovery and Restoration Project.

SUMMARY: The USDA, Forest Service, Plumas National Forest will prepare an EIS on a proposal to harvest dead trees on approximately 15,568 acres in the Moonlight and Antelope Complex fires areas. The Moonlight and Antelope Complex fires burned about 88,000 acres between July and September 2007 on the Plumas National Forest.

DATES: The draft EIS is expected in June 2008 and the final EIS is expected in September 2008.

ADDRESSES: Send written comments to Rich Bednarski, Interdisciplinary Team Leader, Mt. Hough Ranger District, 39696 Highway 70, Quincy, CA 95971. Comments may be: (1) Mailed; (2) hand delivered between the hours of 8 a.m. to 4:30 p.m. weekdays Pacific Time; (3) faxed to (530) 283–1821; or (4) electronically mailed to: *comments-pacificsouthwest-plumas-mthough@fs.fed.us.* Please indicate the name ''Moonlight and Wheeler Fires Recovery and Restoration Project'' on the subject line of your email. Comments submitted electronically must be in Rich Text Format (.rtf), plain text format (.txt), or Word format (.doc).

FOR FURTHER INFORMATION CONTACT: Rich Bednarski, Interdisciplinary Team Leader, Mt. Hough Ranger District, 39696 Highway 70, Quincy, CA 95971. Telephone: (530) 283–7641 or electronic address: *rbednarski@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The proposed action is designed to meet the standards and guidelines for land management activities in the Plumas National Forest Land and Resource Management Plan (1988), as amended by the Herger-Feinstein Quincy Library Group (HFQLG) Final Supplemental Environmental Impact Statement (FSEIS) and Record of Decision (ROD) (1999, 2003), and as amended by the Sierra Nevada Forest Plan Amendment FSEIS and ROD (2004).

The proposed project is located in Plumas County, California, within the Mt. Hough Ranger District of the Plumas National Forest. The project is located in all or portions of: sections 13, 23–27, 34–35, T28N, R1OE; sections 13–14, 17–19, 23–24, 29–34, T28N, R11E; sections 19–20, 29–32, T28N, R12E; sections 1–2, 13–14, 23–25, T27N, R1OE; sections 2–11, 13–15, 17, 19–22, 25, 35–36, T27N, R11E; sections 5, 8, 17–20, 29–32, T27N, R12E; sections 1–5, 9–12, 14–16, 21–23, and 26–27, T26N, R12E; sections 23–29 and 31–36, T27N, R12E; and sections 19, 20, and 30, T27N, R13E; Mount Diablo Meridian.

Purpose and Need for Action

The purpose of the project would be to provide for short-term local economic benefit by creating jobs from the sale of dead merchantable trees, as well as contribute to local and regional areas with net revenues and receipts. The project would promote long term economic recovery through restoration by re-establishing forested conditions. The wood quality, volume, and value of dead trees deteriorate rapidly. The value of trees would cover the cost of their removal and possibly other activities associated with the project.

As a result of the Moonlight and Antelope Complex fires, thousands of acres burned with high vegetation burn severity resulting in deforested condition. As a result, shrub species will dominate these areas for decades and experience a delay in returning to a forested condition. The early establishment of conifers through reforestation will expedite forest regeneration.

Proposed Action

The proposed action would harvest dead conifer trees on approximately 15,568 acres using the following methods: ground based, skyline, and helicopter. Trees greater than 14 inches diameter at breast height (dbh) would be whole tree harvested on the ground-based areas.

Trees less than 14 inches dbh would be removed as biomass material on the ground-based areas. Approximately 7,517 acres would have trees less than 14 inches dbh removed as biomass material and approximately 122 acres would be removed from site preparation. Ground-based equipment would be restricted to slopes less than 35 percent, except on decomposed granitic soils where equipment would be restricted to slopes less than 25

percent. On the skyline and helicopter areas, trees greater than 16 inches dbh would be harvested. Limbs and tops in the skyline and helicopter areas would be lopped and scattered to a depth less than 18 inches in height. Skyline yarding would require one end suspension, with full suspension over intermittent or perennial streams. Dead conifers would be harvested from Riparian Habitat Conservation Areas. Equipment restriction zone widths within Riparian Habitat Conservation Areas would be established based on the stream type and steepness of the slope adjacent to the streams. Snags would be retained in snag retention areas, which are approximately ten acres in size, on approximately ten percent of the project area. Harvest activities would not occur within the snag retention areas except for operability (safety) reasons. Approximately 33 miles of temporary roads would be constructed.

Approximately 30 acres (fourteen landings) of helicopter landings would be constructed. Excess fuels on landings would be piled, a fireline constructed around the piles, and the piles burned. Following completion of the project, the temporary roads and landings would be subsoiled, reforested, and closed. Approximately 17,474 acres would be reforested with conifer seedlings in widely spaced clusters to emulate a naturally established forest. The areas would be reforested with a mixture of native species.

The Moonlight and Antelope Complex fires impacted twenty-five California spotted owl Protected Activity Centers (PACs). According to the Sierra Nevada Forest Plan Amendment FSEIS and ROD (2004), page 37, after a stand-replacing event, the habitat conditions are evaluated within a 1.5 mile radius around the activity center to identify opportunities for re-mapping the PAC. If there is insufficient suitable habitat for designating a PAC within the 1.5 mile radius, the PAC may be removed from the network.

Possible Alternatives

In addition to the proposed action, a no action alternative would be analyzed. Additional alternatives may be developed and analyzed throughout the environmental analysis.

Lead and Cooperating Agencies

The USDA, Forest Service is the lead agency for this proposal.

Responsible Official

Alice B. Carlton, Plumas National Forest Supervisor, PO Box 11500, Quincy, CA 95971.

Nature of Decision To Be Made

The decision to be made is whether to: (1) Implement the proposed action; (2) meet the purpose and need for action through some other combination of activities; or, (3) take no action at this time.

Scoping Process

Scoping is conducted to determine the significant issues that will be addressed during the environmental analysis. Comments that were received for the Moonlight Fire Recovery and Restoration Project and the Wheeler Fire Recovery and Restoration Project will be considered in the combined analysis. Additional comments on the Moonlight and Wheeler Fires Recovery and Restoration Project will also be considered. Scoping comments will be most helpful if received by May 23, 2008.

Permits or Licenses Required

An Air Pollution Permit and a Smoke Management Plan are required by local agencies.

Early Notice of Importance of Public Participation in Subsequent Environmental Review

A draft EIS will be prepared for comment. The comment period on the draft EIS will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft EISs must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft EIS stage, but that are not raised until after completion of the final EIS, may be waived or dismissed by the courts. *City of Rangoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45 day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final EIS.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft EIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft EIS or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909,15, Section 21.

Dated: May 13, 2008.

Mark Beaulieu,

Acting Forest Supervisor.

[FR Doc. E8–11222 Filed 5–21–08; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

(A–821–801)

Solid Urea from the Russian Federation: Final Results of Antidumping Duty New–Shipper Review and Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On December 26, 2007, the Department of Commerce (the Department) published the preliminary results of a new–shipper review of the antidumping duty order on solid urea from the Russian Federation. The solid urea subject to this review was produced and exported by MCC EuroChem (EuroChem). The period of review (POR) is July 1, 2006, through December 31, 2006. Based on our analysis of comments received, we have not made any changes to our calculation of EuroChem's antidumping–duty margin. Therefore, our final results are identical to our published preliminary results. The final results are listed below in the section entitled ''Final Results of the New–Shipper Review''. Furthermore, we are rescinding the concurrent administrative review of the antidumping duty order because it covers the same entry that we reviewed

in the context of the new–shipper review.

EFFECTIVE DATE: May 22, 2008.

FOR FURTHER INFORMATION CONTACT: Thomas Schauer or Minoo Hatten, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0410 and (202) 482–1690, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 26, 2007, the Department published the preliminary results of the new–shipper review of the antidumping duty order on solid urea from the Russian Federation. See *Solid Urea From the Russian Federation: Preliminary Results and Extension of Time Limit for Final Results of the Antidumping Duty New–Shipper Review*, 72 FR 72988 (December 26, 2007) (*Preliminary Results*). On February 27, 2008, we issued a post–preliminary analysis decision memorandum and margin recalculations concerning our sales–below-cost investigation of EuroChem.

On March 21, 2008, the Ad Hoc Committee of Domestic Nitrogen producers (the petitioner) withdrew its sales–below-cost allegation and requested that the Department terminate the cost investigation. On March 24, 2008, EuroChem submitted a letter arguing that the Department should not terminate the cost investigation. After considering all comments, on March 27, 2008, we terminated the cost investigation. See Memorandum from Minoo Hatten to Laurie Parkhill dated March 27, 2008.

On March 28, 2008, we received a case brief from the petitioner. On April 4, 2008, we received a rebuttal brief from EuroChem. Although the petitioner and EuroChem had requested a hearing, both parties withdrew their requests for a hearing on April 15, 2008.

Scope of the Order

The merchandise under review is solid urea, a high–nitrogen content fertilizer which is produced by reacting ammonia with carbon dioxide. The product is currently classified under the Harmonized Tariff Schedules of the United States (HTSUS) item number 3102.10.00.00. Previously such merchandise was classified under item number 480.3000 of the Tariff Schedules of the United States. Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise 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, dated May 15, 2008, which is hereby adopted by this notice. A list of the issues which the parties have raised and to which we have responded is attached to this notice as an appendix. Parties can find a complete discussion of all issues raised and corresponding recommendations in this public memorandum, which is on file in Import Administration's Central Records Unit, Room 1117 of the main Department building. In addition, a complete version of the Decision Memorandum is available on the Internet at http://ia.ita.doc.gov/frn/index.html. The paper copy and electronic version of the Decision Memorandum are identical in content.

Changes Since the Post–Preliminary Results

Because we terminated the cost investigation, the only change we have made has been to revert to the margin calculations we used for the published preliminary results in which we did not perform the cost test. See *Preliminary Results*, 72 FR at 72991, and the preliminary results analysis memorandum for EuroChem dated December 17, 2007, for our calculation of EuroChem's margin.

Final Results of the New–Shipper Review

We determine that the weighted–average margin on solid urea from the Russian Federation produced and exported by EuroChem for the period July 1, 2006, through December 31, 2006, is zero percent.

Rescission of Administrative Review

On August 20, 2007, we initiated an administrative review of the antidumping duty order on solid urea from Russia for the period July 1, 2006, through June 30, 2007. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 72 FR 48613 (August 20, 2007).

Because we have analyzed the entry covered by the administrative review in the context of this concurrent new–shipper review, we are rescinding the administrative review.

Assessment Rates

The Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries in accordance with 19 CFR 351.212. The Department will issue assessment instructions for EuroChem directly to CBP 15 days after the date of publication of these final results.

Because we found no margin for the U.S. sale subject to this new–shipper review, we will instruct CBP to liquidate the appropriate entry without regard to antidumping duties.

Cash–Deposit Requirements

The following cash–deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of the new–shipper review, as provided by section 751(a)(2)(C) of the Act: 1) the cash–deposit rate for subject merchandise both manufactured and exported by EuroChem will be zero; 2) for previously reviewed or investigated companies not listed above, the cash–deposit rate will continue to be the company–specific rate published for the most recent period; 3) if the exporter is not a firm covered in this review or the original less–than-fair–value (LTFV) investigation but the manufacturer is, the cash–deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and 4) the cash–deposit rate for all other manufacturers or exporters will continue to be 64.93 percent, the all–others rate established in the LTFV investigation. See *Urea From the Union of Soviet Socialist Republics; Final Determination of Sales at Less Than Fair Value*, 52 FR 19557 (May 26, 1987). These cash–deposit requirements shall remain in effect until further notice.

Notification to Importers

This notice also 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.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to an administrative protective order of their responsibility concerning the disposition of proprietary information disclosed under such an order in accordance with 19 CFR 351.305(a)(3). Timely notification of the return or destruction of administrative–protective-order materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an administrative protective order is a sanctionable violation.

We are issuing and publishing this notice in accordance with sections 751(a)(2)(B) and 777(i)(1) of the Act.

Dated: May 15, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

Appendix

Comment 1: Qualification as a New Shipper

Comment 2: Bona–Fide Transaction

[FR Doc. E8–11520 Filed 5–21–08; 8:45 am]

BILLING CODE 3510–DR–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–549–822, A–552–802

Certain Frozen Warmwater Shrimp from Thailand and the Socialist Republic of Vietnam: Notice of Extension of Time Limit for the Final Results of the Second Administrative Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: May 22, 2008.

FOR FURTHER INFORMATION CONTACT: Irina Itkin (Thailand) and Irene Gorelik (Vietnam), AD/CVD Operations, Offices 2 and 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, DC 20230; telephone (202) 482–0656 and (202) 482–6905, respectively.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On March 6, 2008, the Department of Commerce (''the Department'') published notices for the preliminary results of the administrative reviews of the antidumping duty orders on certain frozen warmwater shrimp from Thailand and the Socialist Republic of Vietnam (''Vietnam''), covering the period February 1, 2006, through January 31, 2007. *See Certain Frozen Warmwater Shrimp From Thailand: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 12088 (March 6, 2008); and *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Preliminary Partial Rescission and Final Partial Rescission of the Second Administrative Review*, 73 FR 12127 (March 6, 2008). The final results for these administrative reviews are currently due no later than July 7, 2008, the next business day after 120 days from the date of publication of the preliminary results of review.

EXTENSION OF TIME LIMIT FOR THE FINAL RESULTS

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act''), requires theDepartment issue the final results of an administrative review within 120 days after the date on which the preliminary results are published. If it is not practicable to complete the review within that time period, section 751(a)(3)(A) of the Act allows the Department to extend the deadline for the final results to a maximum of 180 days after the date on which the preliminary results are published.

With respect to shrimp from Thailand, the Department requires additional time to properly consider the numerous and complex issues raised by interested parties in their case briefs. Similarly, with respect to shrimp from Vietnam, the Department requires additional time to consider the issues raised in case briefs from multiple interested parties, including the calculation of the dumping margins and the separate–rates status for numerous non–mandatory companies.

Thus, it is not practicable to complete these reviews within the original time limit. Therefore, the Department is extending the time limit for completion of the final results of these reviews by 60 days, in accordance with section 751(a)(3)(A) of the Act. The final results are now due no later than September 2, 2008.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: May 15, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–11511 Filed 5–21–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–821]

Notice of Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review: Polyethylene Retail Carrier Bags From Thailand

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: May 22, 2008.

FOR FURTHER INFORMATION CONTACT: Dmitry Vladimirov, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0665.

Background

At the request of interested parties, the Department of Commerce (the Department) initiated an administrative review of the antidumping duty order on polyethylene retail carrier bags from Thailand for the period August 1, 2006, through July 31, 2007. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 72 FR 54428, 54429 (September 25, 2007). On March 25, 2008, we published in the **Federal Register** a notice extending the due date for the completion of these preliminary results of review from May 2, 2008, to July 1, 2008. See *Notice of Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review: Polyethylene Retail Carrier Bags from Thailand,* 73 FR 15724 (March 25, 2008).

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department to make a preliminary determination within 245 days after the last day of the anniversary month of an order for which a review is requested and a final determination within 120 days after the date on which the preliminary determination is published. If it is not practicable to complete the review within these time periods, section 751(a)(3)(A) of the Act allows the Department to extend the time limit for the preliminary determination to a

maximum of 365 days after the last day of the anniversary month.

We determine that it is not practicable to complete the preliminary results of this review by the current deadline of July 1, 2008. We require additional time to analyze supplemental questionnaire responses with respect to a number of cost issues in this administrative review. Therefore, in accordance with section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2), we are extending the time period for issuing the preliminary results of this review to September 2, 2008.[1]

This notice is published in accordance with sections 751(a)(3)(A) and 777(i)(1) of the Act.

Dated: May 19, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–11519 Filed 5–21–08; 8:45 am]

BILLING CODE 3510–DS–P

[1] The 365th day after the last day of the anniversary month is Saturday, August 30, 2008, and the following Monday, September 1, 2008, is a federal holiday (Labor Day). It is the Department's long-standing practice to issue a determination the next business day when the statutory deadline falls on a weekend, federal holiday, or any other day when the Department is closed. See *Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

DEPARTMENT OF COMMERCE

International Trade Administration

Notice of Scope Rulings

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: May 22, 2008.

SUMMARY: The Department of Commerce (''Department'') hereby publishes a list of scope rulings completed between January 1, 2008, and March 31, 2008. In conjunction with this list, the Department is also publishing a list of requests for scope rulings and anticircumvention determinations pending as of March 31, 2008. We intend to publish future lists after the close of the next calendar quarter.

FOR FURTHER INFORMATION CONTACT: Juanita H. Chen, AD/CVD Operations, SEC Office, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, DC 20230; telephone: 202–482–1904.

SUPPLEMENTARY INFORMATION:

Background

The Department's regulations provide that the Secretary will publish in the **Federal Register** a list of scope rulings on a quarterly basis. See 19 C.F.R. 351.225(o). Our most recent notification of scope rulings was published on February 20, 2008. *See Notice of Scope Rulings*, 73 FR 9293 (February 20, 2008). This current notice covers all scope rulings and anticircumvention determinations completed by Import Administration between January 1, 2008, and March 31, 2008, inclusive, and it also lists any scope or anticircumvention inquiries pending as of March 31, 2008. As described below, subsequent lists will follow after the close of each calendar quarter.

Scope Rulings Completed Between January 1, 2008, and March 31, 2008:

People's Republic of China

A–570–901: Lined Paper Products from the People's Republic of China

Requestor: Davis Group of Companies Corp.; padfolios typically manufactured and bound in leather or simulated leather, including features such as business card holders, ID windows, paper files, pockets and pen holders, in addition to the inclusion of a single paper writing pad, are not within the scope of the antidumping duty order; February 21, 2008.

Multiple Countries

A–549–821: Polyethylene Retail Carrier Bags from Thailand; A–557–813: Polyethylene Retail Carrier Bags from Malaysia; A–570–886: Polyethylene Retail Carrier Bags from the People's Republic of China

Requestor: DMS Holdings, Inc.; certain MABIS Healthcare hospital bags (biohazard disposal bag nos. 75–860–010, 75–860–080, 75–864–080; isolation bag no. 75–850–000; patient set–up bag nos. 75–833–000, 75–842–000, 75–970–550, 75–973–550, 75–979–550; personal belongings bag nos. 75–010–850, 75–011–850, 75–013–850, 75–014–850, 75–019–850, 75–032–850, 75–033–850, 75–036–850, 75–037–850, 75–038–850, 75–046–850, 75–047–850, 75–075–850, 75–105–850, 75–109–850, 75–110–850, 75–111–850, 75–117–850, 75–118–850, 75–120–850, 75–834–000, 75–838–000, 75–839–000, 75–844–000, 75–845–000, 75–847–000; kit packing bag nos.75–801–000, 75–802–000, 75–803–000, 75–804–000, 75–862–000, 75–863–000, 75–865–000) are not within the scope of the antidumping duty orders; January 8, 2008.

Anticircumvention Determinations Completed Between January 1, 2008, and March 31, 2008:

None.

Scope Inquiries Terminated Between January 1, 2008, and March 31, 2008:

None.

Anticircumvention Inquiries Terminated Between January 1, 2008, and March 31, 2008:

None.

Scope Inquiries Pending as of March 31, 2008:

Germany

A–428–801: Ball Bearings and Parts Thereof from Germany

Requestor: Petree & Stoudt Associates, Inc.; whether certain textile machinery components are within the scope of the antidumping duty order; requested January 24, 2008; initiated March 19, 2008.

Italy

A–475–703: Granular Polytetrafluoroethylene Resin from Italy

Requestor: Petitioner, E.I. DuPont de Nemours & Company; whether imports of Polymist[reg] feedstock produced by the respondent Solvay Solexis, Inc. and Solvay Solexis S.p.A. are within the scope of the antidumping duty order; requested August 18, 2006; initiated October 2, 2006; preliminary ruling July 2, 2007.

People's Republic of China

A–570–502: Iron Construction Castings from the People's Republic of China

Requestor: A.Y. McDonald Mfg. Co.; whether cast iron lids and bases independently sourced from the PRC for its ''Arch Pattern'' and ''Minneapolis Pattern'' curb boxes are within the scope of the antidumping duty order; requested April 2, 2007.

A–570–827: Cased Pencils from the People's Republic of China

Requestor: Walgreen Co.; whether the ''Artskills™ Draw & Sketch Kit'' is within the scope of the antidumping duty order; requested May 25, 2007.

A–570–827: Cased Pencils from the People's Republic of China

Requestor: Walgreen Co.; whether the ''Artskills™ Stencil Kit'' is within the scope of the antidumping duty order; requested May 25, 2007.

A–570–827: Cased Pencils from the People's Republic of China

Requestor: The Smencil Company; whether its not yet scent applied newspaper pencils are within the scope of the antidumping duty order; requested July 5, 2007.

A–570–864: Pure Magnesium in Granular Form from the People's Republic of China

Requestor: ESM Group Inc.; whether atomized ingots are within the scope of the antidumping duty order; original scope ruling rescinded and vacated April 18, 2007[1]; initiated April 18, 2007.

A–570–866: Folding Gift Boxes from the People's Republic of China

Requestor: Footstar; whether certain boxes for business cards and forms are within the scope of the antidumping duty order; requested April 26, 2007.

A–570–866: Folding Gift Boxes from the People's Republic of China

Requestor: Hallmark Cards, Inc.; whether its ''FunZip'' gift presentation is within the scope of the antidumping duty order; requested June 1, 2007.

A–570–868: Folding Metal Tables and Chairs from the People's Republic of China

Requestor: Ignite USA, LLC; whether the VIKA Twofold 2–in–1 Workbench/Scaffold is within the scope of the antidumping duty order; requested January 2, 2008.

A–570–875: Non–Malleable Cast Iron Pipe Fittings from the People's Republic of China

Requestor: Taco Inc.; whether black cast iron flange, green ductile iron flange and cast iron ''Twin Tee'' are within the scope of the antidumping duty order; requested September 6, 2007.

A–570–882: Refined Brown Aluminum Oxide from the People's Republic of China

Requestor: 3M Company; whether certain semi–friable and heat–treated, specialty aluminum oxides are within the scope of the antidumping duty order; requested September 19, 2006; initiated January 17, 2007.

A–570–886: Polyethylene Retail Carrier Bags from the People's Republic of China

Requestor: Majestic International; whether certain polyethylene gift bags (UPC codes starting with 8–51603- and ending with: 00002–3, 00004–7, 00140–2, 00141–9, 00142–6, 00041–2, 00040–5, 00052–8, 00059–7, 00066–5, 00068–9, 00071–9, 00072–6, 00075–7, 00076–4, 00092–4, 00093–1, 00094–8, 00098–6, 00131–0, 00132–7, 00133–4, 00144–0, 00145–7, 00152–5, 00153–2, 00155–6, 00156–3, 00160–0, 00163–1, 00165–5, 00166–2, 00175–4, 00176–1, 00181–5, 00183–9, 00226–3, 00230–0, 00231–7, 00246–1, 00251–5, 00252–2, 00253–9, 00254–6, 00255–3, 00256–0, 00257–7, 00259–1, 00260–7, 00262–1, 00263–8, 00300–0, 00301–7, 00302–4, 00303–1, 00305–5, 00306–2, 00307–9, 00308–6, 00309–3, 00350–5, 00351–2, 00352–9, 00353–6, 00354–3, 00355–0, 00356–7, 00357–4, 00358–1) are within the scope of the antidumping duty order; requested June 2, 2007.

A–570–886: Polyethylene Retail Carrier Bags from the People's Republic of China

Requestor: Medline Industries, Inc.; whether certain hospital patient belongings bags and surgical kit bags (drawstring bags model nos. DS500C, DS400C, DONDS600, 38667, 7510, 42818, 25117, 28614, 42817; rigid handle bag model no. 26900) are within the scope of the antidumping duty order; requested June 15, 2007.

A–570–886: Polyethylene Retail Carrier Bags from the People's Republic of China

Requestor: Rayton Produce Packaging Inc.; whether its promotional bag (model # F–OPPAPEJZLG) is within the scope of the antidumping duty order; requested November 20, 2007.

A–570–890: Wooden Bedroom Furniture from the People's Republic of China

Requestor: AP Industries; whether convertible cribs (model nos. 1000–0100; 1000–0125; 1000–0160; 1000–1195/2195; 1000–2145; and 1000–2165) are within the scope of the antidumping duty order; requested June 26, 2007; initiated February 25, 2008; preliminary ruling signed March 20, 2008.

A–570–890: Wooden Bedroom Furniture from the People's Republic of China

Requestor: Dutailier Group, Inc.; whether its convertible cribs (infant crib to toddler bed; model numbers 1230C8, 3500C8, 5400C8, 5500C8, and 6200C8) are within the scope of the antidumping duty order; requested September 21, 2007; initiated February 25, 2008.

A–570–890: Wooden Bedroom Furniture from the People's Republic of China

Requestor: Armel Enterprises, Inc.; whether certain children's playroom and accent furniture are within the scope of the antidumping duty order; requested September 24, 2007.

A–570–890: Wooden Bedroom Furniture from the People's Republic of China

Requestor: Shermag Inc.; whether the Three–in–One Crib (model # 2056–48, 2110–49, and 2045–48) are within the scope of the antidumping duty order; requested November 2, 2007; initiated February 25, 2008; preliminary ruling March 20, 2008.

A–570–890: Wooden Bedroom Furniture from the People's Republic of China

Requestor: Target Corporation; whether the Shabby Chic secretary desk and mirror are within the scope of the antidumping duty order; requested November 30, 2007.

A–570–890: Wooden Bedroom Furniture from the People's Republic of China

Requestor: Zinus, Inc. and Zinus (Xiamen) Inc.; whether its Smartbox mattress support and box spring are within the scope of the antidumping duty order; requested January 22, 2008.

A–570–890: Wooden Bedroom Furniture from the People's Republic of China

Requestor: Acme Furniture Industry, Inc.; whether its mattress supports (item nos. 2833, 2834, 2835, 2836 and 2837) are within the scope of the antidumping duty order; requested February 26, 2008.

A–570–891: Hand Trucks from the People's Republic of China

Requestor: Northern Tool & Equipment Co.; whether a high–axle torch cart (item #164771) is within the scope of the antidumping duty order; requested March 27, 2007.

A–570–891: Hand Trucks from the People's Republic of China

Requestor: WelCom Products, Inc.; whether its ''miniature'' Magna Cart is within the scope of the antidumping duty order; requested August 20, 2007.

A–570–891: Hand Trucks from the People's Republic of China

Requestor: Eastman Outdoors, Inc.; whether its deer cart (model # 9930) is within the scope of the antidumping duty order; requested October 17, 2007.

A–570–891: Hand Trucks from the People's Republic of China

Requestor: WelCom Products, Inc.; whether its MCX Magna Cart is within the scope of the antidumping duty order; requested November 19, 2007.

A–570–891: Hand Trucks from the People's Republic of China

Requestor: American Lawn Mower Company; whether its Collect–It Garden

[1] *See Notice of Scope Rulings*, 72 FR 43245, 43246 (August 3, 2007).

Waste Remover is within the scope of the antidumping duty order; requested January 24, 2008.

A–570–891: Hand Trucks from the People's Republic of China

Requestor: Corporate Express Inc.; whether its luggage carts, model numbers CEB31210 and CEB31490, are within the scope of the antidumping duty order; requested January 31, 2008.

A–570–894: Certain Tissue Paper Products from the People's Republic of China

Requestor: Walgreen Co.; whether gift bags of five different sizes, consisting of a gift bag, one crinkle bow, and 1–6 sheets of tissue paper (depending on bag size) are within the scope of the antidumping duty order; requested February 6, 2008.

A–570–898: Chlorinated Isocyanurates from the People's Republic of China

Requestor: BioLab, Inc.; whether chlorinated isocyanurates originating in the People's Republic of China, that are packaged, tableted, blended with additives, or otherwise further processed in Canada by Capo Industries, Ltd., before entering the U.S., are within the scope of the antidumping duty order; requested November 22, 2006, preliminary ruling October 9, 2007.

A–570–898: Chlorinated Isocyanurates from the People's Republic of China

Requestor: BioLab, Inc.; whether chlorinated isocyanurates originating in the People's Republic of China, that are packaged, tableted, blended with additives, or otherwise further processed in Vietnam before entering the U.S., are within the scope of the antidumping duty order; requested August 15, 2007; initiated March 21, 2008.

A–570–899: Artist Canvas from the People's Republic of China

Requestor: Tara Materials, Inc.; whether artist canvas purchased in the U.S. that has been woven, primed with gesso, and cut to size in the U.S. and shipped to the PRC for assembling (*i.e.*, wrapping and stapling to the wooden frame) and returned to the U.S. are within the scope of the antidumping duty order; requested July 23, 2007.

A–570–901: Lined Paper Products from the People's Republic of China

Requestor: Lakeshore Learning Materials; whether certain printed educational materials, product numbers RR973 and RR974 (Reader's Book Log); GG185 and GG186 (Reader's Response Notebook); GG181 and GG182 (The Writer's Notebook); RR673 and RR674 (My Word Journal); AA185 and AA186 (Mi Diario de Palabras); RR630 and RR631 (Draw & Write Journal); AA786 and AA787 (My First Draw & Write Journal); AA181 and AA182 (My Picture Word Journal); GG324 and GG325 (Writing Prompts Journal); EE441 and EE442 (Daily Math Practice Journal Grades 1 - 3); EE443 and EE444 (Daily Math Practice Journal Grades 4 - 6); EE651 and EE652 (Daily Language Practice, Grades 1–3); EE653 and EE654 (Daily Language Practice Journal, Grades 4 - 6), are within the scope of the antidumping duty order; requested December 7, 2006; initiated May 7, 2007.

Multiple Countries

A–423–808 and C–423–809: Stainless Steel Plate in Coils from Belgium; A–475–822: Stainless Steel Plate in Coils from Italy; A–580–831: Stainless Steel Plate in Coils from South Korea; A–583–830: Stainless Steel Plate in Coils from Taiwan; A–791–805 and C–791–806: Stainless Steel Plate in Coils from South Africa

Requestor: Ugine & ALZ Belgium N.V.; whether stainless steel products with an actual thickness of less than 4.75 mm, regardless of nominal thickness, are within the scope of the antidumping and countervailing duty orders; requested June 8, 2007; initiated July 23, 2007.

Anticircumvention Rulings Pending as of March 31, 2008:

People's Republic of China

A–570–868: Folding Metal Tables and Chairs from the People's Republic of China

Requestor: Meco Corporation; whether the common leg table (a folding metal table affixed with cross bars that enable the legs to fold in pairs) produced in the PRC is a minor alteration that circumvents the antidumping duty order; requested October 31, 2005; initiated June 1, 2006.

A–570–894: Certain Tissue Paper Products from the People's Republic of China

Requestor: Seaman Paper Company; whether imports of tissue paper from Vietnam made out of jumbo rolls of tissue paper from the PRC are circumventing the antidumping duty order; requested July 19, 2006; initiated September 5, 2006.

Interested parties are invited to comment on the completeness of this list of pending scope and anticircumvention inquiries. Any comments should be submitted to the Deputy Assistant Secretary for AD/CVD Operations, Import Administration, International Trade Administration, 14th Street and Constitution Avenue, N.W., APO/Dockets Unit, Room 1870, Washington, DC 20230.

This notice is published in accordance with 19 C.F.R. 351.225(o).

Dated: May 15, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–11518 Filed 5–21–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XH83

Endangered Species; File No. 1576

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

ACTION: Notice; issuance of permit modification.

SUMMARY: Notice is hereby given that NMFS, Northeast Fisheries Science Center (NEFSC), 166 Water Street, Woods Hole, MA 02543–1026, has been issued a modification to scientific research Permit No. 1576.

ADDRESSES: The modification 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;

Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298; phone (978)281–9300; fax (978)281–9394.

FOR FURTHER INFORMATION CONTACT: Patrick Opay or Amy Hapeman, (301)713–2289.

SUPPLEMENTARY INFORMATION: On September 17, 2007, notice was published in the **Federal Register** (72 FR 52860) that an modification of Permit No. 1576, issued November 8, 2006 (71 FR 65471), had been requested by the above-named organization. The requested modification has been granted under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered

and threatened species (50 CFR 222–226).

The permit authorizes researchers to capture, hold, transport, measure, weigh, flipper and passive integrated transponder tag, satellite tag, collect tissue biopsy, photograph, salvage and necropsy up to 50 loggerhead (*Caretta caretta*) and 50 Kemp's ridley (*Lepidochelys kempii*) sea turtles annually through October 31, 2011. Researchers are authorized up to one accidental mortality of each species annually. Research will take place in the Atlantic Ocean off the coast of the eastern United States. The main purpose of the research is to use satellite-linked tags to obtain high-resolution information on the depth, temperature, and movement of these sea turtle species in areas coincident with Northeast fisheries.

Issuance of this modification, as required by the ESA was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of such endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: May 14, 2008.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–11388 Filed 5–21–08; 8:45 am]

BILLING CODE 3510–22–S

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11 a.m., Friday, June 6, 2008.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

FOR FURTHER INFORMATION CONTACT: Sauntia S. Warfield, 202–418–5084.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 08–1290 Filed 5–20–08; 2:43 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11 a.m., Friday, June 13, 2008.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

FOR FURTHER INFORMATION CONTACT: Sauntia S. Warfield, 202–418–5084.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 08–1292 Filed 5–20–08; 2:43 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11 a.m., Friday, June 20, 2008.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

FOR FURTHER INFORMATION CONTACT: Sauntia S. Warfield, 202–418–5084.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 08–1293 Filed 5–20–08; 2:43 pm]

BILLING CODE 6351–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before July 21, 2008.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: May 16, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Institute of Education Sciences

Type of Review: Revision.

Title: Evaluation of Mathematics Curricula.

Frequency: On Occasion.

Affected Public: Individuals or household.

Reporting and Recordkeeping Hour Burden:

Responses: 615.

Burden Hours: 295.

Abstract: The Evaluation of Math Curricula will assess the effectiveness of up to four early elementary math curricula. This submission is for the third phase of the study which will expand the study to the third grade. This submission includes the

justification and plan for the data collection of information and statistical methods for the evaluation. Data collection forms will be used in the study in this submission. These forms are unchanged from previous OMB submissions. The recruitment and first two years of data collection were cleared in previous OMB submissions.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3690. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–11460 Filed 5–21–08; 8:45 am]

BILLING CODE 4000–01–P

ELECTION ASSISTANCE COMMISSION

Sunshine Act Notice

AGENCY: United States Election Assistance Commission.

ACTION: Notice of Public Meeting and Hearing.

DATE AND TIME: Thursday, May 22, 2008, 10 a.m.–1 p.m.

PLACE: U.S. Election Assistance Commission, 1225 New York Ave., NW., Suite 150, Washington, DC 20005 (Metro Stop: Metro Center).

AGENDA: The Commissioners will consider the following items:

Commissioners will consider whether to update the Michigan state instructions and the Louisiana state instructions on the national voter registration form. Commissioners will consider and vote on whether to adopt the Voter Hotline Study Report. Commissioners will consider and vote on whether to adopt the First Time Voter Study Report. Commissioners will consider and vote on whether to modify Advisory Opinion 07–003–A regarding Maintenance of Effort (MOE) funding, pursuant to HAVA Section 254(a)(7). Comments will be taken from members of the public who have registered to speak regarding whether to modify Advisory Opinion 07–003–A. Members of the public who wish to speak must contact and register with EAC by 5 p.m. on Wednesday, May 21, 2008. Speakers may contact EAC via e-mail at *testimony@eac.gov*, or via mail addressed to the U.S. Election Assistance Commission, 1225 New York Ave., NW., Suite 1100, Washington, DC 20005, or by fax at 202/566–3127. Comments will be strictly limited to 5 minutes per person to ensure the fullest participation possible. Commissioners will receive a briefing on an Interim Report on the Statewide Voter Registration Database Study. The Commission will consider other administrative matters.

This meeting will be open to the public.

Person to Contact for Information: Bryan Whitener, Telephone: (202) 566–3100.

Rosemary E. Rodriguez,

Chair, U.S. Election Assistance Commission.

[FR Doc. E8–11302 Filed 5–21–08; 8:45 am]

BILLING CODE 6820–KF–M

ELECTION ASSISTANCE COMMISSION

Sunshine Act Notice

AGENCY: United States Election Assistance Commission.

ACTION: Notice of Public Meeting for EAC Board of Advisors.

DATE AND TIME: Tuesday, June 17, 2008, 10 a.m.–4 p.m. and Wednesday, June 18, 2008, 9 a.m.–4 p.m.

PLACE: Hyatt Regency Capitol Hill, 400 New Jersey Avenue, NW., Washington, DC 20001, Phone number (202) 737–1234 (Metro Stop: Union Station).

PURPOSE: The U.S. Election Assistance Commission (EAC) Board of Advisors, as required by the Help America Vote Act of 2002, will meet to receive updates on EAC program activities. The Board will receive presentations on the proposed next iteration of the Voluntary Voting System Guidelines (VVSG), as were submitted to EAC from the commission's Technical Guidelines Development Committee (TGDC). The Board will receive presentations on the Vote Count and Vote Recount Study and will formulate recommendations to EAC regarding research and studies. The Board will consider redrafted bylaws and other administrative matters.

This meeting will be open to the public.

PERSON TO CONTACT FOR INFORMATION: Bryan Whitener, Telephone: (202) 566–3100.

Gracia M. Hillman,

Commissioner, U.S. Election Assistance Commission.

[FR Doc. E8–11483 Filed 5–21–08; 8:45 am]

BILLING CODE 6820–KF–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12615–001]

Alaska Power & Telephone Company; Notice of Scoping Meeting and Soliciting Scoping Comments for an Applicant Prepared Environmental Assessment Using the Alternative Licensing Procedures

May 15, 2008.

a. *Type of Application:* Alternative Licensing Procedures.

b. *Project No.:* 12615–001.

c. *Applicant:* Alaska Power & Telephone Company.

d. *Name of Project:* Soule River Hydroelectric Project.

e. *Location:* On the Soule River, tributary to Portland Canal, approximately 9 miles south of the community of Hyder, Alaska. The project would occupy approximately 1,112 acres of federal lands within the Tongass National Forest, administered by the U.S. Forest Service.

f. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

g. *Applicant Contact:* Glen Martin, Project Manager, Alaska Power & Telephone Company, 193 Otto Street, P.O. Box 3222, Port Townsend, Washington 98368, (360) 385–1733 X 122, *glen.m@aptalaska.com.*

h. *FERC Contact:* Matt Cutlip, phone at (503) 552–2762; e-mail at *matt.cutlip@ferc.gov.*

i. *Deadline for filing scoping comments:* July 21, 2008.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Scoping comments may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link.

j. The proposed project would consist of: (1) A 1,000-foot-long, 160-foot-high concrete-faced, rock-fill dam; (2) an impoundment with a 950-acre surface area at a full pool elevation of 550 feet mean sea level; (3) a 2.5-mile-long, 14-foot-wide access road from the dam to the marine access facilities, with a 100-foot-long bridge across the Soule River; (4) marine access facilities along the Portland Canal near the mouth of the Soule River; (5) an 18-foot-diameter 11,100-foot-long power tunnel; (6) a 50-foot by 120-foot powerhouse containing two Francis-type generating units, having a total installed capacity of 75,000 kilowatts; (7) a tailrace within the tidewater area of the Soule River confluence with Portland Canal; (8) a 10.5-mile-long, 138 kilovolt (kV) submarine cable and a 0.5-mile-long 138 kV overhead transmission line that would interconnect in Stewart, British Columbia with British Columbia Transmission Corporation's existing electrical transmission system; [1] and (9) appurtenant facilities.

k. Scoping Process

Alaska Power & Telephone Company (AP&T) is utilizing the Commission's alternative licensing procedures (ALP). Under the ALP, AP&T will prepare an Applicant-Prepared Environmental Assessment (APEA) and license application for the Soule River Hydroelectric Project.

AP&T expects to file, with the Commission, the APEA and the license application for the Soule River Hydroelectric Project by June 30, 2009. Although AP&T's intent is to prepare an APEA, there is the possibility that an Environmental Impact Statement (EIS) will be required. Nevertheless, this meeting will satisfy the scoping requirements, pursuant to the National Environmental Policy Act of 1969, as amended, irrespective of whether an EA or EIS is issued by the Commission.

The purpose of this notice is to inform you of the opportunity to participate in the upcoming scoping meetings identified below, and to solicit your scoping comments.

[1] Only the portion of the transmission line that would be located in the United States is under the Commission's jurisdiction.

Scoping Meetings

AP&T and the Commission staff will hold two scoping meetings, one in the daytime and one in the evening, to help us identify the scope of issues to be addressed in the APEA.

The daytime scoping meeting will focus on resource agency concerns, while the evening scoping meeting is primarily for public input. All interested agencies, Indian tribes, individuals, and organizations are invited to attend one or both of the meetings, and to assist staff in identifying the environmental issues that should be analyzed in the APEA. The times and locations of these meetings are as follows:

Daytime Meeting

Tuesday, June 17, 2008, 9 a.m. (PST), Federal Building, 709 W. 9th Street, First Floor, Room #150, Juneau, Alaska.

Evening Meeting

Thursday, June 19, 2008, 7 p.m. to 9 p.m. (PST), Public Library—Hyder Community Center, Main Street, Hyder, Alaska,

Site Visit

AP&T, Commission staff, and state and federal resource agencies will participate in an aerial tour of the project site on Thursday, June 19, 2008. Anyone with questions about the aerial tour should contact Glen Martin, AP&T, at (360) 385–1733 x122. Those individuals planning to participate in the aerial tour should notify Mr. Martin of their intent no later than May 19, 2008.

To help focus discussions, Scoping Document 1 (SD1) was mailed in May 2008, outlining the subject areas to be addressed in the APEA to the parties on the mailing list. Copies of the SD1 also will be available at the scoping meetings. SD1 is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Based on all written comments received, a Scoping Document 2 (SD2) may be issued. SD2 will include a revised list of issues, based on the scoping meetings.

Objectives

At the scoping meetings, staff will: (1) Summarize the environmental issues tentatively identified for analysis in the APEA; (2) solicit from the meeting participants all available information, especially quantifiable data, on the resources at issue; (3) encourage statements from experts and the public on issues that should be analyzed in the APEA, including viewpoints in opposition to, or in support of, staff's preliminary views; (4) determine the resource issues to be addressed in the APEA; and (5) identify those issues that require a detailed analysis, as well as those issues that do not require a detailed analysis.

Procedures

The meetings will be recorded by a stenographer and will become part of the formal record of the Commission proceeding for the project.

Individuals, organizations, agencies, and Indian tribes with environmental expertise and concerns are encouraged to attend the meetings and to assist AP&T and Commission staff in defining and clarifying the issues to be addressed in the APEA.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–11506 Filed 5–21–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1403–056]

Pacific Gas and Electric Company; Notice of Application for Temporary Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

May 16, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Request for Temporary Amendment of Article 402 Supplemental Flow Requirements.

b. *Project No.:* 1403–056.

c. *Date Filed:* May 15, 2008.

d. *Applicant:* Pacific Gas and Electric Company.

e. *Name of Project:* Narrows Hydroelectric Project.

f. *Location:* At the U. S. Army Corps of Engineers' Englebright Reservoir (Upper Narrows Debris Dam) on the Yuba River, in Nevada County, California.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Erich Nolan, Pacific Gas and Electric Company, Mail Code N11C, P.O. Box 770000, San Francisco, CA 94177, Telephone: (415) 973–0344.

i. *FERC Contact:* Antonia Lattin, *antonia.lattin@ferc.gov,* Telephone: (415) 369–3334.

j. *Deadline for filing comments, motions to intervene and protests:* June 6, 2008.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Request:* The Pacific Gas and Electric Company (PG&E) is requesting a temporary amendment of the supplemental flow requirements of article 402 under the project license. Because of dry conditions in the project area and the need to manage river flows to protect federally listed Chinook salmon and steelhead trout in the Yuba River below Englebright Dam, PG&E requests that it be allowed to operate the Narrows Project without releasing from 1,500 to 2,000 cubic feet per second (cfs) of supplemental flows from Englebright Dam from May 16 to June 30, 2008. Instead, flows would be released by the Yuba County Water Agency (licensee of FERC Project No. 2246) to the Yuba River so that flows below irrigation diversions are 900 cfs from May 16 to May 31, 2008, and 500 cfs during June 2008, at the downstream Marysville Gage. Under this arrangement, flows from Englebright Dam would be approximately 1,500 cfs from May 16 to May 31, 2008, and 1,100 cfs from June 1 to June 30, 2008. The Marysville Gage is located about 15 miles below Englebright Dam. Included in PG&E's request were letters of concurrence from the state and federal resource agencies.

l. *Location of the Application:* The filing is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426 or by calling (202) 502–8371, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docsfiling/esubscription.asp* to be notified via e-mail or new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers.

p. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See 18 CFR 385.2001(a)(I)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–11507 Filed 5–21–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

May 16, 2008.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP01–205–016.

Applicants: Southern Natural Gas Company.

Description: Southern Natural Gas Company submits its Master Firm Transportation Service Agreement with Southern Company Services, Inc.

Filed Date: 05/14/2008.

Accession Number: 20080515–0313.

Comment Date: 5 p.m. Eastern Time on Tuesday, May 27, 2008.

Docket Numbers: RP08–376–000.

Applicants: MIGC LLC.

Description: MIGC, LLC submits Original Sheet 1 et al. to its revised FERC Gas Tariff, Second Revised Volume 1 et al., to become effective 6/13/08.

Filed Date: 05/14/2008.

Accession Number: 20080515–0190.

Comment Date: 5 p.m. Eastern Time on Tuesday, May 27, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://*

www.ferc.gov. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–11410 Filed 5–21–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RC08–5–000]

Department of Energy, Portsmouth/Paducah Project Office; Notice of Filing

May 16, 2008.

Take notice that on May 13, 2008, the Department of Energy Portsmouth/Paducah Project Office (DOE) submitted a request for appeal of a NERC decision regarding DOE's registration as a Transmission Owner, Transmission Operator Load Serving Entity and Distribution Provider in the NERC Compliance Registry.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on June 12, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–11505 Filed 5–21–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No.: 733–010]

Eric Jacobson; Notice of Intent to Prepare an Environmental Assessment and Notice of Scoping Meetings and Site Visit and Soliciting Scoping Comments

May 16, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Minor License.

b. *Project No.:* 733–010.

c. *Date Filed:* April 9, 2008.

d. *Applicant:* Eric Jacobson.

e. *Name of Project:* Ouray Hydroelectric Project.

f. *Location:* The project is located on the Uncompahgre River in Ouray County, Colorado. The project occupies lands within the Uncompahgre National Forest managed by the U.S. Forest Service.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* Eric Jacobson, P.O. Box 745, Telluride, CO 81435; (970) 369–4662.

i. *FERC Contact:* Steve Hocking, (202) 502–8753 or *steve.hocking@ferc.gov*.

j. *Deadline for filing scoping comments:* July 17, 2008.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Scoping comments may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link.

k. This application is not ready for environmental analysis at this time.

l. *Project Description:* The project consists of the following existing facilities: (1) A 0.48-acre reservoir formed by a masonry gravity dam with an effective structural height of 19.7 feet and a length of 70 feet consisting of a 51-foot-long non-overflow section and a 19-foot-wide overflow spillway, (2) a 6,130-foot-long pressure pipeline, (3) a 32- by 65-foot powerhouse containing three turbine-generating units with a total authorized capacity of 632 kW, and (4) appurtenant facilities.

m. *Locations of the Application:* A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction by contacting the applicant using the contact information in item (h) above.

You may also register online at *http://www.ferc.gov/esubscribenow.htm* to be notified via e-mail of new filings

and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. *Scoping Process:* The Commission intends to prepare a single environmental assessment (EA) for the project (no draft EA would be prepared) in accordance with the National Environmental Policy Act. The EA will consider both site-specific and cumulative environmental impacts and reasonable alternatives to the proposed action.

Scoping Meetings

Commission staff will hold two scoping meetings in the vicinity of the project at the time and place noted below. The daytime meeting will focus on resource agency, Indian tribes, and non-governmental organization concerns, while the evening meeting is primarily for receiving input from the public. We invite all interested individuals, organizations, and agencies to attend one or both of these meetings and to assist staff in determining the scope of the environmental issues to be addressed in the environmental assessment. The times and locations of these meetings are as follows:

Evening Scoping Meeting

Date: June 16, 2008.
Time: 7 p.m. to 10 p.m. (MST).
Place: Ouray Community Center.
Address: 320 6th Avenue, Ouray, Colorado 81427.

Daytime Scoping Meeting

Date: June 17, 2008.
Time: 9 a.m. to 2 p.m. (MST).
Place: Ouray Community Center.
Address: 320 6th Avenue, Ouray, Colorado 81427.

Scoping Document 1 (SD1), which outlines the subject areas to be addressed in the environmental assessment, was mailed to the individuals and entities on the Commission's mailing list. Copies of SD1 will be available at the scoping meetings or may be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link (see item m above). Based on all oral and written comments, a Scoping Document 2 (SD2) may be issued.

Site Visit

We will hold a site visit to the project on Monday, June 16, 2008, from 8 a.m. to about 12 noon. To attend the site visit, meet at 8 a.m. at the valve house parking lot at the Ouray Project in the town of Ouray, Colorado. We will walk about one mile to the project's dam, then return to the parking lot. We will then drive to the project's powerhouse in Ouray. All participants are responsible for their own transportation.

Note that Commission staff may hold a site visit and/or meeting at the project at a later date to discuss any project-related effects to archaeological, historic, or traditional cultural properties.

Meeting Objectives

At the scoping meetings, staff will: (1) Summarize the environmental issues tentatively identified for analysis in the EA; (2) solicit from meeting participants all available information, especially quantifiable data, on the resources at issues; (3) encourage statements from experts and the public on issues that should be analyzed in the EA, including viewpoints in opposition to, or in support of, the staff's preliminary views; (4) determine the resource issues to be addressed in the EA; and (5) identify those issues that require a detailed analysis, as well as those issues that do not require a detailed analysis.

Meeting Procedures

Scoping meetings will be recorded by a stenographer and will become part of the Commission's formal record for this proceeding.

Individuals, organizations, and agencies with environmental expertise and concerns are encouraged to attend the meetings and to assist staff in defining and clarifying the issues to be addressed in the EA.

Kimberly D. Bose,
Secretary.

[FR Doc. E8–11508 Filed 5–21–08; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PF08–13–000; Docket No. PF08–16–000]

Southern Natural Gas Company; Southeast Supply Header, LLC; Notice of Intent To Prepare an Environmental Assessment for the Proposed South System Expansion III Project and Joint Pipeline Expansion Phase II Project and Request for Comments on Environmental Issues

May 16, 2008.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will address the environmental impacts of the South System Expansion III Project (SSEIII Project) proposed by Southern Natural Gas Company (SNG) and the Joint Pipeline Expansion Phase II Project (JPE Phase II Project) proposed by Southeast Supply Header, LLC (SESH); together they are referred to as ''the projects''. The Commission will use the EA in its decision-making process to determine whether or not to authorize the project. This notice explains the scoping process we [1] will use to gather environmental input from the public and interested agencies on the projects. Your input will help the Commission determine the issues that need to be evaluated in the EA. Please note that the scoping period will close on June 16, 2008.

Details on how to submit written comments are provided in the Public Participation section of this notice.

If you are a landowner receiving this notice, you may be contacted by a pipeline company representative about the acquisition of an easement to construct, operate, and maintain the proposed project facilities. Each pipeline company would seek to negotiate a mutually acceptable agreement for its project. However, if the projects are approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings in accordance with state law.

This notice is being sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. We encourage government representatives to notify their constituents of this planned project and encourage them to comment on their areas of concern.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility on My Land? What Do I Need To Know?'' is available for viewing on the FERC Internet Web site (*http://www.ferc.gov*). This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the FERC's proceedings.

Summary of the Proposed Projects

SNG and SESH propose to construct, own, operate, and maintain certain natural gas transportation facilities within the states of Georgia, Alabama, Mississippi, and Louisiana. The general

[1] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the FERC's Office of Energy Projects.

locations of the proposed pipeline and compression facilities are shown in the figures included as Appendix 1.[2] The purpose of the projects is to provide natural gas transportation service to Georgia Power Company's (Georgia Power) existing Plant McDonough. Georgia Power is converting the Plant McDonough electric generation from coal-fueled to natural gas-fueled. The SSEIII Project would increase pipeline capacity on SNG's existing system to serve Georgia Power, and SESH's proposed JPE Phase II Project would provide the required additional upstream transportation capacity.

SSEIII Project

SNG proposes to construct the SSEIII Project in three phases. In addition to the listed facilities, SNG would install a cathodic protection system to mitigate pipeline corrosion, an AC mitigation system where the pipeline would be near high voltage power lines, ten pig launchers or receivers, and four mainline valves.

Phase I would be constructed entirely within the state of Georgia. The construction of the meter station would begin during the first quarter of 2010 and would have an in-service date in the second quarter of 2010. SNG proposes beginning construction of the Phase I pipeline facilities in the second quarter of 2010 and having an in-service date during the fourth quarter of 2010. The proposed facilities are listed below.

- The Plant McDonough Meter Station would be constructed at milepost (MP) 1.09 on SNG's South Atlanta-Austell Line in Fulton County, Georgia.
- The Thomaston-Griffin Branch Third Loop (Thomaston-Griffin Loop) would consist of about 31.2 miles of 30-inch-diameter pipeline loop parallel to SNG's existing 20-inch-diameter Thomaston-Griffin Branch Second Loop and two pipelines owned and operated by Atlanta Gas Light Company between Thomaston and Griffin, Georgia in Upson, Lamar, and Spalding Counties. The Thomaston-Griffin Loop would extend from SNG's existing Thomaston Compressor Station (MP 0.0) in Upson County to the interconnection with SNG's existing Riverdale pipeline in Spalding County (MPs 0.0 to 31.2).
- The South Atlanta-Austell Replacement would consist of replacement of about 10.9 miles of the existing 18-inch-diameter South Atlanta-Austell pipeline with a 30-inch-diameter pipeline between Riverdale and Union City in Fulton and Clayton Counties, Georgia (MPs 0.0 to 10.9).

Phase II facilities would be constructed within the state of Mississippi. SNG proposes to begin their construction during the fourth quarter of 2010 and to have an in-service date during the second quarter of 2011. The proposed Phase II facilities are listed below.

- The South Main Third Loop Line (Gwinville Loop) would consist of about 9.5 miles of 36-inch-diameter pipeline loop constructed adjacent to SNG's existing South Main System in Jefferson Davis and Simpson Counties, Mississippi. The Gwinville Loop would extend from SNG's existing Gwinville Compressor Station near Gwinville, Jefferson Davis County to a point near Magee, Simpson County, Mississippi (MPs 0.0 to 9.5).
- An additional 10,310 horsepower (hp) of compression and associated ancillary facilities would be installed at SNG's existing Bay Springs Compressor Station in Jasper County, Mississippi.

Phase III facilities would be constructed in the states of Mississippi, Alabama, and Georgia. SNG proposes to begin construction of these facilities during the third quarter of 2011 and to have an in-service date during the second quarter of 2012. The proposed Phase II facilities are listed below.

- The South Main Third Loop Line (Enterprise Loop) would consist of about 2.8 miles of 36-inch-diameter pipeline loop constructed adjacent to SNG's existing 30-, 24-, and 18-inch-diameter pipelines in Lauderdale County, Mississippi. The Enterprise Loop would extend between SNG's existing Enterprise and Bay Springs Compressor Stations (MPs 89.6 to 92.6).
- The South Main Fourth Loop Line (Gallion Loop) would consist of about 6.5 miles of 36-inch-diameter pipeline loop constructed adjacent to SNG's existing 30-, 24-, and dual 18-inch-diameter pipelines in Hale and Perry Counties, Alabama. The Gallion Loop would extend between SNG's existing Gallion and Selma Compressor Stations (MPs 149.9 to 156.4).
- The South Main Fourth Loop Line (Elmore Loop) would consist of about 11.7 miles of 36-inch-diameter pipeline loop constructed adjacent to SNG's existing 30-, 24-, 18-, and 16-inch-diameter pipelines in Elmore County, Alabama. The Elmore Loop would extend between SNG's existing Elmore and Auburn Compressor Stations (MPs 221.6 to 233.3).
- An additional 7,000 hp of compression and associated ancillary facilities would be installed at the existing Ellerslie Compressor Station in Harris County, Georgia.

JPE Phase II Project

SESH proposes the installation of additional compression at two of its existing compressor stations as described below. SESH proposes beginning construction of its facilities in October 2009 and having an in-service date in July 2010.

- An additional 13,000 hp of compression and associated ancillary facilities would be installed at its Delhi Compressor Station in Richland Parish, Louisiana.
- An additional 13,000 hp of compression and associated ancillary facilities would be installed at its Gwinville Compressor Station in Jefferson Davis County, Mississippi.

Land Requirements for Construction

SSEIII Project

The typical construction right-of-way width for the SSEIII Project loop pipelines would vary between 90 and 100 feet. The majority of this construction right-of-way, however, would overlap the existing permanent rights-of-way of the adjacent pipelines. Therefore, between zero and 30 feet of additional temporary right-of-way would be required for construction. Construction of the South Atlanta-Austell Replacement would be accomplished within a 65- to 80-foot-wide construction right-of-way and would require up to 5 feet of additional temporary right-of-way. The typical construction right-of-way width through wetlands would be reduced to 75 feet. Following construction, SNG would retain between zero and 20 feet of additional permanent right-of-way for operation.

Additional temporary extra workspaces beyond the typical construction right-of-way limits would be required at certain feature crossings (*e.g.*, roads, railroads, wetlands, or waterbodies, utilities), in areas with steep side slopes, in association with special construction techniques, for topsoil segregation, and for pipe, equipment, and contractor yards. SNG would access its project construction areas primarily along the existing pipeline right-of-way and existing roads; however, other access roads may be required during construction.

[2] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of all appendices, other than Appendix 1 (maps), are available on the Commission's Web site at the ''eLibrary'' link or from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary refer to the Public Participation section of this notice. Copies of the appendices were sent to all those receiving this notice in the mail. Requests for detailed maps of the proposed facilities should be made directly to SNG or SESH.

Construction of most of SNG's proposed aboveground facilities would be completed within the construction workspaces associated with pipeline construction or within or adjacent to its existing compressor station yards. Operation of the proposed additional compressor facilities would be within the existing compressor station sites. The proposed Plant McDonough Meter Station would require about 1.0 acre for construction and operation.

Based on preliminary information, construction of SNG's proposed project facilities would affect about 867.5 acres including the proposed meter station. Operation of the SSEIII Project would require about 45.4 acres as permanent right-of-way that would be restored as open land or as industrial where aboveground facilities would be operated. The remaining 822.1 acres of temporary workspaces would be restored and would return to previous land use. These totals do not include the temporary land requirements for access roads or contractor, pipe, or equipment yards.

JPE Phase II Project

SESH would require about 56.0 acres for construction of the compressor additions at both project locations of which about 44.0 acres would be required at the Delhi Compressor Station and about 12.0 acres would be required at the Gwinville Compressor Station. Operation of the proposed facilities would not require any additional land outside the existing compressor station sites. Access to both construction areas would be along the permanent compressor station access roads. No new temporary or permanent roads would be required.

Total Land Requirements

The total land requirements for the projects would be 923.5 acres for construction and about 45.4 acres for operation. The remaining 878.1 acres of temporary workspace (including all temporary construction rights-of-way, extra workspaces, and pipe and contractor yards) would be restored and allowed to revert to its former use.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action when it considers whether or not an interstate natural gas pipeline should be approved. The FERC will use the EA to consider the environmental impact that could result if the Projects are authorized under section 7 of the Natural Gas Act. NEPA also requires us to discover and address concerns the public may have about proposals to be considered by the Commission. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. With this Notice of Intent, the Commission staff is requesting public comments on the scope of the issues to be addressed in the EA. All comments received will be considered during preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils;
- Land use;
- Water resources, fisheries, and wetlands;
- Cultural resources;
- Vegetation and wildlife;
- Threatened and endangered species;
- Air quality and noise;
- Hazardous waste; and
- Public safety.

In the EA, we will also evaluate possible alternatives to the proposed projects or portions of the projects, and make recommendations on how to lessen or avoid impacts on affected resources.

Although no formal application has been filed, the FERC staff has already initiated its NEPA review under its NEPA Pre-filing Process. The purpose of the Pre-filing Process is to encourage the early involvement of interested stakeholders and to identify and resolve issues before an application is filed with the FERC.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the proposed project. By becoming a commentor, your concerns will be addressed in the EA and considered by the Commission. Your comments should focus on the potential environmental effects, reasonable alternatives (including alternative facility sites and pipeline routes), and measures to avoid or lessen environmental impact. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please carefully follow these instructions:

- Send an original and two copies of your letter to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426.
- Label one copy of your comments for the attention of Gas Branch 2.
- Reference Docket No. PF08–13–000 for SNG's proposed SSEIII Project and PF08–16–000 for SESH's proposed JPE Phase II Project on the original and both copies.
- Mail your comments so that they will be received in Washington, DC on or before June 16, 2008.

Please note that the Commission strongly encourages electronic filing of any comments or interventions or protests to this proceeding. See 18 Code of Federal Regulations 385.2001(a)(1)(iii) and the instructions on the Commission's Internet Web site at *http://www.ferc.gov* under the link to ''Documents and Filings'' and ''eFiling.'' eFiling is a file attachment process and requires that you prepare your submission in the same manner as you would if filing on paper, and save it to a file on your hard drive. New eFiling users must first create an account by clicking on ''Sign up'' or ''eRegister.'' You will be asked to select the type of filing you are making. This filing is considered a ''Comment on Filing.'' In addition, there is a ''*Quick Comment*'' option available, which is an easy method for interested persons to submit text only comments on a project. The Quick-Comment User Guide can be viewed at *http://www.ferc.gov/docs-filing/efiling/quick-comment-guide.pdf*. Quick Comment does not require a FERC eRegistration account; however, you will be asked to provide a valid e-mail address. All comments submitted under either eFiling or the Quick Comment option are placed in the public record for the specified docket or project number(s).

We might mail the EA for comment. If you are interested in receiving it, please return the Information Request (Appendix 3). If you do not return the Information Request, you will be taken off the mailing list.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC (3372) or on the FERC Internet Web site (*http://www.ferc.gov*) using the ''eLibrary link.'' Click on the eLibrary link, select ''General Search'' and enter the project docket number excluding the last three digits (i.e., PF06–1) in the ''Docket Number'' field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or TTY, contact (202) 502–8659. The eLibrary link on

the FERC Internet Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

In addition, the FERC now offers a free service called eSubscription that allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. To register for this service, go to *http://www.ferc.gov/esubscribenow.htm*.

SNG has established an Internet Web site for the SSEIII Project at *http://www.elpaso.com/sse3/default.shtm*. The Web site includes a description of the project, a map of the proposed pipeline route, and contact information. You may also use SNG's toll free telephone number, 1–800–622–4481 to ask questions about the SSEIII Project.

SESH has also established an Internet Web site for the JPE Phase II Project at *http://www.spectraenergy.com/businesses/projects/sesh/*. The SESH Web site includes contact information and information about its proposed project. You may also use SESH's toll free telephone number, 1–888–312–7374, to ask questions about the JPE Phase II Project.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–11509 Filed 5–21–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER08–536–000; ER08–537–001; ER08–536–002]

Polytop Corporation; Notice of Issuance of Order

May 16, 2008.

Polytop Corporation (Polytop) filed an application for market-based rate authority, with an accompanying tariff. The proposed market-based rate tariff provides for the sale of energy and capacity at market-based rates. Polytop also requested waivers of various Commission regulations. In particular, Polytop requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by Polytop.

On May 16, 2008, pursuant to delegated authority, the Director, Division of Tariffs and Market Development—West, granted the requests for blanket approval under Part 34 (Director's Order). The Director's Order also stated that the Commission would publish a separate notice in the **Federal Register** establishing a period of time for the filing of protests. Accordingly, any person desiring to be heard concerning the blanket approvals of issuances of securities or assumptions of liability by Polytop, should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004). The Commission encourages the electronic submission of protests using the FERC Online link at *http://www.ferc.gov.*

Notice is hereby given that the deadline for filing protests is June 16, 2008.

Absent a request to be heard in opposition to such blanket approvals by the deadline above, Polytop is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Polytop, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approvals of Polytop's issuance of securities or assumptions of liability.

Copies of the full text of the Director's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov,* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–11510 Filed 5–21–08; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[Docket ID Number EPA–HQ–OAQPS–2004–0073; FRL–8569–4]

Agency Information Collection Activities; Proposed Collection; Comment Request; Requirements for Control Technology Determinations for Constructed and Reconstructed Major Sources of Hazardous Air Pollutants; EPA ICR No. 1658.05, OMB Control No. 2060–0373

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 request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This is a request to renew an existing approved collection. This ICR is scheduled to expire on October 31, 2008. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before July 21, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2004–0073, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- E-mail: *a-and-r-docket@epa.gov,* Attention Docket ID No. EPA–HQ–OAR–2004–0073.
- Fax: (202) 566–1741, Attention Docket ID No. EPA–HQ–OAR–2004–0073.
- Mail: U.S. Environmental Protection Agency, EPA West (Air Docket), 1200 Pennsylvania Ave., NW., Room 3334, Mail Code: 6102T, Washington, DC 20460, Attention E-Docket ID No. EPA–HQ–OAR–2004–0073.
- Hand Delivery: Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 1301 Constitution Ave., NW., Room 3334, Mail Code: 6102T, Washington, DC 20460, Attention Docket ID No. EPA–HQ–OAR–2004–0073. 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–2004–

0073. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov,* or e-mail. Send or deliver information identified as CBI only to the following address: Mr. Roberto Morales, OAQPS Document Control Officer, U.S. EPA (C404–02), Attention Docket ID No. EPA–HQ–OAR–2004–0073, Research Triangle Park, NC 27711. Clearly mark the part or all of the information that you claim to be CBI. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

FOR FURTHER INFORMATION CONTACT: Rick Colyer, U.S. EPA, Office of Air Quality Planning and Standards, Sector Policy and Programs Division, Program Design Group, D205–02, Research Triangle Park, North Carolina 27711, telephone number (919) 541–5262, e-mail *colyer.rick@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 number EPA–HQ–OAR–2004–0073. The docket is available for online viewing at *http://www.regulations.gov,* or in person viewing at the EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The 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 Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

Use *http://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 Paperwork Reduction Act (PRA), EPA is soliciting 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 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) or 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 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.

To What Information Collection Activity or ICR Does This Apply?

Affected entities: Owners or operators who construct or reconstruct a major source of HAP emissions must comply with any applicable MACT standard. Where no MACT standard exists, a case-by-case determination of MACT (case-by-case MACT) under CAA section 112(g) must be made. The owner or operator is responsible for obtaining such a case-by-case MACT determination.

State, local, and Tribal agencies with operating permit programs that have been approved by EPA will review information submitted by sources under the CAA section 112(g) provisions. These permitting agencies must determine the level of control that will be necessary to meet case-by-case MACT requirements for new sources. Finally, EPA will review a percentage of the determinations in order to provide oversight of the various State, local, and Tribal permitting authorities.

Title: Information Collection Request for 40 CFR part 63 Regulations Governing Constructed and Reconstructed Major Sources.

ICR numbers: EPA ICR No. 1658.05, OMB Control No. 2060–0373.

ICR status: EPA ICR No. 1658.04 expires on October 31, 2008. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulation is consolidated in 40 CFR part 9.

Abstract: Section 112(g)(2)(B) of the Clean Air Act as amended in 1990 (CAA) requires that maximum achievable control technology (MACT) standards be met by constructed or reconstructed major sources of hazardous air pollutants (HAP). Where

no applicable emission limit has been set, the MACT determination shall be made on a case-by-case basis. The source owner or operator must submit certain information to allow the permitting authority to perform a case-by-case MACT determination (40 CFR 63.43(e)). Permitting agencies, either State, local, Tribal or Federal, review information submitted and make case-by-case MACT determinations. Specific activities and requirements are listed and described in the Supporting Statement for the ICR.

Burden Statement: Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. The reporting and recordkeeping burden was estimated as follows:

Estimated Number of Industry Respondents: 73.

Frequency of Response: Once.

Estimated total average number of responses for each respondent: One title V permit application or amendment, or a notification of MACT approval.

Estimated Total Annual Burden Hours: 6,437.

Estimated Total Annual Cost: $432,503.

Are There Changes in the Estimates from the Last Approval?

Primarily, the decrease in burden is due to the completion of setting MACT standards for the source category list. Therefore our revised estimate of burden is smaller than that estimated in the last ICR.

What is the Next Step in the Process for This ICR?

EPA will consider any 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 person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: May 15, 2008.

Jenny N. Edmonds,

Acting Director, Office of Air Quality Planning and Standards.

[FR Doc. E8–11489 Filed 5–21–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R01–OW–2008–0212; FRL–8569–8]

Massachusetts Marine Sanitation Device Standard—Notice of Determination

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Determination.

SUMMARY: The Regional Administrator of the Environmental Protection Agency—New England Region, has determined that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the state waters of Scituate, Marshfield, Cohasset, and the tidal portions of the North and South Rivers.

ADDRESSES: *Docket:* All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copy-righted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically in *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Ann Rodney, U.S. Environmental Protection Agency—New England Region, One Congress Street, Suite 1100, COP, Boston, MA 02114–2023. Telephone: (617) 918–0538. Fax number: (617) 918–1505. E-mail address: *Rodney.ann@epa.gov.*

SUPPLEMENTARY INFORMATION: This Notice of Determination is for the state waters of Scituate, Marshfield, Cohasset, and the tidal portions of the North and South Rivers. The area of designation includes:

Waterbody/general area	Latitude	Longitude
Northern extent of Green Harbor at the Rt 139 causeway	42°05′11″ N	70°39′03″ W.
South and west along the South River to the Willow Street Bridge	42°05′34″ N	70°42′43″ W.
South and west along the North River to Columbia Road Bridge	42°06′26″ N	70°48′31″ W.
South along the navigable extent of the Gulf River	42°13′30″ N	70°47′06″ W.

The NDA boundary also includes coastal waters within municipal boundaries, westward of a delineation that extends from:

Waterbody/general area	Latitude	Longitude
Marshfield municipal boundary	42°04′22″ N	70°38′54″ W.
East to navigational marker R "2GH" located off Howland Ledge	42°04′36″ N	70°36′48″ W.
North to navigational marker G "21" F1 G 4 S. Whistle located east of Minot Light	42°16′33″ N	70°42′20″ W.
Northwest on a heading to Thieves Ledge G "1" QG Whistle	42°19′ 33″N	70°49′ 50″ W.
To Cohasset municipal boundary	42°18′34″ N	70°47′25″ W.
Southwest to Cohasset municipal boundary	42°15′53″ N	70°49′34″ W.

On April 11, 2008, notice was published that the Commonwealth of Massachusetts had petitioned the Regional Administrator, Environmental Protection Agency, to determine that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the state waters of Scituate, Marshfield, Cohasset, and the tidal portions of the North and South Rivers. No comments were received on this petition.

The petition was filed pursuant to Section 312(f)(3) of Public Law 92–500, as amended by Public Laws 95–217 and 100–4, for the purpose of declaring these waters a ''No Discharge Area'' (NDA).

Section 312(f)(3) states: After the effective date of the initial standards and regulations promulgated under this section, if any State determines that the protection and enhancement of the quality of some or all of the waters within such States require greater environmental protection, such State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such waters, except that no such prohibition shall apply until the Administrator determines that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for such water to which such prohibition would apply.

The information submitted to EPA by the Commonwealth of Massachusetts certifies that there are ten pumpout facilities located within the proposed area. A list of the facilities, with phone numbers, locations, and hours of operation is appended at the end of this determination.

Based on the examination of the petition, its supporting documentation, and information from site visits conducted by EPA New England staff, EPA has determined that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the area covered under this determination.

This determination is made pursuant to Section 312(f)(3) of Public Law 92–500, as amended by Public Laws 95–217 and 100–4.

PUMPOUT FACILITIES WITHIN PROPOSED NO DISCHARGE AREA

Name	Location	Contact info	Hours	Mean low water depth
Cohasset Harbormaster	Cohasset Harbor	(781) 383–0863 VHF 10, 16	15 May–1 Nov 9:00 a.m.–9:00 p.m.	N/A. Boat Service.
Cole Parkway Marina	Scituate Harbor	(781) 545–2130 VHF 9	15 May–15 October 8:00 a.m.–4:00 p.m.	6 ft.
Harbor Mooring Service	North and South Rivers	(781) 544–3130 Cell (617) 281–4365 VHF 9	15 April–1 November Service provided on-call	N/A. Boat Service.
James Landing Marina	Herring River, Scituate	(781) 545–3000	1 May–15 Oct 8 a.m.–4:30 p.m.	6 ft.
Waterline Mooring	Scituate Harbor	(781) 545–4154 VHF 9, 16	15 May–15 Oct 8 a.m.–5 p.m. Or by appointment	N/A. Boat Service.
Green Harbor Town Pier	Green Harbor, Marshfield	(781) 834–5541 VHF 9, 16	1 April–15 Nov 24/7 Self-Serve 15 May–30 Sept. Attendant Service 8 a.m.–11:30 p.m..	4 ft.
Bridgewaye Marina	South River, Marshfield	(781) 837–9343 VHF 9, 11	15 June–15 October 9–5 p.m	6 ft.
Erickson's Marina	South River, Marshfield	(781) 837–2687	15 March–15 November 8 a.m.–5 p.m.	4 ft.
White's Ferry Marina	South River, Marshfield	(781) 837–9343 VHF 9, 11	15 June–15 October 9–5 p.m	4 ft.
Mary's Boat Livery	North River, Marshfield	(781) 837–2322 VHF 9, 16	15 May–1 Oct 8 a.m.–4 p.m.	4 ft.
** Marshfield Yacht Club	South River, Marshfield	TBA	TBA	TBA.
** South River Boat Ramp	South River, Marshfield	TBA	TBA	TBA.

** Pending facilities.

Dated: May 14, 2008.

Robert W. Varney,

Regional Administrator, Region 1.

[FR Doc. E8–11485 Filed 5–21–08; 8:45 a.m.]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2008–0380; FRL–8569–5]

Notice of Receipt of a Request From the State of Texas for a Waiver of a Portion of the Renewable Fuel Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 211(o)(7) of the Clean Air Act (the Act), 42 U.S.C. 7545(o)(7), EPA is issuing a notice of receipt of a request for a waiver of 50 percent of the renewable fuel standard (RFS) ''mandate for the production of ethanol derived from grain.'' The request has been made by the Governor of the State of Texas. Section 211(o)(7)(A) of the Act allows the Administrator of the EPA to grant the waiver if implementation of the national RFS requirements would severely harm the economy or environment of a state, a region, or the United States, or if EPA determines that there is inadequate domestic supply of renewable fuel. EPA is required by the Act to provide public notice and

opportunity for comment on this request.

DATES: *Comments.* Written comments must be received on or before June 23, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2008–0380, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–1741.
- *Mail:* Air and Radiation Docket, Docket ID No. EPA–HQ–OAR–2008–0380, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a total of two copies.
- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, 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–2008–0380. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

FOR FURTHER INFORMATION CONTACT: James W. Caldwell, Office of Transportation and Air Quality, Mailcode: 6406J, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 343–9303; fax number: (202) 343–2802; e-mail address: *caldwell.jim@epa.gov.*

SUPPLEMENTARY INFORMATION:

(A) 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–OAR–2008–0380, which is available for online viewing at *http://www.regulations.gov*, or in person viewing at the EPA/DC Docket Center Public Reading Room, 1301 Constitution Avenue, NW., Room 3334, Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Air and Radiation Docket is 202–566–1742.

Use *http://www.regulations.gov* to obtain a copy of the waiver request, 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.

(B) What Information Is EPA Particularly Interested In?

On April 25, 2008, the Governor of Texas submitted a request to the Administrator under section 211(o) of the Act for a waiver of 50 percent of the RFS ''mandate for the production of ethanol derived from grain.'' The request includes statements regarding the economic impact of higher corn prices in Texas. This request has been placed in the public docket.

Pursuant to section 211(o)(7) of the Act, EPA specifically solicits comments and information to enable the Administrator to determine if the statutory basis for a waiver of the national RFS requirements has been met and, if so, the extent to which EPA should exercise its discretion to grant a waiver. Section 211(o)(7) of the Act allows the Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, to waive the requirements of the national RFS at 40 CFR 80.1105, in whole or in part, upon petition by one or more States. A waiver may be granted if the Administrator determines, after public notice and an opportunity for public comment, that implementation of the RFS requirements would severely harm the economy or environment of a state, a region, or the United States; or that there is an inadequate domestic supply of renewable fuel. The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, shall approve or disapprove a State petition for a waiver within 90 days of receiving it. If a waiver is granted, it can last no longer than one year unless it is renewed by the Administrator after consultation with the Secretary of Agriculture and the Secretary of Energy. The RFS for 2008 was published in the **Federal Register** on February 14, 2008 (73 FR 8665) and was intended to lead to the use of nine (9) billion gallons of renewable fuel in 2008.

EPA requests comment on any matter that might be relevant to EPA's action on the petition, specifically including (but not limited to) information that will enable EPA to:

(a) Evaluate whether compliance with the RFS is causing severe harm to the economy of the State of Texas;

(b) evaluate whether the relief requested will remedy the harm;

(c) determine to what extent, if any, a waiver approval would change demand for ethanol and affect corn or feed prices; and

(d) determine the date on which a waiver should commence and end if it were granted.

In addition to inviting comments on the above issues, EPA recognizes that it has discretion in deciding whether to grant a waiver, as the statute provides that ''[t]he Administrator * * * *may* waive the requirements of [section 211(o)(2)] in whole or in part'' (emphasis supplied) if EPA determines that the severe harm criteria has been met. EPA also recognizes that a waiver would involve reducing the national volume requirements under section 211(o)(2), which would have effects in areas of the country other than Texas, including areas that may be positively impacted by the RFS requirements. Given this, EPA invites comment on all issues relevant to deciding whether and how to exercise its discretion under this provision, including but not limited to the impact of a waiver on other regions or parts of the economy, on the environment, on the goals of the renewable fuel program, on appropriate mechanisms to implement a waiver if a waiver were determined to be

appropriate, and any other matters considered relevant to EPA's exercise of discretion under this provision.

Commenters should include data or specific examples in support of their comments in order to aid the Administrator in determining whether to grant or deny the waiver. Data that shows a quantitative link between the use of corn for ethanol and corn prices, and on the impact of the RFS mandate on the amount of ethanol produced, would be especially helpful.

Dated: May 16, 2008.

Robert J. Meyers,

Principal Deputy Assistant Administrator, Office of Air and Radiation.

[FR Doc. E8–11486 Filed 5–21–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to OMB for Review and Approval, Comments Requested

May 19, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before June 23, 2008. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via Internet at *Nicholas_A._Fraser@omb.eop.gov* or via fax at (202) 395–5167 and to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC or via Internet at *Cathy.Williams@fcc.gov* or *PRA@fcc.gov*. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain*; (2) look for the section of the Web page called ''Currently Under Review;'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading; (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box; (5) click the ''Submit'' button to the right of the ''Select Agency'' box; and (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB control number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0009.

Title: Application for Consent to Assignment of Broadcast Station Construction Permit or License or Transfer of Control of Corporation Holding Broadcast Station Construction Permit or License.

Form Number: FCC Form 316.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions; State, local or Tribal government.

Number of Respondents and Responses: 750 respondents, 750 responses.

Frequency of Response: On occasion reporting requirement.

Obligation To Respond: Required to obtain benefits—Statutory authority for this collection of information is contained in Sections 154(i) and 310(d) of the Communications Act of 1934, as amended.

Estimated Time per Response: 1–4 hours.

Total Annual Burden: 855 hours.

Total Annual Costs: $425,150.

Confidentiality: No need for confidentiality required.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On March 17, 2005, the Commission released a Second Order on Reconsideration and Further Notice of Proposed Rulemaking, Creation of a Low Power Radio Service, MB Docket No. 99–25 (FCC 05–75). The Further Notice of Proposed Rulemaking (''*FNPRM*'') proposed to permit the assignment or transfer of control of Low Power FM (LPFM) authorizations where there is a change in the governing board of the permittee or licensee or in other situations corresponding to the circumstances described above. This proposed rule was subsequently adopted in a Third Report and Order and Second Further Notice of Proposed Rulemaking, MB Docket No. 99–25 (FCC 07–204) (*Third Report and Order*), released on December 11, 2007.

FCC Form 316 has been revised to encompass the assignment and transfer of control of LPFM authorizations, as proposed in the FNPRM and subsequently adopted in the Third Report and Order, and to reflect the ownership and eligibility restrictions applicable to LPFM permittees and licensees.

Filing of the FCC Form 316 is required when applying for authority for assignment of a broadcast station construction permit or license, or for consent to transfer control of a corporation holding a broadcast station construction permit or license where there is little change in the relative interest or disposition of its interests; where transfer of interest is not a controlling one; there is no substantial change in the beneficial ownership of the corporation; where the assignment is less than a controlling interest in a partnership; where there is an appointment of an entity qualified to succeed to the interest of a deceased or legally incapacitated individual permittee, licensee or controlling stockholder; and, in the case of LPFM stations, where there is a voluntary transfer of a controlling interest in the licensee or permittee entity. In addition, the applicant must notify the Commission when an approved transfer of control of a broadcast station construction permit or license has been consummated.

OMB Control Number: 3060–0031.

Title: Application for Consent to Assignment of Broadcast Station Construction Permit or License; Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License; Section 73.3580, Local Public Notice of Filing of Broadcast Applications.

Form Number: FCC Form 314 and FCC Form 315.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents and Responses: 4,510 respondents; 12,210 responses.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain benefits—Statutory authority for this collection of information is contained in Sections 154(i), 303 and 308 of the Communications Act of 1934, as amended.

Estimated Time per Response: 1 hour to 5 hours.

Total Annual Burden: 18,790 hours.

Total Annual Costs: $33,989,570.

Nature of Response: Required to obtain or retain benefits.

Confidentiality: No need for confidentiality required.

Privacy Impact Assessment: No impact(s).

Needs and Uses: The Instructions to Forms 314 and 315 have been revised to reflect the new ownership limits adopted in the *Third Report and Order and Second Notice of Proposed Rulemaking,* FCC 07–204 (released December 11, 2007), namely, that an entity may own only one LPFM station. By amending the Rules to permanently limit LPFM eligibility, the Commission is protecting the public interest in localism and fostering greater diversity of programming from community sources. Forms 314 and 315 have also been revised to reflect the three-year holding period of an LPFM license, as adopted in the *Third Report and Order*, during which a licensee cannot transfer or assign a license, and must operate the station. That restriction will prevent entities from using the LPFM assignment and transfer process to undermine the Commission's LPFM policies and will ensure that the benefits to the public which were the basis for the license grant will be realized.

On December 18, 2007, the Commission adopted a *Report and Order and Order on Reconsideration* in its 2006 Quadrennial Regulatory Review of the Commission's Broadcast Ownership Rules pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 06–121, FCC 07–216. Section 202 requires the Commission to review its broadcast ownership rules every four years and determine whether any of such rules are necessary in the public interest. Further, Section 202 requires the Commission to repeal or modify any regulation it determines to be no longer in the public interest.

Consistent with actions taken by the Commission in the 2006 Quadrennial Regulatory Review, the following changes are made to Forms 314 and 315: The instructions to Forms 314 and 315 have been revised to include a reference to the 2006 Quadrennial Regulatory Review as a source of information regarding the Commission's multiple ownership attribution policies and standards. The language in Section A, IV of Worksheet #3 in Forms 314 and 315 is revised. This worksheet is used in connection with Section III, Item 6b of Form 314 and Section IV, Item 8b of Form 315 to determine the applicant's compliance with the Commission's multiple ownership rules and cross-ownership rules set forth in 47 CFR 73.3555. The revisions to the worksheet account for changes made by the Commission in the 2006 Quadrennial Review to 47 CFR 73.3555(d), the Daily Newspaper Cross-Ownership Rule. The revised rule changes the circumstances under which an entity may own a daily newspaper and a radio station or television station in the same designated market area. In Section B of Worksheet #3 of Form 314, the description of a ''Daily Newspaper'' is changed to comport to the definition of ''Newspaper'' contained in 47 CFR 73.3555(c)(3)(iii) that the Commission revised in the 2006 Quadrennial Regulatory Review. In Section B of Worksheet #3 of Form 315, language from 47 CFR 73.3555(d) is added to assist applicants in their determination of compliance with the Daily Newspaper Cross-Ownership Rule. Therefore, 47 CFR 73.3555(d) (daily newspaper cross-ownership rule) states:

(1) No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in:

(i) The predicted or measured 2 mV/m contour of an AM station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community in which such newspaper is published; or (ii) The predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published; or (iii) The Grade A contour of a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

(2) Paragraph (1) shall not apply in cases where the Commission makes a finding pursuant to Section 310(d) of the Communications Act that the public interest, convenience, and necessity would be served by permitting an entity that owns, operates or controls a daily newspaper to own, operate or control an AM, FM, or TV broadcast station whose relevant contour encompasses the entire community in which such newspaper is published as set forth in paragraph (1).

(3) In making a finding under paragraph (2), there shall be a presumption that it is not inconsistent with the public interest, convenience, and necessity for an entity to own, operate or control a daily newspaper in a top 20 Nielsen DMA and one commercial AM, FM or TV broadcast station whose relevant contour encompasses the entire community in which such newspaper is published as set forth in paragraph (1), provided that, with respect to a combination including a commercial TV station:

(i) The station is not ranked among the top four TV stations in the DMA, based on the most recent all-day (9 a.m.–midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and (ii) At least 8 independently owned and operated major media voices would remain in the DMA in which the community of license of the TV station in question is located (for purposes of this provision major media voices include full-power TV broadcast stations and major newspapers).

(4) In making a finding under paragraph (2), there shall be a presumption that it is inconsistent with the public interest, convenience, and necessity for an entity to own, operate or control a daily newspaper and an AM, FM or TV broadcast station whose relevant contour encompasses the entire community in which such newspaper is published as set forth in paragraph (1) in a DMA other than the top 20 Nielsen DMAs or in any circumstance not covered under paragraph (3).

(5) In making a finding under paragraph (2), the Commission shall consider:

(i) Whether the combined entity will significantly increase the amount of local news in the market; (ii) whether the newspaper and the broadcast outlets each will continue to employ its own staff and each will exercise its own independent news judgment; (iii) the level of concentration in the Nielsen Designated Market Area (DMA); and (iv) the financial condition of the newspaper or broadcast station, and if the newspaper or broadcast station is in

financial distress, the proposed owner's commitment to invest significantly in newsroom operations.

(6) In order to overcome the negative presumption set forth in paragraph (4) with respect to the combination of a major newspaper and a television station, the applicant must show by clear and convincing evidence that the co-owned major newspaper and station will increase the diversity of independent news outlets and increase competition among independent news sources in the market, and the factors set forth above in paragraph (5) will inform this decision.

(7) The negative presumption set forth in paragraph (4) shall be reversed under the following two circumstances:

(i) the newspaper or broadcast station is failed or failing; or (ii) the combination is with a broadcast station that was not offering local newscasts prior to the combination, and the station will initiate at least seven hours per week of local news programming after the combination.

FCC Form 314 and the applicable exhibits/explanations are required to be filed when applying for consent for assignment of an AM, FM, LPFM or TV broadcast station construction permit or license. In addition, the applicant must notify the Commission when an approved assignment of a broadcast station construction permit or license has been consummated.

FCC Form 315 and applicable exhibits/explanations are required to be filed when applying for transfer of control of an entity holding an AM, FM, LPFM or TV broadcast station construction permit or license. In addition, the applicant must notify the Commission when an approved transfer of control of a broadcast station construction permit or license has been consummated. Due to the similarities in the information collected by these two forms, OMB has assigned both forms OMB Control Number 3060–0031.

47 CFR 73.3580 requires local public notice in a newspaper of general circulation of the filing of all applications for transfer of control of license/permit. This notice must be completed within 30 days of the tendering of the application. This notice must be published at least twice a week for two consecutive weeks in a three-week period. A copy of this notice must be placed in the public inspection file along with the application. Additionally, an applicant for transfer of control of license must broadcast the same notice over the station at least once daily on four days in the second week immediately following the tendering for filing of the application.

OMB Control: 3060–0110.

Title: Application for Renewal of Broadcast Station License.

Form Number: FCC Form 303–S.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents and Responses: 3,217 respondents, 3,217 responses.

Obligation to Respond: Required to obtain benefits—Statutory authority for this collection of information is contained in Sections 154(i), 303, 307 and 308 of the Communications Act of 1934, as amended, and Section 204 of the Telecommunications Act of 1996.

Estimated Time per Response: 1–11.83 hours.

Frequency of Response: Every eight year reporting requirement; Third party disclosure requirement.

Total Annual Burden: 6,335 hours.

Total Annual Costs: $1,730,335.

Nature of Response: Required to obtain or retain benefits.

Nature and Extent of Confidentiality: There is no need for confidentiality with this information collection.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: On December 18, 2007, the Commission adopted a *Report and Order and Order on Reconsideration* in its 2006 Quadrennial Regulatory Review of the Commission's Broadcast Ownership Rules pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 06–121, FCC 07–216. Section 202 requires the Commission to review its broadcast ownership rules every four years and determine whether any of such rules are necessary in the public interest. Further, Section 202 requires the Commission to repeal or modify any regulation it determines to be no longer in the public interest.

Consistent with actions taken by the Commission in the 2006 Quadrennial Regulatory Review, changes are made to Form 303–S to account for revisions made to 47 CFR 73.3555(d), the Daily Newspaper Cross-Ownership Rule. The revised rule changes the circumstances under which an entity may own a daily newspaper and a radio station or television station in the same designated market area. In Section III of Form 303–S, a new Question 7 is added which asks the licensee to certify that neither it nor any party to the application has an attributable interest in a newspaper that is within the scope of 47 CFR 73.3555(d). Instructions for this new question are added to Form 303–S, and include a reference to the 2006 Quadrennial Regulatory Review as a source of information regarding the Commission's newspaper/broadcast cross-ownership rule. Therefore, 47 CFR 73.3555(d) (daily newspaper cross-ownership rule) states:

(1) No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in:

(i) The predicted or measured 2 mV/m contour of an AM station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community in which such newspaper is published; or (ii) The predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published; or (iii) The Grade A contour of a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

(2) Paragraph (1) shall not apply in cases where the Commission makes a finding pursuant to Section 310(d) of the Communications Act that the public interest, convenience, and necessity would be served by permitting an entity that owns, operates or controls a daily newspaper to own, operate or control an AM, FM, or TV broadcast station whose relevant contour encompasses the entire community in which such newspaper is published as set forth in paragraph (1).

(3) In making a finding under paragraph (2), there shall be a presumption that it is not inconsistent with the public interest, convenience, and necessity for an entity to own, operate or control a daily newspaper in a top 20 Nielsen DMA and one commercial AM, FM or TV broadcast station whose relevant contour encompasses the entire community in which such newspaper is published as set forth in paragraph (1), provided that, with respect to a combination including a commercial TV station,

(i) The station is not ranked among the top four TV stations in the DMA, based on the most recent all-day (9 a.m.–midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and (ii) At least 8 independently owned and operating major media voices would remain in the DMA in which the community of license of the TV station in question is located (for purposes of this provision major media voices include full-power TV broadcast stations and major newspapers).

(4) In making a finding under paragraph (2), there shall be a presumption that it is inconsistent with the public interest, convenience, and necessity for an entity to own, operate or control a daily newspaper and an AM, FM or TV broadcast station whose relevant contour encompasses the entire community in which such newspaper is published as set forth in paragraph (1) in a DMA other than the top 20 Nielsen DMAs or in any circumstance not covered under paragraph (3).

(5) In making a finding under paragraph (2), the Commission shall consider:

(i) Whether the combined entity will significantly increase the amount of local news in the market; (ii) whether the newspaper and the broadcast outlets each will continue to employ its own staff and each will exercise its own independent news judgment; (iii) the level of concentration in the Nielsen Designated Market Area (DMA); and (iv) the financial condition of the newspaper or broadcast station, and if the newspaper or broadcast station is in financial distress, the proposed owner's commitment to invest significantly in newsroom operations.

(6) In order to overcome the negative presumption set forth in paragraph (4) with respect to the combination of a major newspaper and a television station, the applicant must show by clear and convincing evidence that the co-owned major newspaper and station will increase the diversity of independent news outlets and increase competition among independent news sources in the market, and the factors set forth above in paragraph (5) will inform this decision.

(7) The negative presumption set forth in paragraph (4) shall be reversed under the following two circumstances:

(i) The newspaper or broadcast station is failed or failing; or (ii) the combination is with a broadcast station that was not offering local newscasts prior to the combination, and the station will initiate at least seven hours per week of local news programming after the combination.

OMB Control Number: 3060–0920.

Title: Application for Construction Permit for a Low Power FM Broadcast Station.

Form Number: FCC Form 318.

Type of Review: Revision of a currently approved collection.

Respondents: Not-for-profit institutions; State, local or tribal government.

Number of Respondents and Responses: 16,659 respondents, 23,377 responses.

Frequency of Response: Recordkeeping requirement; On occasion reporting requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain benefits—Statutory authority for this collection of information is contained in Sections 154(i), 303, 308 and 325(a) of the Communications Act of 1934, as amended.

Estimated Time per Response: 0.0025 hours–12 hours.

Total Annual Burden: 34,396 hours.

Total Annual Costs: $23,850.

Confidentiality: No need for confidentiality required.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On December 11, 2007, the FCC released a Third Report and Order and Second Further Notice of Proposed Rulemaking (''Third Report and Order'') MM Docket No. 99–25, FCC 07–204. In the Third Report and Order, the FCC extended the local standards for rural markets. Under the old Rules, an LPFM applicant was deemed local if it was physically headquartered or had a campus within ten miles of the proposed LPFM transmitter site, or if 75 percent of its board members resided within ten miles of the proposed LPFM transmitter site. The Third Report and Order modified the ten-mile requirement to twenty miles for all LPFM applicants for proposed facilities in other than the top fifty urban markets, for both the distance from transmitter and residence of board member standards. We have revised the Form 318 to reflect this extension of local standards for rural markets. While the overall number of respondents increases because the Rule change expands the universe of eligible applicants, there are no new information collection requirements with respect to completion of the Form 318.

In the Third Report and Order, the Commission also delegated to the Media Bureau the authority to consider Section 73.807 waiver requests from certain LPFM stations. When implementation of a full-service station community of license modification would result in an increase in interference caused to the LPFM station or its displacement, the LPFM station may seek a second-adjacent channel short spacing waiver in connection with an application proposing operations on a new channel. Such waiver requests would be filed on a Form 318.

The Third Report and Order also allows LPFM stations to file waiver requests of Section 73.809 of the Rules if: (1) It is at risk of displacement by an encroaching full-service station modification application and no alternative channel is available, and (2) it can demonstrate that it has regularly provided at least eight hours per day of locally originated programming. LPFM stations that wish to make a showing under this waiver standard must file an informal objection to the ''encroaching'' community of license modification application.

FCC Form 318 is required: (1) To apply for a construction permit for a new Low Power FM (LPFM) station; (2) to make changes in the existing facilities of such a station; or (3) to amend a pending FCC Form 318 application.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–11494 Filed 5–21–08; 8:45 am]

BILLING CODE 6712–01–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 applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank

indicated or the offices of the Board of Governors not later than June 16, 2008.

A. Federal Reserve Bank of Richmond (A. Linwood Gill, III, Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528:

1. Eagle Bancorp, Inc.; to acquire 100 percent of the voting shares of Fidelity & Trust Financial Corporation, and thereby indirectly acquire Fidelity & Trust Bank, all of Bethesda, Maryland.

Board of Governors of the Federal Reserve System, May 19, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–11463 Filed 5–21–08; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. 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 the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than June 6, 2008.

A. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. McCamey Financial Corporation, Odessa, Texas, and McCamey Financial Delaware Corporation, Dover, Delaware, through its subsidiary, Security State Bank, Odessa, Texas, to acquire 70 percent of the voting shares of Venture Finance LLC, Midland, Texas, and thereby engage in lending activities pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, May 19, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–11462 Filed 5–21–08; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, National Center for Health Marketing

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 the following committee meetings:

Name: Board of Scientific Counselors, National Center for Health Marketing (BSC, NCHM).

Times and Dates: 10 a.m.–5 p.m., June 5, 2008. 8:30 a.m.–12 p.m., June 6, 2008.

Place: Auditorium A, Global Communications Center, Building 19, 1600 Clifton Road, N.E., Atlanta, Georgia, 30333.

Status: Open to the public, limited only by the space available.

Please Note: Due to current security measures, a valid government issued identification card with photo is required for admittance into the Roybal facility. Non-U.S. citizens wishing to attend should contact Dionne Mason; Telephone, (404) 498–2314. The deadline for notification of attendance is May 22, 2008.

Purpose: The board provides advice to the Secretary, Department of Health and Human Services; and the Director, Centers for Disease Control and Prevention, on strategies and goals for the programs and research within the national center; conducts peer review of scientific programs; and monitors the overall strategic direction and focus of the national center. The board also performs second-level peer review of applications for grants-in-aid for research and research training activities, cooperative agreements, and research contract proposals relating to the broad areas within the national center.

Matters to be Discussed: The agenda will include a general overview of the NCHM and discussions related to the Center's role in preparedness, response and recovery with regards to an outbreak of pandemic influenza.

Agenda items are subject to change as priorities dictate.

Contact for More Information: Dionne R. Mason, Committee Management Specialist, NCHM, CDC, 1600 Clifton Road, NE., Mail Stop E–21, Atlanta, Georgia 30333; Telephone, (404) 498–2314; Fax, (404) 498–2221.

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: May 9, 2008.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E8–11448 Filed 5–21–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0286]

Agency Information Collection Activities; Proposed Collection; Comment Request; Survey to Evaluate FDA's Food Defense Awareness Initiative ALERT

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on a survey of food industry supervisory employees about their awareness and perceptions of FDA's Food Defense Awareness Initiative ALERT.

DATES: Submit written or electronic comments on the collection of information by July 21, 2008.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of the Chief Information Officer (HFA–250), Food

and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4659.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Survey to Evaluate FDA's Food Defense Awareness Initiative ALERT

In July 2006, FDA announced its Food Defense Awareness Initiative, called ALERT (the letters stand for the five key components of the initiative: (assure, look, employees, report, and threat). The ALERT initiative is intended to raise the awareness of State and local government agencies and the food industry regarding food defense issues. ALERT identifies five key points that industry and businesses can use to decrease the risk of intentional food contamination at their facility. The ALERT Web-based training module and more information on ALERT are available at *www.cfsan.fda.gov/~dms/defterr.html*.

Under section 903(b)(2) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 393 (b)(2)), FDA is authorized to conduct research relating to foods and to conduct educational and public information programs relating to the safety of the nation's food supply. Under this authority, FDA is planning to conduct a survey of first line supervisors working in a range of capacities in the food industry about their awareness and perceptions of the agency's ALERT initiative and the ALERT initiative informational materials. The purpose of the survey is to help FDA evaluate ALERT informational materials and to gauge whether the materials succeed in informing food industry supervisory employees about the risk of intentional food contamination and in motivating them to engage in protective behaviors. The survey results will be used to assess how knowledge and awareness, threat perceptions, attitudes, norms, benefits and barriers affect the implementation of the ALERT initiative.

The data will be collected using a Web-based questionnaire. The survey will employ a stratified, cluster sampling design. Using industry networks and listings, we will randomly sample from databases of eight industry groups (regulators, growers, packers, processors, warehousers, transporters, retailers, and food service operators). We will stratify within groups by organization size (small, medium, and large) based on number of employees on the payroll, for a total random sample of 200 organizations. Participation in the survey is voluntary. Cognitive interviews and a pre-test will be conducted prior to fielding the survey.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

Questionnaire	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours Per Response	Total Hours
Cognitive Interviews	10	10	10	1	10
Pre-tests	10	1	10	.4	4
Survey	200	1	200	.4	80
Total					94

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

FDA's burden estimate is based on prior experience with consumer surveys similar to this proposed survey.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

Dated: May 15, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–11514 Filed 5–21–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–D–0293]

Draft Guidance for Industry: Considerations for Allogeneic Pancreatic Islet Cell Products; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the

availability of a draft document entitled ''Guidance for Industry: Considerations for Allogeneic Pancreatic Islet Cell Products'' dated May 2008. The draft guidance document is intended to provide recommendations to manufacturers, sponsors, and clinical investigators involved in the transplantation of allogeneic pancreatic islet cell products for clinical investigations of the treatment of type 1 diabetes mellitus. The draft guidance is intended to provide assistance by identifying the types of data and information obtained during investigational new drug studies that may be helpful in establishing the safety, purity, and potency of a biological product in a biologics license application (BLA).

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit written or electronic comments on the draft guidance by August 20, 2008.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Office of Communication, Training, and Manufacturers Assistance (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist the office in processing your requests. The draft guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Valerie A. Butler, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft document entitled ''Guidance for Industry: Considerations for Allogeneic Pancreatic Islet Cell Products'' dated May 2008. The draft guidance document is intended to provide recommendations to manufacturers, sponsors, and clinical investigators involved in the transplantation of allogeneic pancreatic islet cell products for clinical investigations of the treatment of type 1 diabetes mellitus. The draft guidance is intended to provide assistance with the types of data and information that may be obtained during investigational new drug studies to assist in establishing the safety, purity, and potency of a biological product in a BLA. However, the guidance is not intended to identify all of the product, preclinical, and clinical data that may be needed to successfully support a BLA.

The draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent FDA's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirement of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

The draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 211 has been approved under 0910–0139; the collections of information in 21 CFR part 312 has been approved under 0910–0014; the collections of information in 21 CFR parts 601 and 610 have been approved under 0910–0338; and the collections of information in 21 CFR part 1271 has been approved under 0910–0543 and 0910–0559.

III. Comments

The draft guidance is being distributed for comment purposes only and is not intended for implementation at this time. Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding the draft guidance. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in the brackets in the heading of this document. A copy of the draft guidance and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

IV. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/cber/guidelines.htm* or *http://www.regulations.gov*.

Dated: May 13, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–11516 Filed 5–21–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Cardiovascular and Renal Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Cardiovascular and Renal Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on June 24, 2008, from 8 a.m. to 5 p.m.

Location: Hilton Washington DC/Silver Spring, Maryland Ballroom, 8727 Colesville Rd., Silver Spring, MD, 301–589–5200.

Contact Person: Elaine Ferguson, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane (for express delivery, 5630 Fishers Lane, rm. 1093), Rockville, MD 20857, 301–827–7001, FAX: 301–827–6776, e-mail: *elaine.ferguson@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512533. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot

always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: The committee will discuss safety considerations in the development of ultrasound contrast agents, based upon the experience with the following: (1) New drug application (NDA) 21–064, perflutren lipid microsphere injectable suspension, Lantheus Medical Imaging, Inc.; (2) NDA 20–899, perflutren protein-type A microspheres injectable suspension, GE Healthcare; and (3) the investigational new drug application for sulphur hexafluoride microbubble injection, Bracco Diagnostics. Perflutren lipid microsphere injectable suspension and perflutren protein-type A microspheres injectable suspension are indicated for use in patients with suboptimal echocardiograms to opacify the left ventricular chamber and to improve the delineation of the left ventricular endocardial borders.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*, click on the year 2008 and scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before June 13, 2008. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before June 3, 2008. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by June 5, 2008.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Elaine Ferguson at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/oc/advisory/default.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: May 15, 2008.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E8–11450 Filed 5–21–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Endocrinologic and Metabolic Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Endocrinologic and Metabolic Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on July 1, 2008, from 8 a.m. to 6 p.m. and July 2, 2008, from 8 a.m. to 4:30 p.m.

Location: Hilton Washington DC/Silver Spring, The Ballroom, 8727 Colesville Rd, Silver Spring, MD, 301–589–5200.

Contact Person: Paul Tran, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane (for express delivery, 5630 Fishers Lane, rm. 1093), Rockville, MD 20857, 301–827–7001, FAX: 301–827–6776, e-mail: *paul.tran@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512536. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: On both days, the committee will discuss the role of cardiovascular assessment in the preapproval and postapproval settings for drugs and biologics developed for the treatment of type 2 diabetes mellitus.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*, click on the year 2008 and scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before June 17, 2008. Oral presentations from the public will be scheduled between approximately 8:15 a.m. and 9:45 a.m. on July 2, 2008. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before June 9, 2008. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will

notify interested persons regarding their request to speak by June 10, 2008.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact John Lauttman at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/oc/advisory/default.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: May 15, 2008.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E8–11449 Filed 5–21–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Gastroenterology and Urology Devices Panel of the Medical Devices Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Gastroenterology and Urology Devices Panel of the Medical Devices Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on June 25, 2008, from 8 a.m. to 5 p.m.

Location: Hilton Washington DC North/Gaithersburg, Salons A, B, and C, 620 Perry Pkwy., Gaithersburg, MD.

Contact Person: Jeffrey Cooper, Center for Devices and Radiological Health (HFZ–470), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 240–276–4151 or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512523. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: The committee will discuss, make recommendations, and vote on a premarket approval application, sponsored by Medical Enterprises, Ltd., for a drug/device combination product designed to prevent recurrence of bladder cancer. Synergo SB–3TS 101.1 Device with Mitomycin C is indicated for use for prophylactic treatment of recurrence in patients following endoscopic removal of Ta-T1 and G1–3 superficial transitional cell carcinoma of the bladder (STCCB). Ta-T1 refers to the stage of the tumor, which is a measure of how deep the tumor penetrates into the bladder wall, with Ta and T1 being the most superficial stages for raised bladder tumors. G1–3 refers to the tumor grade, which is a measure of how aggressive the tumor is likely to grow, with G1 being the least aggressive, and G3 the most. Synergo and Mitomycin C treatment is clinically indicated for STCCB patients of intermediate and high risk.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*, click on the year 2008 and scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before June 16, 2008. Oral presentations from the public will be scheduled between approximately 8:15 a.m. and 8:45 a.m., and between approximately 2:45 p.m. and 3:15 p.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before June 6, 2008. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by June 9, 2008.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Ann Marie Williams, Conference Management Staff, at 240–276–8932, at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/oc/advisory/default.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: May 15, 2008.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E8–11455 Filed 5–21–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Ophthalmic Devices Panel of the Medical Devices Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Ophthalmic Devices Panel of the Medical Devices Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on June 10, 2008, from 8 a.m. to 4:30 p.m.

Location: Hilton Washington DC North/Gaithersburg, Salons A, B, and C, 620 Perry Pkwy., Gaithersburg, MD.

Contact Person: Karen F. Warburton, Center for Devices and Radiological Health (HFZ–460), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 240–276–4238, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512396. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: The committee will discuss general issues concerning the postmarket experience with various contact lens care products. The discussion will include recommendations on contact lens care product development topics such as preclinical testing and clinical performance measures, and labeling for contact lenses and lens care products.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*, click on the year 2008 and scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before June 5, 2008. Oral presentations from the public will be scheduled on June 10, 2008, between approximately 9:30 a.m. and 10 a.m. and between approximately 3:30 p.m. and 4 p.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before May 28, 2008. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by May 29, 2008.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact AnnMarie Williams, Conference Management staff, 240–276–8932, at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/oc/advisory/default.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: May 15, 2008.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E8–11451 Filed 5–21–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[FDA No. 225–08–2000]

Memorandum of Understanding With the U.S. Army Corps of Engineers, Mobile District

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is providing notice of a memorandum of understanding (MOU) between FDA and the U.S. Army Corps of Engineers, Mobile District. This MOU establishes a mutual framework governing the respective responsibilities of the parties for the provision of health services through the Corps' Regional Occupational Health Center to FDA employees at the FDA Gulf Coast Seafood Laboratory. Goods and services the Corps may provide include, but are not limited to, physicals at age-appropriate intervals, referral of employees to private physicians, prevention programs related to health, and other related goods and services as meet the criteria and standards of the Public Health Service, immunizations for influenza and tetanus, and safety and environmental counseling

DATES: The agreement became effective April 28, 2008.

FOR FURTHER INFORMATION CONTACT: Julia Pryor, Center for Food Safety and Nutrition, rm. 122 (HFS–400), Food and Drug Administration, P.O. Box 158, One Iberville Dr., Dauphin Island, AL 36528, 251–694–4479.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 20.108(c), which states that all written agreements and MOUs between FDA and others shall be published in the **Federal Register**, the agency is publishing notice of this MOU.

Dated: May 13, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

BILLING CODE 4160–01–S

MEMORANDUM OF AGREEMENT
BETWEEN
U.S. ARMY COPRS OF ENGINEERS, MOBILE DISTRICT
AND
U.S. FOOD AND DRUG ADMINISTRATION
CENTER FOR FOOD SAFETY AND APPLIED NUTRITION
GULF COAST SEAFOOD LABORATORY

ARTICLE I - PURPOSE AND AUTHORITY

This Memorandum of Agreement (MOA) is entered into by and between the U.S. Army Corps of Engineers, Mobile District (Corps) and FDA/Gulf Coast Seafood Laboratory (the parties) for the purpose of establishing a mutual framework governing the respective responsibilities of the parties for the provision of health services through the Corps' Regional Occupational Health Center (ROHC). This MOA is entered into pursuant to the Economy in Government Act (31 U.S.C. § 1535).

ARTICLE II - SCOPE

Goods and services that the Corps may provide under this MOA include (1) upon request, annual physicals for employees 40 years of age or older; triennially for employees less than 40 years of age; (2) referral of employees to private physicians; (3) pre-employment and other examination; (4) prevention programs relating to health, and such other related goods or services as meet the criteria and standards of the Public Health Service, that are authorized and agreed upon in the future; (5) immunizations for influenza and tetanus as supplies are available; (6) safety and environmental counseling; and (7) ergonomic counseling and evaluation.

Nothing in this MOA shall be construed to require FDA/Gulf Coast Seafood Laboratory to use the Corps or to require the Corps to provide any goods or services to FDA/Gulf Coast Seafood Laboratory.

ARTICLE III - INTERAGENCY COMMUNICATIONS

To provide for consistent and effective communication between the Corps and FDA/Gulf Coast Seafood Laboratory, each party shall appoint a Principal Representative to serve as its central point of contact on matters relating to this MOA.

ARTICLE IV - RESPONSIBILITIES OF THE PARTIES

A. Responsibilities of the U.S. Army Corps of Engineers, Mobile District

1. The Corps shall provide FDA/Gulf Coast Seafood Laboratory with goods or services in accordance with the purpose, terms, and conditions of this MOA.

2. The Corps shall identify authorized Corps representatives as points-of-contact.

3. The Corps shall provide the stated goods or services by in-house effort.

4. The Corps shall propose an Estimated Cost Schedule for each fiscal year based on the number of FDA / Gulf Coast Seafood Laboratory employees to be served by the Corps. For subsequent FYs, the Corps shall provide a revised Estimated Cost Schedule.

5. The Corps shall negotiate in good faith, a final agreement as to costs.

6. The Corps shall provide detailed financial reports to the FDA / Gulf Coast Seafood Laboratory. Financial reports shall include information on all funds received, obligated, and expended, and on forecast obligations and expenditures.

B. Responsibilities of the FDA / Gulf Coast Seafood Laboratory

1. The FDA / Gulf Coast Seafood Laboratory shall certify that MOA complies with the requirements of the Economy in Government Act.

2. The FDA / Gulf Coast Seafood Laboratory shall pay all costs associated with the Corps' provisions of goods or services under this MOA and shall certify, at the time of signing, the availability of funds for such goods and services. Actual transfer of funds will take place under an Interagency agreement negotiated between FDA and the Corps specifically for this purpose.

3. The FDA / Gulf Coast Seafood Laboratory shall ensure that only authorized FDA / Gulf Coast Seafood Laboratory official signs this MOA.

4. The FDA / Gulf Coast Seafood Laboratory shall negotiate in good faith, a final agreement as to costs.

ARTICLE V - FUNDING

The FDA / Gulf Coast Seafood Laboratory shall pay all costs associated with the Corps' provision of goods or services under this MOA. The cost to the FDA / Gulf Coast Seafood Laboratory is a flat rate of $150 per employee. The FDA / Gulf Coast Seafood Laboratory shall determine the total number of employees that will receive services under this MOA, and calculate the total estimated annual costs. (See Appendix A) Each month, the Corps shall bill, and the FDA / Gulf Coast Seafood Laboratory shall pay the expenses incurred.

ARTICLE VI - APPLICABLE LAWS

This MOA and all documents and actions pursuant to it shall be governed by the applicable statutes, regulations, directives, and procedures of the United States. Unless otherwise required by law, all work undertaken by the Corps shall be governed by Corps policies and procedures.

ARTICLE VII - DISPUTE RESOLUTION

The parties agree that, in the event of a dispute between the parties, the FDA / Gulf Coast Seafood Laboratory and the Corps shall use their best efforts to resolve that dispute in an informal fashion through consultation and communication, or other forms of non-binding alternative dispute resolution mutually acceptable to the parties. The parties agree that, in the event such measures fail to resolve the dispute, they shall refer it for resolution to the Office of Management and Budget, or such other entity as may be appropriate.

ARTICLE VIII - RESPONSIBILITY FOR COSTS

If liability of any kind is imposed on the United States relating to the Corps' provision of goods or services under this MOA, the Corps will accept accountability for its actions, but the FDA / Gulf Coast Seafood Laboratory shall remain responsible as the program proponent for providing such funds as are necessary to discharge the liability, and all related costs. This obligation extends to all funds legally available to discharge this liability, including funds that may be made legally available through transfer, reprogramming or other means. Should the FDA / Gulf Coast Seafood Laboratory have insufficient funds legally available, including funds that may be made legally available through transfer, reprogramming or other means, they remain responsible for seeking additional funds from Congress for such purpose, although nothing in this MOA shall be construed to imply that Congress will appropriate funds sufficient to meet the liability.

Notwithstanding the above, this MOA does not confer any liability upon the FDA / Gulf Coast Seafood Laboratory for claims payable by the Corps under the Federal Torts Claims Act. Provided further that nothing in this MOA is intended or will be construed to create any rights or remedies for any third party and no third party is intended to be a beneficiary of this MOA.

ARTICLE IX - PUBLIC INFORMATION

Justification and explanation of the FDA / Gulf Coast Seafood Laboratory's programs before Congress and other agencies, departments, and offices of the Federal Executive Branch shall be the responsibility of the FDA / Gulf Coast Seafood Laboratory. The Corps may provide, upon request, any assistance necessary to support the FDA / Gulf Coast Seafood Laboratory's justification or explanations of the FDA / Gulf Coast Seafood Laboratory's programs conducted under this MOA. In general, the FDA / Gulf Coast Seafood Laboratory is responsible for all public information. The FDA / Gulf Coast Seafood Laboratory or the Corps shall make its best efforts to give the other party advance notice before making any public statement regarding work contemplated, undertaken, or completed pursuant this MOA.

ARTICLE X - MISCELLANEOUS

A. Other Relationships or Obligations

This MOA shall not affect any pre-existing or independent relationships or obligations between the FDA / Gulf Coast Seafood Laboratory and the Corps.

B. Survival

The provisions of this MOA which require performance after the expiration or termination of this MOA shall remain in force notwithstanding the expiration or termination of this MOA.

C. Severability

If any provision of this MOA is determined to be invalid or unenforceable, the remaining provisions shall remain in force and unaffected to the fullest extent permitted by law and regulation.

ARTICLE XI - AMENDMENT, MODIFICATION AND TERMINATION

This MOA may be modified or amended only by written, mutual agreement of the parties. Either party may terminate this MOA by providing written notice to the other party. The termination shall be effective upon the sixtieth calendar day following notice, unless a later date is set forth. In the event of termination, the FDA / Gulf Coast Seafood Laboratory shall continue to be responsible for all costs incurred by the Corps under this MOA.

ARTICLE XII - EFFECTIVE DATE

This MOA shall become effective when signed by authorized personnel for both parties.

U.S. Food and Drug Administration
Center for Food Safety and Applied Nutrition

Stephen F. Sundlof, DVM., Ph.D.
Director, Center for Food Safety
and Applied Nutrition

Date: 4/28/08

U.S. Army Corps of Engineers,
Mobile District

Byron G. Jorns
Colonel, Corps of Engineers
Commanding

Date: 24 Mar '08

APPENDIX A

Servicing Agency Name and Address	Paying Agency Name and Address
U. S. Army Corps of Engineers Occupational Health Services SO-H P.O. box 2288 Mobile, AL 36628-0001	U.S. Food and Drug Administration Center for Food Safety and Applied Nutrition Gulf Coast Seafood Laboratory 5100 Paint Branch Parkway College Park, MD 20740
Servicing Agency Contact Information	**Paying Agency Contact Information**
Christene Tomlin-Harding, RN Regional Nurse Mgr/Occupational Health Services Christene.v.tomlin-harding@usace.army.mil Tel: (251) 690-2670 Fax: (251) 690-2028 Toll-Free: (866) 521-2774	Julia Pryor Administrative Specialist Julia.pryor@fda.hhs.gov Tel: (251) 694-4479 Fax: (251) 694-4477
Reimbursable Interagency Agreement Data	**Cost of Service Calculation**
Period of Performance **Fiscal Year : 2008** **10/01/2007 through 9/30/2008**	11 X $150 (ea) = $ 1650.00 No. of Employees

Agency Signature **Title** **Date**

[FR Doc. E8–11521 Filed 5–21–08; 8:45 am]

BILLING CODE 4160–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel, June 16, 2008, 8 a.m. to June 17, 2008, 5 p.m., Four Points Sheraton, 1201 K Street, NW., Washington, DC 20005 which was published in the **Federal Register** on May 2, 2008, 73 FR 24296–24298. The meeting will be held June 23, 2008. The meeting time and location remain the same. The meeting is closed to the public.

Dated: May 14, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11304 Filed 5–21–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Initial Review Group; Subcommittee H—Clinical Groups.

Date: July 14–15, 2008.

Time: 6:30 p.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Timothy C. Meeker, MD, PhD, Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room

8103, Bethesda, MD 20892, (301) 594–1279, *meekert@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: May 14, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11442 Filed 5–21–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Cancer Institute Director's Consumer Liaison Group.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: National Cancer Institute Director's Consumer Liaison Group.

Date: June 30, 2008.

Time: 1 p.m. to 3 p.m.

Agenda: (1) Approval of Minutes; (2) Reports from Dr. John E. Niederhuber, NCI Director; (3) Report from Shannon Bell, OAR Director; (4) Update on issue of the CIRB; (5) Update on the Advocates in Research Working Group; (6) Report of Recommendations Working Group; (7) Reports from DCLG members on NCI Committee Assignments; (8) Public Comment; (9) Action Items and Conclusion.

Place: National Institutes of Health, Building 31, 31 Center Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Barbara Guest, Executive Secretary, Office of Advocacy Relations, National Cancer Institute, National Institutes of Health, 31 Center Drive, Bldg. 31, Room 10A30D, Bethesda, MD 20892, 301–496–0307, *guestb@mail.nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/dclg/dclg.htm*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: May 14, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11444 Filed 5–21–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Function, Integration, and Rehabilitation Sciences Subcommittee.

Date: June 9, 2008.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Anne Krey, PhD, Scientific Review Administrator, Division of Scientific Review, National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5b01, Bethesda, MD 20892, 301–435–6908, *ak41o@nih.gov.*

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Obstetrics and Maternal-Fetal Biology Subcommittee.

Date: June 9, 2008.

Time: 9:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Gaithersburg Hilton, 620 Perry Parkway, Gaithersburg, MD 20877.

Contact Person: Gopal M. Bhatnagar, PhD, Scientific Review Administrator, National Institute of Child Health and Human Development, National Institutes of Health, 6100 Bldg. Rm. 5B01, Rockville, MD 20852, (301) 435–6889, *bhatnagg@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: May 14, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11305 Filed 5–21–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Population Sciences Subcommittee.

Date: June 16–17, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Crowne Plaza Washington National Airport, 1489 Jefferson Davis Hwy, Arlington, VA 22202.

Contact Person: Carla T. Walls, PhD, Scientific Review Administratior, Division of Scientific Review, National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, (301) 435–6898, *wallsc@mail.nih.gov.*

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Developmental Biology Subcommittee.

Date: June 16–17, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel, 1515 Rhode Island Ave., NW., Washington, DC 20005.

Contact Person: Norman Chang, PhD, Scientific Review Administrator, Division of Scientific Review, National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5b01, Bethesda, MD 20892, (301) 496–1485, *changn@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: May 14, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11306 Filed 5–21–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Research Education Grants for Statistical Training in the Genetics of Addiction.

Date: May 27, 2008.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6101 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Meenaxi Hiremath, PhD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6101 Executive Blvd., Suite 220, MSC 8401, Bethesda, MD 20892, 301–402–7964, *mh392g@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; NIDA Avant-Garde Award.

Date: May 30, 2008.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6101 Executive Boulevard, Rockville, MD 20852, (Virtual Meeting).

Contact Person: Nadine Rogers, PhD, Scientific Review Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, 301–402–2105, *rogersn2@nida.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; MACS Cohort Studies.

Date: June 5, 2008.

Time: 10 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Madison, a Loews Hotel, 1177 Fifteenth Street, NW., Washington, DC 20005.

Contact Person: Mark Swieter, PhD, Chief, Training and Special Projects Review Branch, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, 6101 Executive Boulevard, Suite 220, Bethesda, MD 20892–8401, (301) 435–1389, *ms80x@nih.gov.*

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Non-Coding RNA(s) and Other Post-transcriptional Regulatory Mechanisms in Neuroplasty & Addiction.

Date: June 11, 2008.

Time: 8:30 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.

Contact Person: Eliane Lazar-Wesley, PhD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, 301–451–4530, *elazarwe@nida.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: May 14, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11307 Filed 5–21–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; International Research Training and Support (N01DA–8–1137).

Date: May 29, 2008.

Time: 9:30 a.m. to 4:30 p.m.

Agenda: To review and evaluate contract proposals.

Place: Courtyard by Marriott Rockville, 2500 Research Boulevard, Rockville, MD 20850.

Contact Person: Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, (301) 435–1439, *lf33c.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Receptor Profiling and Compound Library Screening (N01DA–8–8877).

Date: June 3, 2008.

Time: 9:30 a.m. to 4:30 p.m.

Agenda: To review and evaluate contract proposals.

Place: Courtyard by Marriott Rockville, 2500 Research Boulevard, Rockville, MD 20850.

Contact Person: Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, (301) 435–1439, *lf33c.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: May 14, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11310 Filed 5–21–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Nursing Research Initial Review Group.

Date: June 19, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Bethesda Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: Yujing Liu, PhD, MD, Chief, Office of Review, National Institute of Nursing Research, National Institutes of Health, 6707 Democracy Blvd., Ste. 710, Bethesda, MD 20892, (301) 594–3169, *yujing_liu@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: May 14, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11311 Filed 5–21–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development, Special Emphasis Panel, Egg to Embryo-Gene Regulatory Circuitry in Development.

Date: June 17, 2008.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, 5BO1N, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Peter Zelazowski, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Boulevard, Rm. 5B01, Bethesda, MD 20892–7510, 301–435–6902, *Peter.zelazowski@nih.gov*.

Name of Committee: National Institute of Child Health and Human Development, Special Emphasis Panel, Gene Therapy for Metabolic Disorders.

Date: June 20, 2008.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, 5BO1N, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Peter Zelazowski, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Boulevard, Rm. 5B01, Bethesda, MD 20892–7510, 301–435–6902, *peter.zelazowski@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: May 14, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11312 Filed 5–21–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development, Special Emphasis, Panel National Child Study.

Date: June 1–3, 2008.

Time: 2 p.m. to 5 p.m.

Agenda: To review and evaluate contract proposals.

Place: Courtyard Gaithersburg Washingtonian, 204 Boardwalk Place, Gaithersburg, MD 20878.

Contact Person: Sathasiva B. Kandasamy, PhD, Scientific Review Administrator, Division of Scientific Review, National Institute of Child Health and Human Development, 6100 Executive Boulevard, Room 5B01, Bethesda, MD 20892–9304, (301) 435–6680, *skandasa@mail.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: May 14, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11313 Filed 5–21–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Office of Refugee Resettlement; Grant Notice

AGENCY: Office of Refugee Resettlement, Administration for Children and Families, DHHS.

ACTION: Notice to supplement funding to the 2008 Voluntary Agency Matching Grant Program.

CFDA#: 93.567.

Legislative Authority: Section 412(c)(1)(A) of the Immigration and Nationality Act (8 U.S.C. 1522(c)(1)(A); Section 7(a) and (b) of the Refugee Assistance Extension Act of 1986 (P.L. 99–605) (8 U.S.C. 1522 note)

Amount of Award: $2.17 million supplemental to 2008 awards of $60 million federal funds plus $30 million in cash and in-kind ''match''.

Project Period: February 15, 2008 to January 31, 2010.

SUMMARY: Notice is hereby given that the Office of Resettlement, Division of Community Resettlement, will award supplemental funds without competition to nine agencies: Church World Service, Ethiopian Community Development Council, Episcopal Migration Ministries, Hebrew Immigrant Aid Society, International Rescue Committee, Lutheran Immigration and Refugee Services, the United States Committee for Refugees and Immigrants, the United States Conference of Catholic Bishops, and World Relief Corporation. The cost for these supplemental awards is $2.17 million.

The Voluntary Agency Matching Grant program was created by Congress in 1979. Matching Grant services enable the Voluntary Agencies' resettlement agencies to work with recently arrived refugees and other eligible clients. The goal of the program is to assist refugees become economically self-sufficient without accessing public assistance within 120–180 days. Last year, 81% of clients entering the program were economically self-sufficient within 180 days.

Since the Presidential Determination was signed in October 2007, the ceiling for refugees was raised from 70,000 to 80,000 to accommodate 10,000 additional Iraqi refugees. In addition, legislation passed in December 2007 and January 2008 created a new class of individuals eligible for the refugee services. Thousands of Afghani and Iraqi interpreters who served the U.S. military have been provided ''Special Immigrant Visas'' (SIV) and are now eligible for six or eight months of refugee services. The Matching Grant program is often the program of choice for these special populations as it is geared for readily employable cases and for SIV cases, conforms to the legislative time limits.

FOR FURTHER INFORMATION CONTACT: Ronald A. Munia, Director, Division of Community Resettlement, Office of Refugee Resettlement, 370 L'Enfant Promenade, SW., Washington, DC 20047. E-mail: *rmunia@acf.hhs.gov* and phone: 202–401–4559.

Dated: May 13, 2008.

David H. Siegel,

Director, Office of Refugee Resettlement.

[FR Doc. E8–11440 Filed 5–21–08; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2008–0049]

Science and Technology Directorate; Submission for Review; Information Collection Request for the DHS S&T Bio-Knowledge Center Expert Database

AGENCY: Science and Technology Directorate, DHS.

ACTION: 30-day Notice and request for comment.

SUMMARY: The Department of Homeland Security (DHS) invites the general public to comment on a new data collection form for the Bio-Knowledge Center Expert Database: Subject Matter Expert (SME) Registration Form (DHS Form 10043). The Bio-Knowledge Center Database will collect SME information in order to understand who can provide scientific expertise for peer review of scientific programs, and who can provide expertise in the event of a perceived biothreat. In addition, the directory will make it easier to identify scientific specialty areas for which there is a shortage of SMEs with appropriate security clearances. SME contact information, scientific expertise, and level of education will be collected electronically through a Web portal currently being developed by DHS S&T. The SME information will be shared with U.S. Government program managers and other members of the biodefense community who have a legitimate need to identify biological SMEs. Cleared SMEs are necessary to accomplish scientific reviews, attend topical meetings, and to consult in the event of a perceived biothreat. This notice and request for comments is required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). Previously, a 60-day notice was published in the **Federal Register** on March 14, 2008.

DATES: Comments are encouraged and will be accepted until June 23, 2008.

Comments: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to Desk Officer for the Department of Homeland Security, Science & Technology Directorate, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974. Please include docket number [DHS–2008–00XX] in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Michael Bowerbank (202) 254–6895 (this is not a toll free number).

SUPPLEMENTARY INFORMATION: The National Counterproliferation Center has identified the need for a comprehensive and readily available list of biological agent SMEs that includes security clearance status. In particular, there is no database that contains security clearance information, biological domain expertise, and contact information. Therefore, the SME Directory is being coordinated at the national level to address this need. If a similar database is identified in the future, we will work with the identified collection agent to ensure a cooperative partnership is developed.

The SME Directory will use electronic (Web-based) technology to collect, maintain, and transmit SME information. The SMEs will have access to their own data and will be able to edit and update the information electronically.

DHS is particularly interested in comments that:

(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, including the validity of the methodology and assumptions used;

(3) Suggest ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Suggest ways to minimize the burden of the data collection on those who respond, including 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.

Overview of This Information Collection

(1) *Type of Information Collection:* New information collection.

(2) *Title of the Form/Collection:* Bio-Knowledge Center Expert Database.

Agency Form Number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection: DHS Form 10043 (2/08), DHS Science & Technology Directorate.

(3) *Affected public who will be asked or required to respond, as well as a brief abstract:* Individuals; the data will be gathered from individual SMEs and stored in a central database, accessible through a Web-based portal. The SME information will be shared with U.S. Government program managers and other members of the biodefense community who have a legitimate need to identify biological SMEs.

(4) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

a. *Estimate of the total number of respondents:* 4000

b. *An estimate of the time for an average respondent to respond:* .25 burden hours.

Dated: May 14, 2008.

Kenneth D. Rogers,

Chief Information Officer, Science and Technology Directorate.

[FR Doc. E8–11454 Filed 5–21–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form G–639, Extension of an Existing Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection Under Review: Form G–639, Freedom of Information/Privacy Act Request; OMB Control No. 1615–0102.

The Department of Homeland Security, U.S. Citizenship and Immigration Services has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until July 21, 2008.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352, or via e-mail at *rfs.regs@dhs.gov*. When submitting comments by e-mail please add the OMB Control Number 1615–0102 in the subject box.

During this 60-day period USCIS will be evaluating whether to revise the Form G–639. Should USCIS decide to revise the Form G–639 it will advise the public when it publishes the 30-day notice in the **Federal Register** in accordance with the Paperwork Reduction Act. The public will then have 30-days to comment on any revisions to the Form G–639.

Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) 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;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Freedom of Information/Privacy Act Request.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form G–639. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or Households. This form is provided as a convenient means for persons to provide data necessary for identification of a particular record desired under FOIA/PA.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 100,000 responses at 15 minutes per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 25,000 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit: *http://www.regulations.gov/search/index.jsp*.

We may also be contacted at: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529, telephone number 202–272–8377.

Dated: May 19, 2008.

Stephen Tarragon,

Acting Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E8–11534 Filed 5–21–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–539, Extension of an Existing Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection Under Review: Form I–539, Application to Extend/Change Nonimmigrant Status. OMB Control Number: 1615–0003.

The Department of Homeland Security, U.S. Citizenship and Immigration Services has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until July 21, 2008.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated

response time should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352, or via e-mail at *rfs.regs@dhs.gov.* When submitting comments by e-mail please add the OMB Control Number 1615–0003 in the subject box.

During this 60-day period USCIS will be evaluating whether to revise the Form I–539. Should USCIS decide to revise the Form I–539 it will advise the public when it publishes the 30-day notice in the **Federal Register** in accordance with the Paperwork Reduction Act. The public will then have 30-days to comment on any revisions to the Form I–539.

Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) 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;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of an existing information collection.

(2) *Title of the Form/Collection:* Application to Extend/Change Nonimmigrant Status.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–539. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as brief abstract: Primary:* Individuals or households. This form will be used to apply for an extension of stay or for a change to another nonimmigrant classification.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 261,867 responses at 45 minutes (.75) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 196,400 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit: *http://www.regulations.gov/search/index.jsp*

We may also be contacted at: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529, telephone number 202–272–8377.

Dated: May 19, 2008.

Stephen Tarragon,

Acting Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E8–11535 Filed 5–21–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5187–N–32]

Certification and Funding of State and Local Fair Housing Enforcement Agencies

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.

State and local government agencies apply for certification of substantial equivalency with the Fair Housing Act. Once determined to be substantially equivalent, HUD enters into a cooperative agreement with such an agency though which funding is provided in support of fair housing enforcement.

DATES: *Comments Due Date: June 23, 2008.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2529–0005) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L_Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Certification and Funding of State and Local Fair Housing Enforcement Agencies.

OMB Approval Number: 2529–0005.

Form Numbers: None.

Description of the Need for the Information and Its Proposed Use: State and local government agencies apply for certification of substantial equivalency with the Fair Housing Act. Once determined to be substantially equivalent, HUD enters into a cooperative agreement with such an agency though which funding is provided in support of fair housing enforcement.

Frequency of Submission: On occasion, Biannually.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	146	25.05		19.56		71,560

Total Estimated Burden Hours: 71,560.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: May 19, 2008.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. E8–11541 Filed 5–21–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UT–040–08–2822–JS–DNF9–24–1A]

Notice of Motor Vehicle Travel Closure and Restrictions on Public Lands in Beaver County, UT

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Motor Vehicle Travel Closure and Restrictions.

SUMMARY: Under the authority of 43 CFR 8364.1, notice is hereby given that a travel closure and restriction for the use and operation of motorized vehicles, including Off-Highway Vehicles, is in effect on public lands administered by the Cedar City Field Office, Bureau of Land Management.

DATES: The closure will be in effect on May 22, 2008 and will remain in effect until November 1, 2009, supporting on-going emergency stabilization efforts and minimizing further soil erosion. The closure provides for two growing seasons of rest consistent with grazing regulations and the DOI ES/R Handbook; allowing emergency stabilization objectives to be achieved which are focused on stabilizing soils and the re-establishment of vegetation following the Milford Flat wild fire of 2007.

FOR FURTHER INFORMATION CONTACT: Todd S. Christensen, Field Manager, Cedar City Field Office, 126 E. DL Sargent Drive, Cedar City, UT 84720. Telephone (435) 586–2401.

SUPPLEMENTARY INFORMATION: The closure affects all federal land within the Mineral Mountains in Beaver County, Utah, within the following description:

T. 26S. R. 7W., SLM;
Section 3, S½S½;
Section 4, S½S½;
Section 5, S½S½;
Sections 7, 8, 9, 10;
Section 11, W½, W½E½;
Section 14, NW¼, N½SW¼, SW¼SW¼;
Sections 15, 17, 18, 19, 20, 21;
Section 22, W½, N½NE¼, SW¼NE¼;
Section 27, W½, W½SE¼, SW¼NE¼;
Sections 28, 29, 30, 31, 33;
Section 34, W½, SE¼, W½NE¼;
T. 26S. R. 8W., SLM;
Section 1, S½S½;
Section 3, S½S½;
Section 4, S½S½;
Section 5, S½S½;
Section 6, S½S½;
Sections 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35;
T. 26S. R. 9W., SLM;
Sections 9, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, 33, 34, 35;
T. 27S. R. 7W., SLM;
Section 3, W½;
Sections 4, 5, 6, 7;
Section 8, N½, SW¼, W½SE¼;
Section 9, N½;
Section 10, NW¼;
Section 17, N½NW¼, NW¼NE¼;
Section 18, W½, N½NE¼, SW¼NE¼;
T. 27S. R. 8W., SLM;
Sections 1, 3, 4, 5, 6, 7;
Section 10, NE¼NW¼, N½NE¼;
Section 11, N½N½, SW½NE¼;
Section 12, W½NW¼, N½NE¼;
Section 14, S½SW¼, W½SE¼;
Section 15, SE¼, W½;
Sections 17, 18, 19, 20, 21, 22;
Section 23, S½, NW¼, NW¼NE¼;
Section 24, SW¼, SW¼NW¼;
Section 25, W½, SW¼SE¼;
Sections 26, 27, 28;
Section 29, NW¼SW¼;
Section 30, NW¼, NW¼NE¼;
Sections 33, 34, 35;
T. 27S., R. 9W., SLM;
Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24;
Section 25, N½, NE¼SW¼, NW¼SE¼;
Sections 26, 27, 28;
Section 33, N½, N½SE¼;
Section 34, NW¼, NW¼SW¼;
Section 35, N½NW¼;
Section 36, N½N½;
T. 28S. R. 7W., SLM;
Section 6, W½;
T. 28S. R. 8W., SLM;
Sections 1, 3;
Section 4, NE¼, E½SE¼;
Section 10, N½NW¼, NE¼NE¼;
Section 11, N½N½;

The travel closure and restriction is necessary to prevent further degradation of the watershed, and to protect soils from erosion and damage by motorized vehicles following stabilization efforts, allowing vegetation to re-establish.

Maps of the restricted area are available online at *http://www.blm.gov/ut/st/en/fo/cedar_city.1.html*, and at the Bureau of Land Management, Cedar City Field Office, 176 E. DL Sargent Dr., Cedar City, UT 84720. Also available for review at the Cedar City Field Office are the Milford Flat Fire Emergency Stabilization and Rehabilitation DNA–Utah–040–07–26, and the Normal Year Fire Stabilization and Rehabilitation Plan and Environmental Assessment (EA–UT–0040–03–28), as well as other documents associated with this closure. Motorized travel is permitted within the restricted area along routes marked with signs as ''open'' to vehicle traffic.

The following restrictions apply:

1. No person shall operate any motorized vehicle within the identified area, except on routes marked as ''open'' for use.

2. Camping is limited to within 50 feet of any open road.

Exemptions

This order applies to all forms of camping and motorized vehicle use. Personnel that are exempt from the area restrictions include any Federal, State, local officer, or employee in the scope of their duties within the restricted area; members of any organized law enforcement, rescue or fire-fighting force in the performance of an official duty, or any person authorized or permitted in writing by the Bureau of Land Management; or any person or corporation holding a valid right-of-way or easement. This order applies to BLM administered lands within the restricted area, not to private or state lands within the boundary.

Enforcement

Any person who violates any of these restrictions may be tried before a United States Magistrate and fined no more than $1,000, imprisoned no more than 12 months, or both, in accordance with 43 U.S.C. 1733(a) and 43 CFR 8360.0–7. Such violations may also be subject to the enhanced penalties provided by 18 U.S.C 3571 and 3581. In accordance with 43 CFR 8365.1–7, State or local officials may also impose penalties for violations of Utah law.

Selma Sierra,

State Director, Utah.

[FR Doc. E8–11431 Filed 5–21–08; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW173743]

Wyoming: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement from Lee Washburn for Noncompetitive oil and gas lease WYW173743 for land in Weston County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Pamela J. Lewis, Chief, Branch of Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $5.00 per acre, or fraction thereof, per year and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW173743 effective January 1, 2008, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. BLM has not issued a valid lease affecting the lands.

Pamela J. Lewis,

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. E8–11456 Filed 5–21–08; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–056–5874–EU; N–82714; 8–08807; TAS: 14X5260]

Notice of Realty Action: Direct Sale of Public Lands in Nye County, NV

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management (BLM) proposes to offer by non-competitive sale one parcel of land in Nye County, Nevada totaling approximately 292.46 acres. This land has been examined and found suitable for disposal utilizing direct sale procedures. The authority for the sale is under Sections 203 and 209 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1713 and 1719, respectively, and BLM land sale and mineral conveyance regulations at 43 CFR 2710 and 2720.

DATES: Interested parties may submit written comments regarding the proposed sale or the environmental assessment (EA) until July 7, 2008.

ADDRESSES: Mail written comments to the BLM Field Manager, Las Vegas Field Office, 4701 N. Torrey Pines Drive, Las Vegas, NV 89130.

FOR FURTHER INFORMATION CONTACT: Manuela Johnson at (702) 515–5224.

SUPPLEMENTARY INFORMATION: The following described land, parcel N–82714, is located at the intersection of U.S. Highway 95 and State Route 373, known as Lathrop Wells, Nevada.

The parcel is legally described as:

Mount Diablo Meridian, Nevada.
T. 15 S., R. 50 E.,
Sec. 18, lots 39 and 41, E½NW¼, E½NW¼NW¼, E½SW¼NW¼, NE¼SW¼, SE¼NW¼SW¼, E½NE¼NW¼SW¼, NW¼NE¼NW¼SW¼, E½NE¼SE¼SW¼, NE¼NW¼SE¼SW¼, N½SE¼, W½NE¼SW¼SE¼, NW¼SE¼SW¼SE¼, NW¼SW¼SE¼.

The area described contains 292.46 acres, more or less.

This parcel of land is offered for sale to Nye County, Nevada at no less than the fair market value (FMV) of $818,900 as determined by the authorized officer. An appraisal report has been prepared by a state certified appraiser for the purposes of establishing FMV.

Consistent with Section 203 of FLPMA, the tract of the lands may be sold where, as a result of approved land use planning, the sale of the tract meets the disposal criteria. These lands are identified as suitable for disposal in the BLM Las Vegas Resource Management Plan (RMP), approved October 5, 1998. BLM has determined that the proposed action conforms to the land use plan decision, LD–1, in that RMP. LD–1 provides that the Las Vegas Field Office should dispose of this property to local governmental entities as identified by a local government and is consistent with community plans. The EA, master title plat, map, and approved appraisal report for the proposed sale are available for review at the Las Vegas Field Office.

This sale meets the criteria found in 43 CFR 2710.0–3(a)(2) which states that disposal of such tract shall serve important public objectives, including but not limited to, expansion of communities and economic development, which cannot be achieved prudently or feasibly on lands other than public lands and which outweigh other public objectives and values, including, but not limited to, recreation and scenic values, which would be served by maintaining such tract in Federal ownership.

Lands totaling approximately 353.12 acres were identified for a non-competitive direct sale under special legislation, Public Law 106–113, through a notice published in the **Federal Register** on March 9, 2001. Of these lands, 60.66 acres, more or less, were conveyed to Nye County by Patent Number 27–2002–0059, dated July 18, 2002. Public Law 106–113 expired on November 29, 2004.

On March 30, 2006, Nye County submitted a letter to the BLM requesting to purchase the remaining 292.46 acres, more or less, of lands pursuant to 43 CFR 2710.0–6(c)(3)(iii), Sections 203 and 209 of FLPMA, and the Federal Land Transaction Facilitation Act (Public Law 106–248). Pursuant to that request from Nye County, the BLM proposes to offer by sale this parcel of land located in the Amargosa Valley.

This parcel is surrounded on the south side by private lands and the remaining sides by public lands. Access to the parcel is from U.S. Highway 95.

A direct sale (without competition) may be utilized, when in the opinion of the authorized officer, a competitive sale is not appropriate and the public interest would best be served by direct sale. An example includes, but is not limited to, a tract identified for transfer to State or local government.

Certain minerals for this parcel will be reserved to the United States in accordance with BLM approved Mineral Potential Report, dated February 29, 2000. Information pertaining to the reservation of minerals specific to the parcel is located in the case file and available for review at the Las Vegas Field Office.

Terms and Conditions of Sale: The patent issued would contain the following numbered reservations, covenants, terms and conditions:

1. All sand, gravel, oil and gas minerals are reserved to the United States, its permittees, licensees and lessees, together with the right to

prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary of the Interior may prescribe, along with all necessary access and exit rights;

2. A right-of-way is reserved for ditches and canals constructed by authority of the United States under the Act of August 30, 1890 (43 U.S.C. 945);

3. A right-of-way is reserved for federal aid highway purposes which have been reserved to Nevada Department of Transportation, its successors and assigns, by right-of-way No. CC–018078, pursuant to the Act of November 9, 1921 (042 Stat. 0216);

4. The parcel is subject to valid existing rights;

5. Those rights for an aerial telephone line purposes which have been granted to Nevada Bell, its successors and assigns, by right-of-way No. CC–021745, pursuant to the Act of October 21, 1976 (43 U.S.C. 1761);

6. Those rights for fiber optic line purposes which have been granted to Nevada Bell, its successors and assigns, by right-of-way No. N–73706, pursuant to the Act of October 21, 1976 (43 U.S.C. 1761);

7. Those rights for a fiber optic line purposes which have been granted to Nevada Bell, its successors and assigns, by right-of-way No. N–81408, pursuant to the Act of October 21, 1976 (43 U.S.C. 1761);

8. Those rights for aerial line purposes which have been granted to Valley Electric Association, its successors and assigns, by right-of-way No. N–058116, pursuant to the Act of February 15, 1901 (43 U.S.C. 959);

9. By accepting this patent, the patentee agrees to indemnify, defend and hold the United States harmless from any costs, damages, claims, causes of action, penalties, fines, liabilities, and judgments of any kind or nature arising from the past, present, and future acts or omissions of the patentee, its employees, agents, contractors, or lessees, or any third-party, arising out of, or in connection with, the patentees use, occupancy, or operations on the patented real property. This indemnification and hold harmless agreement includes, but is not limited to, acts and omissions of the patentee, its employees, agents, contractors, or lessees, or third party arising out of or in connection with the use and/or occupancy of the patented real property resulting in: (1) Violations of federal, state, and local laws and regulations applicable to the real property; (2) Judgments, claims or demands of any kind assessed against the United States; (3) Costs, expenses, damages of any kind incurred by the United States; (4) Other releases or threatened releases on, into or under land, property and other interests of the United States by solid or hazardous waste(s) and/or hazardous substance(s), as defined by federal or state environmental laws; (5) Other activities by which solid or hazardous substances or wastes, as defined by federal and state environmental laws were generated, released, stored, used or otherwise disposed of on the patented real property, and any cleanup response, remedial action, or other actions related in any manner to said solid or hazardous substances or wastes; (6) Or natural resource damages as defined by federal and state law. This covenant shall be construed as running with the patented real property, and may be enforced by the United States in a court of competent jurisdiction; and

10. Pursuant to the requirements established by section 120(h) of the Comprehensive Environmental Response, Compensation and Liability Act, 43 U.S.C. 9620(h) (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1988, 100 Stat. 1670, notice is hereby given that the above-described lands have been examined and no evidence was found to indicate that any hazardous substances have been stored for one year or more, nor had any hazardous substances been disposed of or released on the subject property.

The parcel is subject to reservations for road, public utilities and flood control purposes, both existing and proposed, in accordance with the local governing entities' transportation plans.

No warranty of any kind, express or implied, is given by the United States as to the title, physical condition or potential uses of the parcel of land proposed for sale, and the conveyance of any such parcel will not be on a contingency basis. It is the buyer's responsibility to be aware of all applicable federal, state and local government policies and regulations that would affect the subject lands. It is also the buyer's responsibility to be aware of existing or prospective uses of nearby properties. Any land lacking access from a public road or highway will be conveyed as such, and future access acquisition will be the responsibility of the buyer.

Federal law requires that conveyees must be: (a) A citizen of the United States 18 years of age or over; (b) a corporation subject to the laws of any State or of the United States; (c) a State, State instrumentality or political subdivision authorized to hold property; and (d) an entity legally capable of conveying and holding lands or interests therein under the laws of the State within which the lands to be conveyed are located. Where applicable, the entity shall also meet the requirements of paragraphs (a) and (b) of this section.

Upon publication of this notice and until completion of the sale, the BLM is no longer accepting land use applications affecting the identified land, except applications for the amendment of previously filed right-of-way applications or existing authorizations to increase the term of the grants in accordance with 43 CFR 2807.15 and 2886.15. Encumbrances that may appear in the BLM files for the parcel proposed for sale are available for review during business hours, 7:30 a.m. to 4:30 p.m., Pacific Time, Monday through Friday, at the Las Vegas Field Office.

The parcel may be subject to applications received prior to publication of this notice if processing the application would have no adverse effect on the marketability of title, or the FMV of the parcel. Encumbrances of records, appearing in the BLM files for the parcel offered for sale, are available for review during business hours, 7:30 a.m. to 4:30 p.m., Pacific Time, Monday through Friday, at the Las Vegas Field Office. Subject to limitations prescribed by law and regulation, and prior to patent issuance, a holder of any right-of-way within the parcel may be given the opportunity to amend the right-of-way for conversion to a new term, including perpetuity, if applicable, or to an easement.

BLM will notify valid existing right-of-way holders of their ability to convert their compliant rights-of-way to perpetual rights-of-way or easements. Each valid holder will be notified in writing of their rights and then must apply for the conversion of their current authorization.

Unless other satisfactory arrangements are approved in advance by a BLM authorized officer, conveyance of title shall be through the use of escrow. Designation of the escrow agent shall be through mutual agreement between the BLM and the prospective patentee, and costs of escrow shall be borne by the prospective patentee.

Requests for all escrow instructions must be received by the Las Vegas Field Office prior to 30 days before the prospective patentee's scheduled closing date. There are no exceptions.

BLM will not sign any documents related to 1031 Exchange transactions. The timing for completion of the exchange is the prospective patentee's responsibility in accordance with Internal Revenue Service regulations.

BLM is not a party to any 1031 Exchange.

In the event of a sale, the unreserved mineral interests will be conveyed simultaneously with the sale of the land. These unreserved mineral interests have been determined to have no known mineral value pursuant to 43 CFR 2720.0–6 and 2720.2(a). Acceptance of the sale offer will constitute an application for conveyance of those unreserved mineral interests. The purchaser will be required to pay a $50 non-refundable filing fee for conveyance of the available mineral interests. In accordance with BLM's authority to conduct direct sales, BLM is borrowing some of the competitive bid procedures as set forth below. The purchaser will have until 4 p.m., Pacific Time, 30 days from the date of receiving the sale offer to accept the offer and submit a deposit of 20 percent of the purchase price, the $50 filing fee for conveyance of mineral interests, and payment of publication costs to the Las Vegas Field Office. The purchaser must remit the remainder of the purchase price within 180 days from the date of receiving the sale offer to the Las Vegas Field Office. Payments must be received by certified check, postal money order, bank draft, or cashier's check payable to the U.S. Department of the Interior—BLM. Failure to meet conditions established for this sale will void the sale and any monies received will be forfeited. Arrangements for electronic fund transfer to BLM for the balance due shall be made a minimum of two weeks prior to the date you wish to make payment.

The BLM may accept or reject any or all offers to purchase any parcel, or may withdraw any parcel of land or interest therein from sale, if, in the opinion of the authorized officer, consummation of the sale would not be fully consistent with the FLPMA or other applicable laws or is determined to not be in the public interest.

Public Comments: The parcel of land will not be offered for sale prior to 60 days from the date of publication of this notice. For a period until *July 7, 2008*, interested parties may submit written comments to the Las Vegas Field Office. Only written comments submitted by postal service or overnight mail will be considered as properly filed. Electronic mail, facsimile, or telephone comments will not be considered comments as properly filed.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Any adverse comments regarding the proposed sale will be reviewed by the BLM Nevada State Director, who may sustain, vacate, or modify this realty action. In the absence of timely filed objections, this realty action will become the final determination of the Department of the Interior.

Authority: 43 CFR 2711.

Dated: May 12, 2008.

Mary Jo Rugwell,

Las Vegas Field Office Manager.

[FR Doc. E8–11504 Filed 5–21–08; 8:45 am]

BILLING CODE 4310–HC–P

INTERNATIONAL BOUNDARY AND WATER COMMISSION, UNITED STATES AND MEXICO

United States Section; Notice of Availability of the Revised Record of Decision for the Final Supplemental Environmental Impact Statement for International Boundary and Water Commission Clean Water Act Compliance at the South Bay International Wastewater Treatment Plant, San Diego County, CA

AGENCY: United States Section, International Boundary and Water Commission (USIBWC).

ACTION: Notice of availability of the Revised Record of Decision for the Final Supplemental Environmental Impact Statement.

SUMMARY: On September 30, 2005, the USIBWC issued a Record of Decision (''ROD'') which selected Alternative 4, Treatment Option C, Discharge Option 1 (Operation of SBIWTP as Advance Primary Facility, Secondary Treatment in Mexico) as the means for achieving CWA compliance at the SBIWTP. Reevaluation of alternatives for achieving compliance was prompted by the inability to timely implement the selected alternative and by changes in financial considerations relevant to the decision of whether to provide secondary treatment in Mexico or in the United States. After reevaluation, the USIBWC has decided to upgrade the SBIWTP to secondary treatment in the United States (Secondary Treatment in the United States, Alternative 5, Option B–2, Activated Sludge with Expanded Capacity) to achieve compliance with the CWA and the NPDES permit. This Revised Record of Decision reflects the results of the revaluation and was prepared in compliance with 40 CFR 1505.2.

DATES: The Revised ROD for the Final SEIS was made available to agencies, organizations and the general public on May 15, 2008. A copy of the Revised ROD for the Final SEIS was posted on the USIBWC Web site at *http://www.ibwc.gov/Files/ROD_sbiwtp_2008.pdf*.

FOR FURTHER INFORMATION CONTACT: Mr. Daniel Borunda, Environmental Protection Specialist, Environmental Management Division, USIBWC, 4171 North Mesa Street, C–100, El Paso, Texas 79902 or e-mail: *danielborunda@ibwc.gov*.

Dated: May 16, 2008.

Susan E. Daniel,

Legal Counsel.

[FR Doc. E8–11503 Filed 5–21–08; 8:45 am]

BILLING CODE 7010–01–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–1114 and 1115 (Final)]

Certain Steel Nails From China and the United Arab Emirates

AGENCY: United States International Trade Commission.

ACTION: Revised schedule for the subject investigations.

EFFECTIVE DATE: May 15, 2008.

FOR FURTHER INFORMATION CONTACT: Fred Ruggles (202–205–3187), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: On February 8, 2008, the Commission established a schedule for the conduct of the final phase of the subject investigations (73 FR 7590). The Commission is hereby revising its schedule.

The Commission's new schedule for the investigations is as follows: requests to appear at the hearing must be filed with the Secretary to the Commission not later than June 5, 2008; the prehearing conference will be held at the U.S. International Trade Commission Building at 9:30 a.m. on June 9, 2008; the hearing will be held at the U.S. International Trade Commission Building at 9:30 a.m. on June 11, 2008; and the deadline for filing posthearing briefs is June 18, 2008.

For further information concerning these investigations see the Commission's notice cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

By order of the Commission.

Issued: May 16, 2008.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–11459 Filed 5–21–08; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of the Availability of the Record of Decision Concerning a Proposal To Award a Contract to House Federal Detainees Within a Contractor-Owned/Contractor-Operated Detention Facility in the Las Vegas, NV, Area

AGENCY: U.S. Department of Justice, Office of the Federal Detention Trustee.

ACTION: Notice of a Record of Decision.

SUMMARY: The U.S. Department of Justice, Office of the Federal Detention Trustee (OFDT) announces the availability of the Record of Decision (ROD) concerning the Final Environmental Impact Statement (EIS) for a proposal to award a contract to house federal detainees within a Contractor-Owned/Contractor-Operated detention facility in the Las Vegas, Nevada, area.

Background Information

Pursuant to section 102, 42 U.S.C. 4332, of the National Environmental Policy Act (NEPA) of 1969, as amended and the Council of Environmental Quality Regulations (40 CFR Parts 1500–1508), the OFDT, together with the U.S. Marshals Service (USMS), prepared Draft and Final EISs concerning a proposal to award a contract to house federal detainees within a Contractor-Owned/Contractor-Operated detention facility in the Las Vegas, Nevada, area.

Project Information

During the past two decades, the federal detainee population has experienced unprecedented growth as a result of expanded federal law enforcement initiatives and resources. During this time, the federal detainee population has increased by over 1,000 percent from approximately 3,000 in 1981 to 55,000 to 60,000 today with continued growth in the federal detainee population expected for the foreseeable future. These prisoners are housed in a combination of local, state, federal and private facilities around the country. The growth in the detainee population is occurring at the same time that available bedspace in local jails is decreasing. Local jail space is increasingly needed to house local offenders, leaving less space available for the contractual accommodation of federal detainees. These trends are expected to continue and present a major challenge for those federal agencies responsible for detaining prisoners.

Housing the growing number of federal detainees within the Las Vegas, Nevada, area is considered to be an especially important priority. The high level of federal law enforcement activity in the western United States in general and the Las Vegas metropolitan area in particular requires more beds than are readily available in local or state facilities. Compounding the challenge faced by the USMS is the need for detention facilities to be located near federal courthouses so as to allow the USMS to transport detainees accused of violating federal laws for court appearances. In response to this need, the OFDT, with the support and assistance of the USMS, is seeking to contract for a Contractor-Owned/Contractor-Operated facility to house detained individuals charged with federal offenses and while awaiting trial or sentencing.

In 2007, in response to the need, the OFDT solicited proposals from contractors interested in housing individuals charged with federal offenses and while awaiting trial or sentencing. At that time, preparation of a Draft EIS to analyze the potential environmental consequences of such an action was also undertaken. A Draft EIS was subsequently published on December 23, 2007 which assessed the environmental consequences associated with housing approximately 1,000 to 1,500 federal detainees within a Contractor-Owned/Contractor-Operated detention facility in the Las Vegas, Nevada, area. Implementation of the proposed action would allow federal detainees to be housed at a facility located in proximity to the United States Courthouse in Las Vegas while meeting the need for expanded bedspace capacity. Alternative actions have been evaluated, including the No Action alternative, as stipulated by the National Environmental Policy Act of 1969, as amended.

Five prospective detention contractors initially offered 11 alternative sites in Nevada and Arizona for development of a Contractor-Owned/Contractor-Operated detention facility with several of the alternative sites offered by more than one contractor. Ten of the 11 sites were found to be located within a 75-mile radius of the United States Courthouse in downtown Las Vegas, Nevada. The 75-mile radius was among several minimum solicitation requirements and, hence, one of the 11 sites, located near the City of Kingman in Mohave County, Arizona, was eliminated from further consideration. Prior to preparation of the Draft EIS, six of the 10 alternative sites located within the 75-mile radius were subsequently withdrawn from further consideration by the prospective contractors. Four sites (the 630 East Parque Avenue Site, the 2250 East Mesquite Avenue Site, the Apex Industrial Use Zone Site A, and the Moapa Site) were determined to be alternatives worthy of consideration and were evaluated in the Draft EIS. Following publication of the Draft EIS, the Apex Industrial Use Zone Site A was also withdrawn from further consideration to house federal detainees, leaving three prospective contractors and three alternative sites.

The agency preferred alternative is to contract for provision of a Contractor-Owned/Contractor-Operated detention facility to house approximately 1,000 to 1,500 federal detainees at the 2250 East Mesquite Avenue Site located in Pahrump, Nevada. Implementation of the proposed action to award a contract to house federal detainees is expected to result in less-than-significant impacts to the project site and the community surrounding the selected site. Beneficial impacts would be derived from the proposed action, including contributions toward protecting society and achieving the goals of the U.S. Department of Justice.

A Draft EIS was issued on December 23, 2007, coinciding with publication of the Notice of Availability (NOA) in the **Federal Register** (72 FR 72707). The NOA provided for a 45-day public comment period which began on December 23, 2007, and ended on

February 4, 2008. Along with publication in the **Federal Register**, written notice of the availability of the Draft EIS was also published in four local and regional newspapers (in English and Spanish) and over 200 copies of the document were distributed to federal, state and local government agencies, elected officials, public libraries, interested organizations, and individuals. Public hearings concerning the proposed action and the Draft EIS were held during the public comment period on January 16, 2008, in Moapa, Nevada, and January 17, 2008, in Pahrump, Nevada, with approximately 60 individuals attending the two hearings.

The Final EIS addressed comments received on the Draft EIS and publication of the NOA in the **Federal Register** concerning the Final EIS occurred on March 28, 2008 (73 FR 16672). The 30-day review period for receipt of public comments concerning the Final EIS ended on April 28, 2008. Less than 60 comment letters were received during the Final EIS public review period. The comment letters received on the Final EIS are similar to comments received concerning the Draft EIS and were considered in the decision presented in the ROD.

Availability of the Record of Decision

The ROD and other information regarding this project are available upon request by contacting: Scott P. Stermer, Assistant Federal Detention Trustee, Office of the Federal Detention Trustee, 4601 North Fairfax Drive, 9th Floor, Arlington, Virginia 22203; or Tel: 202–353–4601/Fax: 202–353–4611/E-mail: *Scott.Stermer2@doj.gov*.

FOR FURTHER INFORMATION CONTACT: Scott P. Stermer, Assistant Federal Detention Trustee.

Dated: May 13, 2008.

Scott P. Stermer,

Assistant Federal Detention Trustee, Office of the Federal Detention Trustee.

[FR Doc. E8–11291 Filed 5–21–08; 8:45 am]

BILLING CODE 4410–HM–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–62,850]

Magnesium Aluminum Corporation Including On-Site Leased Workers From Alliance Staffing Solutions and Staff, Inc., Cleveland, OH; Amended Certification Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on April 4, 2008, applicable to workers of Magnesium Aluminum Corporation, including on-site leased workers from Alliance Staffing Solutions, Cleveland, Ohio. The notice was published in the **Federal Register** on April 17, 2008 (73 FR 20954).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of aluminum and magnesium castings for the automotive industry.

New information shows that a leased worker of Staff, Inc. was employed on-site at the Cleveland, Ohio, location of Magnesium Aluminum Corporation. The Department has determined that this worker was sufficiently under the control of the subject firm.

Based on these findings, the Department is amending this certification to include a leased worker of Staff, Inc. working on-site at the Cleveland, Ohio, location of the subject firm.

The intent of the Department's certification is to include all workers employed at Magnesium Aluminum Corporation who were adversely affected by a shift in production of aluminum and magnesium castings to Mexico.

The amended notice applicable to TA–W–62,850 is hereby issued as follows:

All workers of Magnesium Aluminum Corporation, including on-site leased workers from Alliance Staffing Solutions and Staff, Inc., Cleveland, Ohio, who became totally or partially separated from employment on or after February 13, 2007, through April 4, 2010, are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC this 12th day of May 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–11370 Filed 5–21–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) number and alternative trade adjustment assistance (ATAA) by (TA–W) number issued during the period of *May 5 through May 9, 2008.*

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Section (a)(2)(A) all of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a)(2)(B) both of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. The country to which the workers' firm has shifted production of the articles to a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Also, in order for an affirmative determination to be made for secondarily affected workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) Significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance benefits and such supply or production is related to the article that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied for the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss or business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for the Division of Trade Adjustment Assistance to issue a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of Section 246(a)(3)(A)(ii) of the Trade Act must be met.

1. Whether a significant number of workers in the workers' firm are 50 years of age or older.

2. Whether the workers in the workers' firm possess skills that are not easily transferable.

3. The competitive conditions within the workers' industry (i.e., conditions within the industry are adverse).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) of the Trade Act have been met.

None.

Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–62,719; OSRAM Sylvania, Materials Div., Siemens Corp., Warren, PA: February 8, 2008.

TA–W–62,890; Buxton Acquisition Co., LLC, Chicopee, MA: February 21, 2007.

TA–W–63,204; Klaussner Furniture Industries, Inc., Plant 75, Asheboro, NC: April 16, 2007.

TA–W–63,204A; Klaussner Furniture Industries, Inc., Plant 27, Star, NC: April 16, 2007.

TA–W–63,204B; Klaussner Furniture Industries, Inc., Plant 15, Asheboro, NC: April 16, 2007.

TA–W–63,259; Kenneth Gordon, A Subsidiary of I.A.G., Inc., Harahan, LA: April 25, 2007.

TA–W–63,263; Woodgrain Millwork, Inc., Woodgrain Doors Division, Nampa, ID: April 23, 2007.

TA–W–62,979; Blackhawk Automotive Plastics, Mason, OH: March 7, 2007.

TA–W–62,999; Quality Beachwear, Compton, CA: March 13, 2007.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–62,856; Honeywell International, Inc., Honeywell Process Solution, Field Solutions, HPS, Manpower, Phoenix, AZ: February 13, 2007.

TA–W–63,137; Quiksilver, Screenprint Operation Div., On-Site Workers from Rainmaker and Citistaff Solutions, Huntington Beach, CA: March 28, 2007.

TA–W–63,162; Whirlpool Corporation, Workers Producing 20″ Free Standing Range, Cleveland, TN: April 1, 2007.

TA–W–63,233; MPC Computers, LLC, Also known as Gateway Pro Partners, Select Staffing, La Vergne, TN: April 22, 2007.

TA–W–63,293; Wausau Paper Specialty Products, LLC, A Subsidiary of Wausau Paper Corp., Converted Products Division, Columbus, WI: April 28, 2007.

TA–W–62,595; Cisco Systems, Inc., Optical Transport Business Unit, Petaluma, CA: December 7, 2006.

TA–W–62,603; Coyne and Delany Company, Charlottesville, VA: December 17, 2006.

TA–W–63,223; San Diego Union-Tribune, Advertising Artists Group, San Diego, CA: April 10, 2007.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–63,205; Johnson Controls, Inc., Automotive Experience Division, Taylor, MI: April 14, 2007.

TA–W–63,068; Gouverneur Talc Company, Division of R.T. Vanderbilt Company, Gouverneur, NY: March 26, 2007.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

None.

Negative Determinations for Alternative Trade Adjustment Assistance

In the following cases, it has been determined that the requirements of 246(a)(3)(A)(ii) have not been met for the reasons specified.

The Department has determined that criterion (1) of Section 246 has not been met. The firm does not have a significant number of workers 50 years of age or older.

None.

The Department has determined that criterion (2) of Section 246 has not been met. Workers at the firm possess skills that are easily transferable.

None.

The Department has determined that criterion (3) of Section 246 has not been met. Competition conditions within the workers' industry are not adverse.

None.

Negative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

Because the workers of the firm are not eligible to apply for TAA, the workers cannot be certified eligible for ATAA.

The investigation revealed that criteria (a)(2)(A)(I.A.) and (a)(2)(B)(II.A.) (employment decline) have not been met.

TA–W–63,113; Custom Metal Spinning, Inc., Paramount, CA.

The investigation revealed that criteria (a)(2)(A)(I.B.) (Sales or production, or both, did not decline) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–63,227; Belden, Mohawk Division, Leominster, MA.

The investigation revealed that criteria (a)(2)(A)(I.C.) (increased imports) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–62,898; Finisar Corporation, Advanced Optical Components Division, Allen, TX.

TA–W–63,096; PolyVision Corporation, Corona, CA.

TA–W–63,169; Batavia Transmissions, LLC, A Subsidiary of Ford Motor Company, Batavia, OH.

TA–W–63,029; Carm Newsome Hosiery, Inc., Fort Payne, AL.

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–63,074; Pfizer, Inc., Global Research and Development Division, Groton, CT.

TA–W–63,076; Aon Risk Services, Inc., Document Production Department, Saint Louis, MO.

TA–W–63,200; Ranco North America, Invensys Climate Controls Division, Brownsville, TX.

TA–W–63,254; Teva Neuroscience, Inc., Global Clinical Professional Resources Group, Horsham, PA.

TA–W–63,294; Hughes Lumber Company, White City, OR.

The investigation revealed that criteria of Section 222(b)(2) has not been met. The workers' firm (or subdivision) is not a supplier to or a downstream producer for a firm whose workers were certified eligible to apply for TAA.

None.

I hereby certify that the aforementioned determinations were issued during the period of *May 5 through May 9, 2008*. Copies of these determinations are available for inspection in Room C–5311, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 during normal business hours or will be mailed to persons who write to the above address.

Dated: May 15, 2008.

Erin Fitzgerald,

Director, Division of Trade Adjustment Assistance.

[FR Doc. E8–11367 Filed 5–21–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,075]

Russound Also Known as Folded Metal Products, Inc., Newmarket, NH; Notice of Negative Determination Regarding Application for Reconsideration

By application received May 7, 2008, a petitioner requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA), applicable to workers and former workers of the subject firm. The denial notice was signed on April 11, 2008 and published in the **Federal Register** on April 23, 2008 (73 FR 21992).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The negative TAA determination issued by the Department for workers of Russound, also known as Folded Metal Products, Inc., Newmarket, New Hampshire was based on the finding that the worker group does not produce an article within the meaning of Section 222 of the Trade Act of 1974.

The petitioner infers that employment at the subject firm was negatively impacted by the outsourcing of production by other companies to foreign sources. Following this shift of production abroad, jobs performed by workers of the subject firm (electronic, mechanical and industrial designers and engineers, supply chain managers, safety/compliance engineers) were also shifted or outsourced abroad. The petitioner also states that regardless of whether the workers of the subject firm produce a product or provide services, they should be certified eligible for Trade Adjustment Assistance.

The investigation revealed that the workers of Russound, also known as Folded Metal Products, Inc., Newmarket, New Hampshire are engaged in functions related to the design and distribution of audio-video systems and connectivity products. These functions, as described above, are not considered production of an article within the meaning of Section 222 of the Trade Act of 1974.

The allegation of a shift to another country might be relevant if it was determined that workers of the subject firm produced an article. Since the investigation determined that workers of Russound, also known as Folded Metal Products, Inc., Newmarket, New Hampshire do not produce an article, there cannot be imports nor a shift in production of an ''article'' abroad within the meaning of the Trade Act of 1974 in this instance.

The petitioner did not supply facts not previously considered; nor provide additional documentation indicating that there was either (1) a mistake in the determination of facts not previously considered or (2) a misinterpretation of facts or of the law justifying reconsideration of the initial determination.

After careful review of the request for reconsideration, the Department determines that 29 CFR 90.18(c) has not been met.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 15th day of May 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–11372 Filed 5–21–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–62,718]

Fraser Timber Limited Including On-Site Leased Workers of Tempo Employment Services; Ashland, ME; Notice of Revised Determination on Reconsideration

On April 28, 2008, the Department issued an Affirmative Determination Regarding Application on Reconsideration applicable to workers and former workers of the subject firm. The notice was published in the **Federal Register** on May 7, 2008 (73 FR 25772).

The previous investigation initiated on January 23, 2008, resulted in a negative determination issued on March 14, 2008, that was based on the finding that imports of lumber and woodchips did not contribute importantly to worker separations at the subject firm and no shift in production to a foreign source occurred. The denial notice was published in the **Federal Register** on March 26, 2008 (73 FR 16064).

In the request for reconsideration, the company official provided additional information regarding the subject firm's customers and also requested the Department of Labor conduct further analysis of imports of lumber and woodchips.

The Department reviewed responses of a sample customer survey conducted during the initial investigation. On further analysis, it has been determined that a significant number of customers increased their reliance on imports of lumber and woodchips while decreasing their purchases from the subject firm from 2006 to 2007.

In accordance with Section 246 the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor herein presents the results of its investigation regarding certification of eligibility to apply for alternative trade adjustment assistance (ATAA) for older workers.

In order for the Department to issue a certification of eligibility to apply for ATAA, the group eligibility requirements of Section 246 of the Trade Act must be met. The Department has determined in this case that the requirements of Section 246 have been met.

A significant number of workers at the firm are age 50 or over and possess skills that are not easily transferable. Competitive conditions within the industry are adverse.

The investigation revealed that Fraser Timber Limited leased workers from Tempo Employment Services to work on-site at the Ashland, Maine, plant.

Conclusion

After careful review of the additional facts obtained on reconsideration, I conclude that increased imports of articles like or directly competitive with those produced at Fraser Timber Limited, Ashland, Maine, contributed importantly to the declines in sales or production and to the total or partial separation of workers at the subject firm. In accordance with the provisions of the Act, I make the following certification:

All workers of Fraser Timber Limited, including on-site leased workers of Tempo Employment Services, Ashland, Maine, who became totally or partially separated from employment on or after January 19, 2007, through two years from the date of this certification, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed in Washington, DC, this 13th day of May 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–11369 Filed 5–21–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,207]

Automated Equipment, Inc., Paris, TN; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on April 17, 2008 in response to a petition filed by a company official on behalf of workers at Automated Equipment, Inc., Paris, Tennessee.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 15th day of May, 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–11377 Filed 5–21–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–62,982]

Employment Giant, LLC, Warren, MI; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 11, 2008, in response to a petition filed by a State agency representative on behalf of workers of Employment Giant, LLC, Warren, Michigan, working at Thyssenkrupp Budd, Detroit, Michigan.

The petitioning worker group is covered by petition certification number TA–W–60,703, amended on May 15, 2008, to reflect that Thyssenkrupp Budd, Detroit, Michigan, began using the payroll service of Employment Giant, LLC to pay the wages of the workers at the producing firm.

Since the petitioning worker group is covered by amended TA–W–60,703, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 15th day of May 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–11371 Filed 5–21–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,120]

Honeywell International, Inc., Honeywell Process Solutions Division, HPS Technology Subdivision, Phoenix, AZ; Notice of Termination of Investigation

In accordance with Section 221 of the Trade Act of 1974, as amended, an

investigation was initiated on April 3, 2008 in response to a petition filed by a company official on behalf of workers of Honeywell International, Inc., Honeywell Process Solutions Division, HPS Technology Subdivision, Phoenix, Arizona.

The petitioning group of workers is covered by an active certification (TA–W–62,856) which expires on May 9, 2010. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 13th day of May, 2008.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–11374 Filed 5–21–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,128]

Sun Chemical Corporation, North American Inks Division, Hopkinsville, KY; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on April 4, 2008, in response to a worker petition filed by a company official on behalf of workers at Sun Chemical Corporation, North American Inks Division, Hopkinsville, Kentucky.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 13th day of May 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–11375 Filed 5–21–08; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act; Notice of Agency Meeting

TIME AND DATE: 10 a.m., Thursday, May 22, 2008.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. NCUA's Outreach Task Force: Data Collection.
2. Board Briefing: Proposed Rule—Part 706 of NCUA's Rules and Regulations, Unfair or Deceptive Acts or Practices.
3. Proposed Rule: Part 701 of NCUA's Rules and Regulations, Interpretive Ruling and Policy Statement (IRPS) 08–2, Criteria to approve service to undeserved areas.
4. Proposed Rule: Part 721 of NCUA's Rules and Regulations, Incidental Powers.

RECESS: 11:15 a.m.

TIME AND DATE: 11:30 a.m., Thursday, May 22, 2008.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. One (1) Administrative Action under Sections 205, 207, and 208 of the Federal Credit Union Act. Closed pursuant to Exemptions (8), (9)(A)(ii), and (9)(B).

FOR FURTHER INFORMATION CONTACT: Mary Rupp, Secretary of the Board, Telephone: 703–518–6304.

Mary Rupp,

Secretary of the Board.

[FR Doc. E8–11278 Filed 5–21–08; 8:45 am]

BILLING CODE 7535–01–M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52–022 and 52–023]

Progress Energy Carolinas, Inc.; Shearon Harris Nuclear Power Plant, Units 2 and 3; Combined License Application; Notice of Intent To Prepare an Environmental Impact Statement and Conduct Scoping Process

Progress Energy Carolinas, Inc. (PEC) has submitted an application for a combined license (COL) to build Units 2 and 3 at its Shearon Harris Nuclear Power Plant (HAR) site, located in the extreme southwestern corner of Wake County, North Carolina with portions located in southeastern Chatham County. The City of Raleigh, North Carolina, is approximately 34.9 kilometers (km) (21.7 miles [mi]) northeast of the site and the City of Sanford, North Carolina, is approximately 26.5 km (16.5 mi) southwest of the site. The HAR site is located just northwest of the existing Shearon Harris Nuclear Power Plant on a peninsula that extends into Harris Reservoir. The application for the COL was submitted by PEC via letter dated February 18, 2008, pursuant to Title 10 of the Code of Federal Regulations, Part 52. A notice of receipt and availability of the application including the environmental report (ER), was published in the **Federal Register** on March 11, 2008 (72 FR 66200).

A notice of acceptance for docketing of the application for the COL was published in the **Federal Register** on April 23, 2008 (73 FR 21995). A notice of hearing and opportunity to petition for leave to intervene will be published at a later date. The purpose of this notice is to inform the public that the U.S. Nuclear Regulatory Commission (NRC) will be preparing an environmental impact statement (EIS) in support of the review of the application for the COL and to provide the public with an opportunity to participate in the environmental scoping process as defined in 10 CFR 51.29.

In addition, as outlined in 36 CFR 800.8(c), ''Coordination with the National Environmental Policy Act,'' the NRC staff plans to coordinate compliance with Section 106 of the National Historic Preservation Act (NHPA) with steps taken to meet the requirements of the National Environmental Policy Act of 1969, as amended (NEPA). Pursuant to 36 CFR 800.8(c), the NRC staff intends to use the process and documentation for the preparation of the EIS on the proposed action to comply with Section 106 of the NHPA in lieu of the procedures set forth on 36 CFR 800.3 through 800.6.

In accordance with 10 CFR 51.45 and 51.50, PEC submitted the ER as part of the application. The ER was prepared pursuant to 10 CFR parts 51 and 52 and is available for public inspection at the NRC Public Document Room (PDR) located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852 or from the Publicly Available Records (PAR) component of NRC's Agency-wide Documents Access and Management System (ADAMS). ADAMS is accessible at *http://www.nrc.gov/reading-rm/adams.html*, which provides access through the NRC's Electronic Reading Room (ERR) link. The accession number in ADAMS for the ER is ML080601078. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR Reference staff at 1–800–397–4209/301–415–4737 or by e-mail to *pdr@nrc.gov*. The application may also be viewed on the Internet at *http://www.nrc.gov/reactors/new-licensing/col/harris.html*. In addition, the Eva H. Perry Library, 2100

Shepherd's Vineyard Drive, Apex, NC 27502; West Regional Library, 4000 Louis Stephens Drive, Cary, NC 27519; and Holly Springs Library, 300 West Ballentine Street, Holly Springs, NC 27540 have agreed to make the ER available for public inspection. The following key reference documents related to the application and the NRC staff's review processes are available through the NRC's Web site at *http://www.nrc.gov:*

a. 10 CFR Part 51, Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions,

b. 10 CFR Part 52, Licenses, Certifications, and Approvals for Nuclear Power Plants,

c. 10 CFR Part 100, Reactor Site Criteria,

d. NUREG–1555, Standard Review Plans for Environmental Reviews for Nuclear Power Plants,

e. NUREG/BR–0298, Brochure on Nuclear Power Plant Licensing Process,

f. Regulatory Guide 4.2, Preparation of Environmental Reports for Nuclear Power Stations,

g. Regulatory Guide 4.7, General Site Suitability Criteria for Nuclear Power Stations,

h. Fact Sheet on Nuclear Power Plant Licensing Process,

i. Regulatory 1.206, Combined License Applications for Nuclear Power Plants, and

j. NRR Office Instruction LIC–203, Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues.

The regulations, NUREG-series documents, regulatory guides, and the fact sheet can be found under Document Collections in the ERR on the NRC Web page. The Office Instruction LIC–203 can be found in ADAMS in two parts under the accession numbers ML011710073 (main text) and ML011780314 (charts and figures).

This notice advises the public that the NRC intends to gather the information necessary to prepare an EIS in support of the review of the application for COL at the HAR site. Possible alternatives to the proposed action (issuance of the COL for the HAR site) include no action, reasonable alternative energy sources, and alternate sites. The NRC is required by 10 CFR 51.20(b)(2) to prepare an EIS in connection with the issuance of the COL. This notice is being published in accordance with NEPA and the NRC's regulations found in 10 CFR Part 51.

The NRC will first conduct a scoping process for the EIS and immediately thereafter will prepare a draft EIS for public comment. Participation in this scoping process by members of the public, local, State, Tribal, and Federal government agencies is encouraged. The scoping process for the draft EIS will be used to accomplish the following:

a. Define the proposed action that is to be the subject of the EIS,

b. Determine the scope of the EIS and identify the significant issues to be analyzed in-depth,

c. Identify and eliminate from detailed study those issues that are peripheral or that are not significant,

d. Identify any environmental assessments and other EISs that are being or will be prepared that are related to but are not part of the scope of the EIS being considered,

e. Identify other environmental review and consultation requirements related to the proposed action,

f. Identify parties consulting with the NRC under the NHPA, as set forth in 36 CFR 800.8(c)(1)(i),

g. Indicate the relationship between the timing of the preparation of the environmental analyses and the Commission's tentative planning and decision-making schedule,

h. Identify any cooperating agencies and, as appropriate, allocate assignments for preparation and schedules for completing the EIS to the NRC and any cooperating agencies; and

i. Describe how the EIS will be prepared, including any contractor assistance to be used. The NRC invites the following entities to participate in the scoping process:

a. The applicant; PEC,

b. Any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved or that is authorized to develop and enforce relevant environmental standards,

c. Affected State and local government agencies, including those authorized to develop and enforce relevant environmental standards,

d. Any affected Indian tribe,

e. Any person who requests or has requested an opportunity to participate in the scoping process, and

f. Any person who intends to petition for leave to intervene.

In accordance with 10 CFR 51.26, the scoping process for an EIS may include a public scoping meeting to help identify significant issues related to a proposed activity and to determine the scope of issues to be addressed in an EIS. The NRC will hold two identical public scoping meetings for the EIS regarding PEC COL application. The scoping meeting will be held at the Holly Springs Cultural Center, 300 West Ballentine Street, Holly Springs, NC 27540, on Tuesday, June 10, 2008. The meeting will convene at 12:30 p.m. and will continue until approximately 3 p.m., and again at 6 p.m. and will continue until approximately 8:30 p.m. The meetings will be transcribed and will include the following: (1) An overview by the NRC staff of the NEPA environmental review process (the proposed scope of the EIS) and the proposed review schedule; (2) the opportunity for interested government agencies, organizations, and individuals to submit comments or suggestions on the environmental issues or the proposed scope of the EIS. Additionally, the NRC staff will host informal discussions for one hour prior to the start of each public meeting. No formal comments on the proposed scope of the EIS will be accepted during the informal discussions. To be considered, comments must be provided either at the transcribed public meeting or in writing, as discussed below. Persons may register to attend or present oral comments at the meeting on the scope of the NEPA review by contacting Dr. Donald Palmrose or Ms. Tomeka Terry at 1–800–368–5642, extensions 3803 or 1488, respectively. In addition, persons can register via e-mail to the NRC at *Harris.COLEIS@nrc.gov* no later than June 3, 2008.

Members of the public may also register to speak at the meeting prior to of the start of the session. Individual oral comments may be limited by the time available, depending on the number of persons who register. Members of the public who have not registered may also have an opportunity to speak, if time permits. Public comments will be considered in the scoping process for the EIS. If special equipment or accommodations are needed to attend or present information at the public meeting, the need should be brought to Dr. Donald Palmrose or Ms. Tomeka Terry's attention no later than June 5, 2008, so that the NRC staff can determine whether the request can be accommodated.

Members of the public may send written comments on the scope of the HAR COL environmental review to the Chief, Rulemaking, Directives, Editing Branch, Division of Administrative Services, Office of Administration, Mailstop T–6D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Comments may be hand-delivered to the NRC at 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m., and 4:15 p.m., on federal workdays. To be considered in the scoping process, written comments must be postmarked or delivered by Comment period end

date July 18, 2008. Electronic comments may be sent by e-mail to the NRC at *Harris.COLEIS@nrc.gov*. Electronic submissions must be sent no later than the Comment period end date of July 18, 2008, to be considered in the scoping process. Comments will be made available electronically and will be accessible through the NRC's Electronic Reading Room link *http://www.nrc.gov/reading-rm/adams.html*.

Participation in the scoping process for the EIS does not entitle participants to become parties to the proceeding to which the EIS relates. Notice of a hearing regarding the application for COL will be separately noticed in the **Federal Register**.

At the conclusion of the scoping process, the NRC will prepare a concise summary of the determination and conclusions on the scope of the environmental review reached including the significant issues identified, and will be made publicly available. The staff will then prepare and issue for comment the draft EIS, which will be the subject of a separate **Federal Register** notice and a separate public meeting. Copies will be available for public inspection at the PDR through the above-mentioned address and one copy per request will be provided free of charge.

After receipt and consideration of the comments, the NRC will prepare a final EIS, which will also be available to the public. Information about the proposed action, the EIS, and the scoping process may be obtained from Dr. Donald Palmrose or Ms. Tomeka Terry at 1–800–368–5642, extensions 3803 or 1488, respectively or by e-mail at *donald.palmrose@nrc.gov* and *tomeka.terry@nrc.gov*.

Dated at Rockville, Maryland, this 16th day of May, 2008.

For the Nuclear Regulatory Commission

James E. Lyons,

Director, Division of Site and Environmental Reviews, Office of New Reactors.

[FR Doc. E8–11500 Filed 5–21–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–346]

FirstEnergy Nuclear Operating Company; Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (NRC, or the Commission) is considering issuance of an amendment to Facility Operating License No. NPF–3 issued to FirstEnergy Nuclear Operating Company (the licensee) for operation of the Davis-Besse Nuclear Power Station, Unit No. 1 (DBNPS), located in Ottawa County, Ohio.

The proposed amendment requested by the licensee's August 3, 2007, license amendment request (LAR) would represent a full conversion from the current technical specifications (CTS) to a set of improved technical specifications (ITS) based on NUREG–1430, ''Standard Technical Specifications (STS) Babcock and Wilcox Plants,'' Revision 3.1 dated December 2005 and certain generic changes to the NUREG. The attachment to the licensee's August 3, 2007, LAR consists of 17 volumes.

Volume 1 provides details concerning the application of the selection criteria to the individual DBNPS CTS. Each CTS Specification is evaluated, and a determination is made as to whether or not the CTS Specification meets the criteria in Title 10 of the Code of Federal Regulations (10 CFR) Section 50.36(d)(2)(ii) for retention in the proposed ITS. Volume 2 contains the licensee's evaluation of environmental considerations for the proposed ITS conversion LAR. Volumes 3–16 provide details and safety analyses to support the proposed changes. Volume 17 contains copies of the DBNPS CTS markup pages that have been annotated to show the differences between the CTS and the proposed ITS.

NUREG–1430 has been developed by the Commission's staff through working groups composed of both NRC staff members and industry representatives. It has been endorsed by the NRC staff as part of an industry-wide initiative to standardize and improve the technical specifications (TSs) for nuclear power plants.

In addition to the conversion, the licensee proposed or the NRC staff identified 24 beyond scope items (BSIs) where the requirements are different from the CTS and the STS of NUREG–1430. The BSIs are identified later in this notice.

This notice is based on the application dated August 3, 2007, and the information provided to the NRC through the DBNPS ITS Conversion Web page hosted by Excel Services Corporation. To expedite its review of the application, the NRC staff issued its requests for additional information (RAIs) through the DBNPS ITS Conversion Web page and the licensee addressed the RAIs by providing responses on the Web page. Entry into the database is protected so that only licensee and NRC reviewers can enter information into the database to add RAIs (NRC) or provide responses to the RAIs (licensee); however, the public can enter the database to read the questions asked and the responses provided. To be in compliance with the regulations for written communications for LARs and to have the database on the DBNPS docket before the amendment is issued, the licensee will submit a copy of the database in a submittal to the NRC after there are no further RAIs and before the amendment is issued. The public can access the Web site by going to *http://www.excelservices.com*. Once at the Web site, click on ''Davis Besse'' on the left side of the screen. Upon clicking the link, the Web site will inform you that ''you are about to enter the DAVIS BESSE Improved Technical Specification Licensing On-Line Question and Answer Database.'' At this point, click on ''Click Here to continue.'' This will bring you to the ITS Licensing Database. The RAIs and responses to RAIs are organized by ITS Sections 1.0, 2.0, 3.0, 3.1 through 3.9, 4.0, and 5.0. For every listed ITS section, there is a RAI which can be read by clicking on the ITS section number. The RAI question(s) and the licensee's response(s) are contained on the same Web page.

The licensee has categorized the proposed changes to the CTS into five general groupings within the discussion of changes (DOC) section of the application. These groupings are characterized as administrative changes (i.e., ITS x.x, DOC A.xx), more restrictive changes (i.e., ITS x.x, DOC M.xx), relocated specifications (i.e., ITS x.x, DOC R.xx), removed detail changes (i.e., ITS x.x, DOC LA.xx), and less restrictive changes (i.e., ITS x.x, DOC L.xx). This is to say that the DOCs are numbered sequentially with each letter designator for each ITS Chapter, Section, or Specification, and the designations are A.xx for administrative changes, M.xx for more restrictive changes, R.xx for relocated specifications, LA.xx for removed detail changes, and L.xx for less restrictive changes. These changes to the requirements of the CTS do not result in operations that will alter assumptions relative to mitigation of an analyzed accident or transient event.

Administrative changes are those that involve restructuring, renumbering, rewording interpretation and complex rearranging of requirements and other changes not affecting technical content or substantially revising an operating requirement. The reformatting, renumbering, and rewording process reflects the attributes of NUREG–1430

and does not involve technical changes to the CTS. The proposed changes include: (a) Providing the appropriate numbers, etc., for NUREG–1430 bracketed information (information that must be supplied on a plant-specific basis, and which may change from plant to plant), (b) identifying plant-specific wording for system names, etc., and (c) changing NUREG–1430 section wording to conform to existing licensee practices. Such changes are administrative in nature and do not impact initiators of analyzed events or assumed mitigation of accident or transient events.

More restrictive changes are those involving more stringent requirements compared to the CTS for operation of the facility. These more stringent requirements do not result in operation that will alter assumptions relative to the mitigation of an accident or transient event. The more restrictive requirements will not alter the operation of process variables, structures, systems, and components described in the safety analyses. For each requirement in the STS that is more restrictive than the CTS that the licensee proposes to adopt in the ITS, the licensee has provided an explanation as to why it has concluded that adopting the more restrictive requirement is desirable to ensure safe operation of the facility because of specific design features of the plant.

Relocated changes are those involving relocation of requirements and surveillances for structures, systems, components, or variables that do not meet the criteria for inclusion in TSs. Relocated changes are those CTS requirements that do not satisfy or fall within any of the four criteria specified in the 10 CFR 50.36(d)(2)(ii) and may be relocated to appropriate licensee-controlled documents.

The licensee's application of the screening criteria is described in the attachment to the licensee's August 3, 2007 letter, which is entitled, ''Application of Selection Criteria to the Davis-Besse Nuclear Power Station Technical Specifications,'' in Attachment 1 of the submittal. The affected structures, systems, components or variables are not assumed to be initiators of analyzed events and are not assumed to mitigate accident or transient events. The requirements and surveillances for these affected structures, systems, components, or variables will be relocated from the TSs to administratively-controlled documents such as the quality assurance program, the Updated Final Safety Analysis Report (UFSAR), the ITS Bases, the technical requirements manual (TRM) that is incorporated by reference in the UFSAR, the core operating limits report, the offsite dose calculation manual, the inservice testing program, the inservice inspection program, or other licensee-controlled documents. Changes made to these documents will be made pursuant to 10 CFR 50.59 or other appropriate control mechanisms, and may be made without prior NRC review and approval. In addition, the affected structures, systems, components, or variables are addressed in existing surveillance procedures that are also controlled pursuant to 10 CFR 50.59.

Removed detail changes are changes to the CTS that eliminate detail and relocate the detail to a licensee-controlled document. Typically, this involves details of system design and function, or procedural detail on methods of conducting a surveillance requirement (SR). These changes are supported, in aggregate, by a single generic no significant hazards consideration (NSHC).

Less restrictive changes are those where CTS requirements are relaxed or eliminated, or new plant operational flexibility is provided. The more significant ''less restrictive'' requirements are justified on a case-by-case basis. When requirements have been shown to provide little or no safety benefit, their removal from the TSs may be appropriate. In most cases, relaxations previously granted to individual plants on a plant-specific basis were the result of: (a) Generic NRC actions, (b) new NRC staff positions that have evolved from technological advancements and operating experience, or (c) resolution of the Owners Groups' comments on the improved STSs. Generic relaxations contained in NUREG–1430 were reviewed by the NRC staff and found to be acceptable because they are consistent with current licensing practices and NRC regulations. The licensee's design is being reviewed to determine if the specific design basis and licensing basis are consistent with the technical basis for the model requirements in NUREG–1430, thus providing a basis for the ITS, or if relaxation of the requirements in the CTS is warranted based on the justification provided by the licensee.

These administrative, relocated, more restrictive, removed detail and less restrictive changes to the requirements of the CTS do not result in operations that will alter assumptions relative to mitigation of an analyzed accident or transient event.

In addition to the proposed changes solely involving the conversion, there are also changes proposed that are different from the requirements in both the CTS and the STS NUREG–1430. To date 24 BSIs have been identified. These BSIs to the conversion are as follows (note that the words below that are capitalized are terms that are defined in the ITS):

1. BSI–1 proposes a change to the CTS by not requiring a CHANNEL CHECK of 2 relays (ITS 3.3.8, DOC L03). CTS 4.3–2 Functional Unit 4.b requires a CHANNEL CHECK of the Essential Bus Feeder Breaker Trip Degraded Voltage Relay (DVR) and Functional Unit 4.c requires a CHANNEL CHECK of the Diesel Generator Start and Load Shed on Essential Bus, Loss of Voltage Relay (LVR). ITS 3.3.8 does not require a CHANNEL CHECK.

2. BSI–2 proposes a change to the CTS by changing the Allowable Values for three Functional Units (ITS 3.3.11, DOC M02). CTS Table 3.3–12 Functional Unit 1, Steam Line Pressure-Low, specifies an Allowable Value of ≥ 591.6 psig for the CHANNEL FUNCTIONAL TEST and ≥ 586.6 psig for CHANNEL CALIBRATION. CTS Table 3.3–12 Functional Unit 2, Steam Generator Level-Low, specifies an Allowable Value of ≥ 16.9 inches for the CHANNEL FUNCTIONAL TEST. CTS Table 3.3–12 Functional Unit 3, Steam Generator Feedwater Differential Pressure-High, specifies an Allowable Value of ≤ 197.6 psig for the CHANNEL FUNCTIONAL TEST and ≤ 199.6 psig for CHANNEL CALIBRATION. ITS Table 3.3.11–1 Functions 1, 3, and 2 specify Allowable Values of ≥ 600.2 psig, ≥ 17.3 inches, and ≤ 176.8 psig, respectively.

3. BSI–3 proposes a change to the CTS by increasing the departure from nucleate boiling reactor coolant pressure parameter limits (ITS 3.4.1, DOC M01). CTS Table 3.2.–2 requires measured reactor coolant system pressure to be ≥ 2062.7 psig for four reactor coolant pump operation and ≥ 2058.7 psig for three reactor coolant pump operation. ITS LCO 3.4.1 requires Reactor Coolant System (RCS) loop pressure to be ≥ 2064.8 psig for four reactor coolant pump operation and ≥ 2060.8 psig for three reactor coolant pump operation.

4. BSI–4 proposes a change to the CTS by extending the Completion Time to reduce the trip setpoints from ''4 hours'' to ''10 hours'' (ITS 3.4.4., DOC L01). CTS 3.4.1.1 Action a, requires a reduction of the High Flux trip setpoint from the four reactor coolant pumps (RCPs) operating to three RCPs operating trip setpoint within 4 hours when shifting from four RCPs operating to three RCPs operating. ITS 3.4.4 Action A requires the reduction in the trip setpoints within 10 hours.

5. BSI–5 proposes a change to the CTS by allowing a wider range for the core flooding tank (CFT) borated water volume and nitrogen cover pressure (ITS 3.5.1, DOC L01). CTS LCO 3.5.1.b requires each CFT contained water volume be between 7555 gallons and 8004 gallons of borated water. CTS LCO 3.5.1.d requires each CFT nitrogen cover pressure be between 575 psig and 625 psig. In the ITS, SR 3.5.1.2 requires the borated water volume to be between 7480 gallons and 8078 gallons and ITS SR 3.5.1.3 requires the nitrogen cover pressure be between 567 psig and 633 psig.

6. BSI–6 proposes a change to the CTS by delaying performance of a RCS flow Surveillance until adequate conditions exist to perform the Surveillance (ITS 3.4.1, DOC L02). CTS 4.2.5.2 requires RCS total flow rate be determined to be within limits once per 18 months. ITS SR 3.4.1.4 requires the same Surveillance but includes a Note to allow the performance to be delayed for up to 7 days after stable thermal conditions are established at ≥ 70 percent RTP.

7. BSI–7 proposes a change to the CTS by requiring the emergency diesel generators (EDGs) to be tested for a longer duration, at higher loading, and within a power factor limit, with an allowance to not meet the load or power factor requirements due to momentary transients (ITS 3.8.1, DOC M06). CST 4.8.1.1.2.d.3 requires verification that the diesel generator operates for ≥ 60 minutes while loaded to ≥ 2000 kW. ITS SR 3.8.1.13 requires an endurance and load test for each EDG. The endurance and load test requires that the EDGs be operated for ≥ 8 hours, with ≥ 2 hours loaded between 2730 kW and 2860 kW and the remaining 6 hours loaded between 2340 kW and 2600 kW. This Surveillance is modified by Note 1 and Note 3. Note 1 states, ''momentary transients outside the load and power factor ranges do not invalidate this test.'' Note 3 states, ''If part b is performed with EDG synchronized with offsite power, it shall be performed within the power factor limit. However, if grid conditions do not permit, the power factor limit is not required to be met. Under this condition the power factor shall be maintained as close to the limit as practicable.''

8. BSI–8 proposes a change to incorporate Technical Specification Task Force (TSTF) Traveler 451T, ''Correct the Battery Monitoring and Maintenance Program and the Bases of SR 3.8.4.2'' (ITS 5.5.16, DOC A.6).

9. BSI–9 proposes a change to the CTS by extending the Completion Time of the High Flux and Flux-ΔFlux-Flow trip setpoints from 4 hours to 10 hours (ITS 3.2.5, DOC L02). CTS 3.2.2 Action a states the High Flux and Flux-ΔFlux-Flow trip setpoints must be reduced 1 percent for each 1 percent Nuclear Heat Flux Hot Channel Factor exceeds its limit within 4 hours. CTS 3.2.3 Action A states the High Flux and Flux-ΔFlux-Flow trip setpoints must be reduced to 1 percent for each 1 percent Nuclear Enthalpy Rise Hot Channel Factor exceeds its limit within 4 hours. ITS 3.2.5 Required Actions A.2 and B.2 requires the trip setpoints to be reduced similarly within 10 hours.

10. BSI–10 proposes a change to the CTS by allowing the suspension of the RCS minimum temperature for criticality limit during performance of a MODE 2 PHYSICS TEST (ITS 3.1.0, DOC L03). However, it places a limitation on the RCS lowest loop average temperature that is allowed during the test. CTS 3.10.2 states that limitations of certain Specifications may be suspended during the performance of PHYSICS TESTS. ITS 3.1.9 provides an additional exception to LCO 3.4.2, ''RCS Minimum Temperature for Criticality,'' provided the RCS lowest loop average temperature is ≥ 520°F (ITS LCO 3.1.9 part e). A Surveillance to verify RCS lowest loop average temperature is ≥ 520°F every 30 minutes (ITS SR 3.1.9.2) has been added. In addition, ITS 3.1.9 ACTION C has been added to cover the situation when RCS lowest loop average temperature is not within limit. The Required Action is to suspend PHYSICS TESTS exceptions within 30 minutes.

11. BSI–11 proposes a change to the CTS requirement by specifying a power factor limit if EDG testing is conducted by synchronizing with the offsite sources, and a change to the CTS by requiring the EDG to maintain a frequency ≤ 66.75 Hz following the load reject instead of not tripping the EDG (ITS 3.8.1, DOC M05 and DOC M08). CTS 4.8.1.1.2.d.1 requires verifying that the EDG is capable of rejecting a load equal to the largest single emergency load supplied by the generator without tripping. This surveillance does not specify that an EDG shall be tested at a specific power factor. ITS SR 3.8.1.10 requires the verification that each EDG can reject a load equal to or greater than its associated single largest post-accident load. The SR additionally states in Note 2 ''If performed with the EDG synchronized with offsite power, it shall be performed within the power factor limit. However, if grid conditions do not permit, the power factor limit is not required to be met. Under this condition the power factor shall be maintained as close to the limit as practicable.'' CTS 4.8.1.1.2.d.1 requires verification that each EDG can reject a load equivalent to the largest single emergency load without tripping the EDG. ITS SR 3.8.1.10 also requires verification that each EDG can reject a load equivalent to the largest single emergency load, except the acceptance criterion is that the EDG frequency is maintained ≤ 66.75 Hz following the load reject, which is below the EDG overspeed trip setpoint.

12. BSI–12 proposes a change to the CTS by extending the time to restore rod groups from 2 hours to 4 hours (ITS 3.2.1, DOC L01). CTS 3.1.3.6 Actions require entry with any group sequence or overlap outside the limits. CTS 3.1.3.6 Action A requires restoration of the regulating groups to within the limits within 2 hours. ITS 3.2.1 ACTION C requires the restoration of regulating rod group to within the limits within 4 hours.

13. BSI–13 proposes the following changes related to draft TSTF–493:

a. Adds Footnotes (c) and (d) to ITS Table 3.3.1–1 Functional Unit 1a (ITS 3.3.1, Attachment 1 Volume 8, page 43 of 636 of application).

b. Allows Method 1 or Method 2 of ISA 67.04–Part II—1994 or ISA 67.04.02—2000 for all RPS Functional Units in the ITS Bases (ITS 3.3.1 Attachment 1 Volume 8, page 59 of 636 of application).

c. Allows modification to where the Nominal trip setpoints are specified in the TS Bases (ITS 3.3.1 Attachment 1 Volume 8, pages 60 and 62 of 636 of application).

d. Adds a statement to the TS Bases in the ITS for SR 3.3.1.5 and SR 3.3.1.7 for the High Flux—Low Setpoint, concerning instrument uncertainties and other uncertainties (ITS 3.3.1 Attachment 1 Volume 8, page 65 of 636 of application).

e. Adds a statement concerning setpoint methodology to the Bases in the ITS (ITS 3.3.1 Attachment 1 Volume 8, pages 81—84 of 636 of application).

f. Allows Method 1 or Method 2 of ISA 67.04–Part II—1994 or ISA 67.04.02—2000 for all Safety Features Actuation System (SFAS) Functional Units in the ITS Bases (ITS 3.3.5 Attachment 1 Volume 8, page 209 of 636 of application).

g. Allows Method 1 or Method 2 of ISA 67.04–Part II—1994 or ISA 67.04.02—2000 for all Steam/Feedwater Rupture Control System (SFRCS) Functional Units in the ITS Bases (ITS 3.3.11 Attachment 1 Volume 8, pages 394–395 of 636 of application).

14. BSI–14 proposes to retain the heat balance evaluation criteria in a licensee controlled document instead of the technical specifications (ITS 3.3.1

Attachment 1 Volume 8, page 36 of 636 of application).

15. BSI–15 proposes to relocate the Anticipatory Reactor Trip System Instrumentation LCO and Surveillances out of the Technical Specifications (ITS 3.3.1 DOC R01).

16. BSI–16 is not used.

17. BSI–17 proposes to reference the RPS cabinet vice the preamplifier in the TS Bases discussion of the source range CHANNEL CALIBRATION (ITS 3.3.9 Attachment 1 Volume 8, page 330 of 636 of application).

18. BSI–18 proposes to remove the source range and immediate range nuclear instrument overlap check (ITS 3.3.9 DOC LA03).

19. BSI–19 proposes the following changes concerning the Containment Purge and Exhaust Isolation TSs:

a. Adds the term ''recently'' to modify the APPLICABILITY of LCO 3.3.15 (ITS 3.3.15 DOC L01).

b. Adds the term ''when the Containment Purge and Exhaust System is in service'' to the APPLICABILITY of ITS LCO 3.3.15 (ITS 3.3.15 Attachment 1 Volume 8, page 500 of 636 of application).

c. Removes the STS calibration data in ITS LCO 3.3.15 (ITS 3.3.15 DOC M02).

d. Revises the TS Bases discussion in the STS concerning LCO 3.3.15 (ITS 3.3.15 Attachment 1 Volume 8, page 504 of 636 of application).

e. Revises the TS Bases discussion with respect to the CTS and STS concerning LCO 3.9.4 (ITS 3.3.15 Attachment 1 Volume 8, page 507 of 636 of application).

f. Revises the surveillance requirements associated with the containment purge and exhaust system radiation monitors (ITS 3.3.15 DOC M02).

20. BSI–20 proposes to revise the CHANNEL adjustment discussion in the ITS Bases concerning the calibration SRs for the Fuel Pool Area Emergency Ventilation System Actuation Area Monitor (ITS 3.3.14 Attachment 1 Volume 8, page 488 of 636 of application), and proposes to omit an allowable value for the channel calibration for SR 3.3.16.3 concerning the Station Vent Normal Range Monitoring (ITS 3.3.16 DOC M02).

21. BSI–21 proposes to deviate from the STS by not placing the Control Room Emergency Ventilation System in operation during the movement of irradiated fuel for an inoperable channel, and not immediately suspending irradiated fuel movements if two channels are inoperable and compensatory actions are not immediately carried out (ITS 3.3.16 DOC M03 and ITS 3.7.10 DOC M012).

22. BSI–22 proposes a new definition of Loss of Power Start (LOPS) operability in the TS Bases (ITS 3.3.8 Attachment 1 Volume 8, page 298 of 636 of application).

23. BSI–23 proposes to only have monitoring instrumentation to support maintaining the unit in a safe shutdown condition from locations other than the control room (ITS 3.3.18 Attachment 1 Volume 8, pages 605–611 of 636 of application), and proposes to delete the APPLICABILITY requirement and the CTS SR for control circuits and transfer switches required for a serious control room or cable spreading room fire (ITS 3.3.18 Attachment 1 Volume 8, page 601 of 636 of application).

24. BSI–24 proposes to make the LCO for the Fuel Handling Exhaust—High Radiation Monitors applicable only during movement of irradiated fuel assemblies in the spent fuel pool (ITS 3.3.14 Attachment 1 Volume 8, page 482 of 636 of application).

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

Within 60 days after the date of publication of this notice, the person(s) may file a request for hearing with respect to issuance of the amendment to the subject facility operating license and any person(s) whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file written request via electronic submission through the NRC E-Filing system for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner/requestor in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestors/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

A request for hearing or a petition for leave to intervene must be filed in

accordance with the NRC E-Filing rule, which the NRC promulgated on August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve documents over the Internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least five (5) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at *hearingdocket@nrc.gov*, or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html*. Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html*.

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397–4209 or locally, (301) 415–4737. Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, Participants are requested not to include copyrighted materials in their submissions.

For further details with respect to this license amendment application, see the application for amendment dated August 3, 2007, which is available for public inspection at the Commission's PDR, located at One White Flint North, File Public Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 16th day of May 2008.

For the Nuclear Regulatory Commission.

Thomas J. Wengert,

Project Manager, Plant Licensing Branch III–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E8–11470 Filed 5–21–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Draft Regulatory Guide: Issuance, Availability

AGENCY: Nuclear Regulatory Commission.

ACTION: Issuance, Availability of Draft Regulatory Guide (DG)–1195.

FOR FURTHER INFORMATION CONTACT: Satish Aggarwal, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: (301) 415–6005 or e-mail *Satish.Aggarwal@NRC.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) has issued for public comment a draft guide in the agency's ''Regulatory Guide'' series. This series was developed to describe and make available to the public such information as methods that are acceptable to the

NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

The draft regulatory guide (DG), entitled, ''Availability of Electric Power Sources,'' is temporarily identified by its task number, DG–1195, which should be mentioned in all related correspondence.

This draft regulatory guide is revision 1 to Regulatory Guide (RG) 1.93, ''Availability of Electric Power Sources,'' dated December 1974. An earlier revision 1 to RG 1.93 was issued in October 2006 as DG–1153. Subsequent to its publication the staff received numerous comments from the public and members of the NRC staff. As a result, significant changes were made to the original draft guide (DG–1153). These changes necessitated reissuing revision 1 of RG 1.93 as a new DG for public comment.

This guide describes the operating procedures and restrictions that the staff of the NRC considers acceptable for implementation when the available electric power sources are less than the limiting conditions for operation. This guide is applicable to single and multi-unit plants. These practices and methods are the result of NRC review of operating experience and they reflect the latest methods and approaches acceptable to the NRC staff. If future information results in alternative methods, the NRC staff will review such methods to determine their acceptability.

II. Further Information

The NRC staff is soliciting comments on DG–1195. Comments may be accompanied by relevant information or supporting data, and should mention DG–1195 in the subject line. Comments submitted in writing or in electronic form will be made available to the public in their entirety through the NRC's Agencywide Documents Access and Management System (ADAMS).

Personal information will not be removed from your comments. You may submit comments by any of the following methods:

1. Mail comments to: Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

2. E-mail comments to: *NRCREP@nrc.gov*.

3. Hand-deliver comments to: Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

4. Fax comments to: Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission at (301) 415–5144.

Requests for technical information about DG–1195 may be directed to the NRC Senior Program Manager, Satish Aggarwal at (301) 415–6005 or e-mail at *Satish.Aggarwal@NRC.gov*.

Comments would be most helpful if received by July 25, 2008. Comments received after that date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Although a time limit is given, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

Electronic copies of DG–1195 are available through the NRC's public Web site under Draft Regulatory Guides in the ''Regulatory Guides'' collection of the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections/*. Electronic copies are also available in ADAMS (*http://www.nrc.gov/reading-rm/adams.html*), under Accession No. ML080570075.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR), which is located at 11555 Rockville Pike, Rockville, Maryland. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4205, by fax at (301) 415–3548, and by e-mail to *PDR@nrc.gov*.

Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

Dated at Rockville, Maryland, this 15th day of May, 2008.

For the Nuclear Regulatory Commission.

Stephen C. O'Connor,

Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. E8–11473 Filed 5–21–08; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. PI2008–3; Order No. 76]

Universal Postal Service Obligation

AGENCY: Postal Regulatory Commission.

ACTION: Notice of public workshop and field hearings.

DATES: June 12, 2008: public workshop, Washington, DC (10 a.m.). See **SUPPLEMENTARY INFORMATION** for field hearing dates.

FOR FURTHER INFORMATION CONTACT: Ann Fisher, chief of staff, 202–789–6803 or *ann.fisher@prc.gov.*

SUPPLEMENTARY INFORMATION:

Regulatory History

73 FR 23507 (April 30, 2008).

I. Background

In Order No. 71, the Postal Regulatory Commission (Commission) established a docket to address its responsibility, under section 702 of the Postal Accountability and Enforcement Act (PAEA), Public Law 109–435, to submit a report to the President and the Congress on ''universal postal service and the postal monopoly in the United States * * * including the monopoly on the delivery of mail and on access to mailboxes.'' It invited written comments on these topics, including specific questions presented in an accompanying discussion memorandum, and noted that field hearings and a public workshop would be held to obtain additional input. This order provides some additional details concerning the field hearings and public workshop.

II. Public Workshop

The Commission will sponsor a workshop on Thursday, June 12, 2008, from 10 a.m. to 12 p.m. The workshop will be held in the Commission's hearing room, located at 901 New York Ave., NW., Suite 200, Washington, DC. The moderator will be Commission Chairman Dan G. Blair. The workshop is open to the public. The proceedings will be transcribed, and a copy of the transcript will be posted on the Commission's Web site.

III. Field Hearings

A. Information Applicable to All Field Hearings

Format and record. All comments and testimony received, including responses to questions from Commissioners, will be transcribed, posted on the Commission's Web site, and used to inform the Commission's conclusions. The public is invited to attend the hearings.

Special accommodations. It is the Commission's understanding that each hearing room is handicapped accessible. Any member of the public who believes his or her attendance may require special accommodations is requested to contact Judy Grady, assistant director of Strategic Planning and Performance

Management, 202–789–6898, or *judith.grady@prc.gov* as soon as possible.

B. Flagstaff, Arizona Hearing

The Flagstaff hearing will be held on Wednesday, May 21, 2008, at City Hall, 211 West Aspen Ave. The hearing is scheduled to begin at 2 p.m. and conclude at 4 p.m. Details concerning the witness list will be posted on the Commission's Web site.

C. St. Paul, Minnesota Hearing

The St. Paul field hearing will be held on Thursday, June 5, 2008, in City Council Chambers on the third floor of the City Hall/Court House Building, 15 Kellogg Blvd. The hearing is scheduled to begin at 10 a.m. and conclude at 12 p.m. Details concerning the witness list will be posted on the Commission's Web site.

D. Portsmouth, New Hampshire Hearing

The Portsmouth field hearing will be held on Thursday, June 19, 2008, at City Hall, 1 Junkins Ave. The hearing is scheduled to begin at 2 p.m. and conclude at 4 p.m. Details concerning the witness list will be posted on the Commission's Web site.

IV. Ordering Paragraphs

It is Ordered:

1. The Commission will hold the scheduled field hearings and public workshop referred to in the body of this order.

2. The Secretary shall arrange for publication of this notice in the **Federal Register**.

By the Commission.

Dated: May 16, 2008.

Garry J. Sikora,

Acting Secretary.

[FR Doc. E8–11453 Filed 5–21–08; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213

Extension:

Regulation S–X; SEC File No. 270–3; OMB Control No. 3235–0009.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the previously approved collection of information discussed below.

Information collected and information prepared pursuant to Regulation S–X focus on the form and content of, and requirements for, financial statements filed with periodic reports and in connection with the offer and sale of securities. Investors need reasonably current financial statements to make informed investment and voting decisions.

The potential respondents include all entities that file registration statements or reports pursuant to the Securities Act of 1933 (15 U.S.C. 77a, *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a, *et seq.*) or the Investment Company Act of 1940 (15 U.S.C. 80a–1, *et seq.*).

Regulation S–X specifies the form and content of financial statements when those financial statements are required to be filed by other rules and forms under the federal securities laws. Compliance burdens associated with the financial statements are assigned to the rule or form that directly requires the financial statements to be filed, not to Regulation S–X. Instead, an estimated burden of one hour traditionally has been assigned to Regulation S–X for incidental reading of the regulation. The estimated average burden hours are solely for purposes of the Paperwork Reduction Act and are not derived from a comprehensive or even a representative survey or study of the costs of SEC rules or forms.

Recordkeeping retention periods are based on the disclosure required by various forms and rules other than Regulation S–X. In general, balance sheets for the preceding two fiscal years, income and cash flow statements for the preceding three fiscal years, and condensed quarterly financial statements must be filed with the Commission. Five-year summary financial information is required to be disclosed by some larger registrants.

Filing financial statements, when required by the governing rule or form, is mandatory. Because these statements are provided for the purpose of disseminating information to the securities markets, they are not kept confidential.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

General comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or send an e-mail to: *Alexander_T._Hunt@omb.eop.gov*, and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*.

Dated: May 15, 2008.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–11430 Filed 5–21–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57818; File No. SR–Amex–2008–30]

Self-Regulatory Organizations; American Stock Exchange LLC; Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Amend the Eligibility Criteria for Components of an Index or Portfolio Underlying Portfolio Depositary Receipts and Index Fund Shares

May 15, 2008.

I. Introduction

On March 25, 2008, the American Stock Exchange LLC (''Amex'' 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 Commentary .03 to Amex Rule 1000–AEMI (Portfolio Receipts or ''PDRs'') and Commentary .02 to Amex Rule 1000A–AEMI (Index Fund Shares or ''IFSs,'' and together with PDRs, collectively, ''ETFs'') to modify certain eligibility criteria for components of an index or portfolio underlying ETFs. On April 1, 2008, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change was published for comment in the **Federal Register** on April 14, 2008.[3] The Commission received no comments on the proposed rule change. This order

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57631 (April 8, 2008), 73 FR 20074.

approves the proposed rule change, as modified by Amendment No. 1 thereto.

II. Description of the Proposal

The Exchange proposes to amend Commentary .03 to Amex Rule 1000–AEMI and Commentary .02 to Amex Rule 1000A–AEMI to exclude ETFs and securities defined as Managed Fund Shares (Amex Rule 1000B), Trust Issued Receipts (Amex Rule 1200), Commodity-Based Trust Shares (Amex Rule 1200A), Currency Trust Shares (Amex Rule 1200B), Partnership Units (Amex Rule 1500), and Paired Trust Shares (Amex Rule 1600) (together with ETFs, collectively, ''Derivative Securities Products'') when applying certain quantitative listing requirements of Commentary .03 to Amex Rule 1000–AEMI and Commentary .02 to Amex Rule 1000A–AEMI. In this way, the Exchange seeks to enable the listing and trading of ETFs that are linked to, or based on, components that are Derivative Securities Products pursuant to Rule 19b–4(e) under the Act.[4]

Amex Rules 1000–AEMI and 1000A–AEMI provide that the Exchange may approve a series of PDRs and IFSs, respectively, for listing and/or trading (including pursuant to unlisted trading privileges) pursuant to Rule 19b–4(e) under the Act,[5] if such series satisfies the criteria set forth in such Rules. In its proposal, the Exchange seeks to exclude Derivative Securities Products when applying certain quantitative listing requirements of Commentary .03 to Amex Rule 1000–AEMI and Commentary .02 to Amex Rule 1000A–AEMI relating to the listing of PDRs and IFSs, respectively, based on a U.S. index or portfolio or an international or global index or portfolio.

With respect to Commentary .03 to Amex Rule 1000–AEMI and Commentary .02 to Amex Rule 1000A–AEMI, the Exchange proposes to exclude Derivative Securities Products, as components, when applying the following existing component eligibility requirements: (1) Component stocks that, in the aggregate, account for at least 90% of the weight of the index or portfolio each must have a minimum market value of at least $75 million (Commentary .03(a)(A)(1) to Amex Rule 1000–AEMI and Commentary .02(a)(A)(1) to Amex Rule 1000A–AEMI); (2) component stocks that, in the aggregate, account for at least 90% of the weight of the index or portfolio each must have a minimum monthly trading volume during each of the last six months of at least 250,000 shares (Commentary .03(a)(A)(2) to Amex Rule 1000–AEMI and Commentary .02(a)(A)(2) to Amex Rule 1000A–AEMI); and (3) the most heavily weighted component stock must not exceed 30% of the weight of the index or portfolio, and the five most heavily weighted component stocks must not exceed 65% of the weight of the index or portfolio (Commentary .03(a)(A)(3) to Amex Rule 1000–AEMI and Commentary .02(a)(A)(3) to Amex Rule 1000A–AEMI). Component stocks, in the aggregate, excluding Derivative Securities Products, would still be required to meet the criteria of these provisions. Thus, for example, when determining compliance with Commentaries .03(a)(A)(1) and (2) to Amex Rule 1000–AEMI and Commentaries .02(a)(A)(1) and (2) to Amex Rule 1000A–AEMI, component stocks that, in the aggregate, account for at least 90% of the remaining index weight, after excluding any Derivative Securities Products, would be required to have a minimum market value of at least $75 million and minimum monthly trading volume of 250,000 shares during each of the last six months, respectively. In addition, with respect to Commentary .03(a)(A)(3) to Amex Rule 1000–AEMI and Commentary .02(a)(A)(3) to Amex Rule 1000A–AEMI, when determining the component weight for the most heavily weighted stock and the five most heavily weighted component stocks for an underlying index that includes a Derivative Securities Product, the weight of such Derivative Securities Products included in the underlying index or portfolio would not be considered.

In addition, the Exchange proposes to modify the requirements in Commentary .03(a)(A)(4) to Amex Rule 1000–AEMI and Commentary .02(a)(A)(4) to Amex Rule 1000A–AEMI, which provide that the underlying index or portfolio must include a minimum of 13 component stocks. Specifically, the Exchange proposes that there shall be no minimum number of component stocks if: (1) One or more series of ETFs constitute, at least in part, components underlying a series of ETFs; or (2) one or more series of Derivative Securities Products account for 100% of the weight of the index or portfolio. Thus, for example, if the index or portfolio underlying a series of ETFs includes one or more series of ETFs, or if it consists entirely of other Derivative Securities Products, then there would not be required to be any minimum number of component stocks (*i.e.*, one or more components comprising the underlying index or portfolio would be acceptable). However, if the index or portfolio consists of Derivative Securities Products other than ETFs (*e.g.*, Commodity-Based Trust Shares or Currency Trust Shares), as well as securities that are not Derivative Securities Products (*e.g.*, common stocks), then there would have to be at least 13 components in the underlying index or portfolio.

Consistent with current Commentary .03(a)(A)(5) to Amex Rule 1000–AEMI and Commentary .02(a)(A)(5) to Amex Rule 1000A–AEMI, all securities in the index or portfolio would have to be ''US Component Stocks'' (as defined in Amex Rules 1000–AEMI(b)(3) and 1000A–AEMI(b)(4))[6] listed on a national securities exchange and NMS Stocks, as defined in Rule 600 of under the Act.[7]

With respect to Commentary .03(a)(B) to Amex Rule 1000–AEMI and Commentary .02(a)(B) to Amex Rule 1000A–AEMI, the Exchange proposes to exclude Derivative Securities Products, as components, when applying the following existing component eligibility requirements: (1) Component stocks that, in the aggregate, account for at least 90% of the weight of the index or portfolio each must have a minimum market value of at least $100 million (Commentary .03(a)(B)(1) to Amex Rule 1000–AEMI and Commentary .02(a)(B)(1) to Amex Rule 1000A–AEMI); (2) component stocks that, in the aggregate, account for at least 90% of the weight of the index or portfolio each must have a minimum worldwide monthly trading volume during each of the last six months of at least 250,000 shares (Commentary .03(a)(B)(2) to Amex Rule 1000–AEMI and Commentary .02(a)(B)(2) to Amex Rule 1000A–AEMI); and (3) the most heavily weighted component stock must not exceed 25% of the weight of the index or portfolio, and the five most heavily weighted component stocks must not exceed 60% of the weight of the index or portfolio (Commentary .03(a)(B)(3) to

[4] Rule 19b–4(e) under the Act provides that the listing and trading of a new derivative securities product by a self-regulatory organization (''SRO'') shall not be deemed a proposed rule change, pursuant to Rule 19b–4(c)(1) (17 CFR 240.19b–4(c)(1)), if the Commission has approved, pursuant to Section 19(b) of the Act (15 U.S.C. 78s(b)), the SRO's trading rules, procedures, and listing standards for the product class that would include the new derivatives securities product, and the SRO has a surveillance program for the product class. *See* 17 CFR 240.19b–4(e).

[5] *See id.*

[6] ''US Component Stock'' is an equity security that is registered under Section 12(b) or 12(g) of the Act or an American Depositary Receipt, the underlying equity security of which is registered under Section 12(b) or 12(g) of the Act. *See* Amex Rules 1000–AEMI(b)(3) and 1000A–AEMI(b)(4).

[7] *See* 17 CFR 242.600(b)(47).

Amex Rule 1000–AEMI and Commentary .02(a)(B)(3) to Amex Rule 1000A–AEMI). Thus, for example, when determining compliance with Commentaries .03(a)(B)(1) and (2) to Amex Rule 1000–AEMI and Commentaries .02(a)(B)(1) and (2) to Amex Rule 1000A–AEMI, component stocks that, in the aggregate, account for at least 90% of the remaining index weight, after excluding any Derivative Securities Products, would be required to have a minimum market value of at least $100 million and minimum worldwide monthly trading volume of 250,000 shares during each of the last six months, respectively. In addition, with respect to Commentary .03(a)(B)(3) to Amex Rule 1000–AEMI and Commentary .02(a)(B)(3) to Amex Rule 1000A–AEMI, when determining the component weight for the most heavily weighted stock and the five most heavily weighted component stocks for an underlying index that includes a Derivative Securities Product, the weight of such Derivative Securities Products included in the underlying index or portfolio would not be considered.

In addition, the Exchange proposes to modify the requirements in Commentary .03(a)(B)(4) to Amex Rule 1000–AEMI and Commentary .02(a)(B)(4) to Amex Rule 1000A–AEMI, which provide that the underlying index or portfolio must include a minimum of 20 component stocks. Specifically, the Exchange proposes that there shall be no minimum number of component stocks if: (1) One or more series of ETFs constitute, at least in part, components underlying a series of ETFs; or (2) one or more series of Derivative Securities Products account for 100% of the weight of the index or portfolio. Thus, for example, if the index or portfolio underlying a series of ETFs includes one or more series of ETFs, or if it consists entirely of other Derivative Securities Products, then there would not be required to be any minimum number of component stocks (*i.e.*, one or more components comprising the underlying index or portfolio would be acceptable). However, if the index or portfolio consists of Derivative Securities Products other than ETFs (*e.g.*, Commodity-Based Trust Shares or Currency Trust Shares), as well as securities that are not Derivative Securities Products (*e.g.*, common stocks), then there would have to be at least 20 components in the underlying index or portfolio.

Consistent with current Commentary .03(a)(B)(5) to Amex Rule 1000–AEMI and Commentary .02(a)(B)(5) to Amex Rule 1000A–AEMI, each component that is a U.S. Component Stock (which would include each Derivative Securities Product) would be required to be listed on a national securities exchange and be an NMS Stock, as defined in Rule 600 under the Act, and each component that is a Non-US Component Stock (as defined in Amex Rules 1000–AEMI(b)(4) and 1000A–AEMI(b)(5)) [8] would be required to be listed and traded on an exchange that has last-sale reporting.

III. Discussion and Commission's Findings

After careful review and based on the Exchange's representations, 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.[9] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[10] which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest.

Under Commentary .03 to Amex Rule 1000–AEMI and Commentary .02 to Amex Rule 1000A–AEMI, one or more series of Derivative Securities Products may be included as a component comprising the index or portfolio underlying a series of ETFs.[11] The Commission notes that, based on the trading characteristics of Derivative Securities Products, it may be difficult for component Derivative Securities Products to satisfy certain quantitative index criteria, such as the minimum market value and trading volume limitations. However, because Derivative Securities Products are themselves subject to specific initial and continued listing requirements, the Commission believes that it would be reasonable to exclude Derivative Securities Products, as components, when applying certain quantitative listing requirements related to the listing of PDRs and IFSs. For example, the index component eligibility standards for ETFs require, among others, that there be a minimum of 13 component stocks in an underlying U.S. index or portfolio and a minimum of 20 component stocks in an international or global index or portfolio. If one or more series of ETFs constitutes, at least in part, a component of a U.S. or international index underlying a series of ETFs, the Commission believes that not requiring a minimum number of components underlying such overlying ETFs would be reasonable because each component ETF already requires a minimum of 13 or 20 component stocks, as the case may be. In addition, if the index or portfolio underlying a series of ETFs consists entirely of other component Derivative Securities Products, then there would be no required minimum number of component stocks. The Commission notes that, if a series of ETFs is based on the performance of an underlying index or portfolio composed, in part, of: (1) An ETF and another non-Derivative Securities Product (*e.g.*, common stock), or (2) a Derivative Securities Product other than an ETF, then the minimum number of component stock requirement will continue to apply.

In addition, because component Derivative Securities Products may comprise 100% of the weight of any index underlying a series of ETFs, the Commission believes that providing for an exception to the concentration limits contained in Commentary .03(a)(A)(3) to Amex Rule 1000–AEMI and Commentary .02(a)(A)(3) to Amex Rule 1000A–AEMI with respect to component Derivative Securities Products is reasonable. The Commission further notes that component Derivative

[8] "Non-US Component Stock" is an equity security that is not registered under Section 12(b) or 12(g) of the Act and that is issued by an entity that (1) is not organized, domiciled, or incorporated in the United States, and (2) is an operating company (including Real Estate Investment Trusts and income trusts, but excluding investment trusts, unit trusts, mutual funds, and derivatives). *See* Amex Rules 1000–AEMI(b)(4) and 1000A–AEMI(b)(5).

[9] 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).

[10] 15 U.S.C. 78f(b)(5).

[11] Under Commentary .03 to Amex Rule 1000–AEMI and Commentary .02 to Amex Rule 1000A–AEMI, a series of a Derivative Securities Product may be included as a U.S. Component Stock or Non-U.S. Component Stock underlying a series of PDRs or IFSs, respectively, so long as the shares of such series meet the definitions of U.S. Component Stock and Non-U.S. Component Stock, as applicable. *See supra* notes 6 and 8. *See also* Commentaries .03(a)(A)(5) and .03(a)(B)(5) to Amex Rule 1000–AEMI and Commentaries .02(a)(A)(5) and .02(a)(B)(5) to Amex Rule 1000A–AEMI (requiring that, in any event, all securities in the applicable index or portfolio must be a U.S. Component Stock listed on a national securities exchange and an NMS Stock, as defined in Rule 600 under the Act, or, in the case of an international or global index or portfolio, must be a Non-U.S. Component Stock that is listed and traded on an exchange that has last-sale reporting).

Securities Products that are U.S. Component Stocks comprising, at least in part, an index or portfolio underlying a series of Units must meet the definition of NMS Stock [12] and already have been listed and trading on a national securities exchange pursuant to a proposed rule change approved by the Commission pursuant to Section 19(b)(2) of the Act [13] or submitted by a national securities exchange pursuant to Section 19(b)(3)(A) of the Act,[14] or would have been listed by a national securities exchange pursuant to the requirements of Rule 19b–4(e) under the Act.[15] Component Derivative Securities Products that are Non-U.S. Component Stocks comprising, at least in part, an international or global index or portfolio underlying a series of Units must already have been listed and trading on an exchange that has last-sale reporting.

The Commission believes that the proposed rule change will facilitate the listing and trading of additional types of exchange-traded products that will enhance competition among market participants, to the benefit of investors and the marketplace. In addition, the listing and trading criteria set forth in the proposal are intended to protect investors and the public interest. The Commission notes that it has approved a substantively identical proposal of another national securities exchange.[16] The Commission is not aware of any regulatory issue that should cause it revisit that finding and, as such, believes it is reasonable and consistent with the Act for the Exchange to modify the index component eligibility criteria for ETFs in the manner described in the proposal.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[17] that the proposed rule change (SR–Amex–2008–30), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–11424 Filed 5–21–08; 8:45 am]

BILLING CODE 8010–01–P

[12] *See supra* note 7.

[13] 15 U.S.C. 78s(b)(2).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] *See supra* note 4.

[16] *See* Securities Exchange Act Release No. 57751 (May 1, 2008), 73 FR 25818 (May 7, 2008) (SR–NYSEArca–2008–29).

[17] 15 U.S.C. 78s(b)(2).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57816; File No. SR–CBOE–2008–41]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of Proposed Rule Change Relating to the Automated Improvement Auction

May 14, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 15, 2008, Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to allow orders for less than 50 contracts to be entered into the Automated Improvement Mechanism (''AIM'') at a price that matches the national best bid or offer (''NBBO''). The text of the proposed rule change is available at the Exchange, on the Exchange's Web site (*http://www.cboe.org/Legal*), 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 Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In order to provide additional opportunities for price improvement, the Exchange proposes to expand the application of its electronic AIM auction process. Under the AIM auction process, a member that represents agency orders may submit an order it represents as agent (''Agency Order'') along with a second order (a principal order or a solicited order for the same amount as the Agency Order) into the AIM auction where other participants can compete with the submitting member's second order to execute against the Agency Order. A member (the ''Initiating Member'') may initiate the AIM auction process provided certain requirements are met. These requirements include a condition that the Initiating Member stop the entire Agency Order as principal or with a solicited order at the following price: (i) If the Agency Order is for 50 contracts or more, at the better of the NBBO or the Agency Order's limit price (if the order is a limit order); and (ii) if the Agency Order is for less than 50 contracts, at the better of (A) the NBBO price improved by one minimum price improvement increment, which increment shall be determined by the Exchange but may not be smaller than one cent; or (B) the Agency Order's limit price (if the order is a limit order).

The Exchange is now proposing to modify this condition with respect to the stop price for orders of less than 50 contracts. Under the proposed rule change, such orders would be stopped at the better of the NBBO or the Agency Order's limit price (if the order is a limit order). Thus, orders for less than 50 contracts would be treated the same as orders for 50 contracts or more for purposes of the AIM stop price requirement. The Exchange believes this is a reasonable modification designed to provide additional flexibility for members to obtain executions on behalf of their customers while continuing to provide a meaningful, competitive auction. The Exchange believes this expansion of AIM would have the added benefit of providing members with an alternative method of achieving an execution at the NBBO for their customers without having to pay taker fees that may be associated with routing an order to another market in those scenarios where CBOE's best bid or offer is inferior to the NBBO.[3]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Several options exchanges have adopted a fee structure in which firms receive a rebate for the execution of orders resting in the limit order book (*i.e.,* posting liquidity) and pay a fee for the execution of orders that trade against liquidity resting on the limit order book (*i.e.,* taking liquidity). Taker fees currently range up to $0.45 per contract and are charged without consideration of the order origin category, including public customer orders. In contrast, CBOE does not generally charge a fee for the execution of public customer orders. The effective price paid by a

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Section 6(b)(5) of the Act,[5] in particular, in that it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the Exchange believes that the proposed rule change will provide additional opportunities for price improvement and guaranteed executions at a price at least as good as the NBBO. Additionally, it will allow members to avoid paying taker fees.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR–CBOE–2008–41 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–CBOE–2008–41. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2008–41 and should be submitted on or before June 12, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–11419 Filed 5–21–08; 8:45 am]

BILLING CODE 8010–01–P

customer purchasing an option can be considerably higher on an exchange that charges a taker fee. For example, a customer that enters a marketable limit order to buy 10 contracts for $0.10 would pay $100 on CBOE and $104.50 if executed on an exchange that charges a $0.45 taker fee (an effective 4.5% increase). Because orders cannot be executed at prices inferior to the NBBO, members are effectively forced to pay taker fees when an exchange with a taker fee structure is at the NBBO and the members' orders are directly routed to such an exchange or indirectly routed to such an exchange through the Intermarket Options Linkage (where the fees are passed through).

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57821; File No. SR–FICC–2008–03]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change, as Modified, To Eliminate the Coverage Component and Margin Requirement Differential From the Mortgage-Backed Securities Division Participants Fund Calculation

May 15, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on April 18, 2008, the Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') and on April 21, 2008, amended the proposed rule change described in Items I, II, and III below, which items have been prepared primarily by FICC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of the proposed rule change is to modify FICC's Mortgage-Backed Securities Division (''MBSD'') participant fund calculation as set forth in Article IV, Rule 1 (Total Required Fund Deposit) by eliminating the Coverage Component and the Margin Requirement Differential from the calculation.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FICC 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. FICC has prepared summaries, set forth in sections (A), (B),

[1] 15 U.S.C. 78s(b)(1).

and (C) below, of the most significant aspects of these statements.[2]

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

On August 31, 2007, FICC filed with the Commission and on September 27, 2007, amended proposed rule change SR–FICC–2007–10 pursuant to Section 19(b)(1) of the Act. On March 31, 2008, the Commission approved the proposed rule change.[3]

The rule change modified FICC's MBSD rules, replacing the current participants fund methodology (which used haircuts and offsets) with a Value-at-Risk (''VaR'') model, which was expected to better account for market volatility and more thoroughly distinguish levels of risk presented by individual securities.[4]

As approved by the Commission, the revised participants fund calculation included: (1) An end-of-day charge (which is the greater of the VaR-based charge and a defined minimum charge), (2) a Coverage Component (which is an additional charge to bring the participant's coverage to a targeted confidence level), (3) an additional payment (which is called a ''Special Charge'') as determined by FICC from time to time, and (4) a Margin Requirement Differential (which takes into account intra-day portfolio variations and the potential for a late margin deficit satisfaction).

FICC has determined not to implement the Coverage Component and the Margin Requirement Differential, while it continues to study the methodology. Accordingly, FICC is modifying MBSD Article I (Definitions and General Provisions) and Article IV (Participants Fund) to remove references to these components.

FICC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act[5] and the rules and regulations thereunder applicable to FICC because the proposed rule change should better enable FICC to assure the safeguarding of securities and funds in its custody or control or for which it is responsible by enabling FICC to more effectively manage the risks presented by participants' activities.

B. Self-Regulatory Organization's Statement on Burden on Competition

FICC does not believe that the proposed rule change will have any impact on or impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments relating to the proposed rule change have been solicited or received. FICC will notify the Commission of any written comments received by FICC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(iii) of the Act[6] and Rule 19b–4(f)(4)[7] thereunder because the proposed rule change effects a change in an existing service of FICC that (i) does not adversely affect the safeguarding of securities or funds in the custody or control of FICC or for which it is responsible and (ii) does not significantly affect the respective rights of the clearing agency or persons using the service. At any time within sixty days of the filing of such 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.[8]

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–FICC–2008–03 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–FICC–2008–03. 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 changes that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings also will be available for inspection and copying at the principal office of FICC and on FICC's Web site at *http://www.dtcc.com/legal/rule_filings/ficc/2008.php.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FICC–2008–03 and should be submitted on or before June 12, 2008.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–11425 Filed 5–21–08; 8:45 am]

BILLING CODE 8010–01–P

[2] The Commission has modified the text of the summaries prepared by FICC.

[3] Securities Exchange Act Release No. 57586 (March 31, 2008), 73 FR 19537 (SR–FICC–2007–10).

[4] VaR is defined to be the maximum amount of money that may be lost on a portfolio over a given period of time, within a given level of confidence.

[5] 15 U.S.C. 78q–1.

[6] 15 U.S.C. 78s(b)(3)(A)(iii).

[7] 17 CFR 240.19b–4(f)(4).

[8] 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 21, 2008, the date on which the last amendment to the proposed rule change was filed with the Commission. 15 U.S.C. 78s(b)(3)(C).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57830; File No. SR–MSRB–2008–04]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Proposed Rule Change Relating to MSRB Rule G–34, CUSIP Numbers and New Issue Requirements, To Require Underwriter Registration and Testing With Depository Trust and Clearing Corporation's New Issue Information Dissemination System

May 16, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 9, 2008, the Municipal Securities Rulemaking Board (''MSRB'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB is filing with the Commission a proposed rule change consisting of changes to Rule G–34, CUSIP Numbers and New Issue Requirements. The proposed rule change would require underwriters to register and conduct tests with the Depository Trust and Clearing Corporation's New Issue Information Dissemination System. The text of the proposed rule change is available on the MSRB's Web site (*http://www.msrb.org*), at the MSRB's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change would require underwriters to register and conduct tests with the Depository Trust and Clearing Corporation's (''DTCC'') New Issue Information Dissemination System (''NIIDS''). The proposed rule change would help ensure that dealers are prepared for the September 30, 2008 effective date of changes to other MSRB rules to require underwriters to participate in NIIDS.[3] Accordingly, the proposed rule change would require all brokers, dealers and municipal securities dealers (collectively ''dealers'') that have acted as underwriter[4] in the last year on a new issue of municipal securities with nine months or greater effective maturity to register to use NIIDS with DTCC and successfully test NIIDS prior to September 15, 2008.[5] On an ongoing basis the proposed rule change would require dealers to register to use NIIDS with DTCC and successfully test NIIDS prior to acting as underwriter on a new issue of municipal securities with nine months or greater effective maturity.

DTCC NIIDS Implementation Plan

NIIDS is a centralized system for collecting and communicating new issue securities information. NIIDS will act as a central collection point for standardized electronic files of new issue information provided by underwriters that will be disseminated in real-time to information vendors. NIIDS is a component of a larger initiative at DTCC to implement an updated system for making new issues depository eligible (''UW SOURCE''). While NIIDS will provide an improved mechanism for disseminating the new issue information necessary for trade processing, information submitted into NIIDS also will be used in UW SOURCE for making new issues depository eligible.

Beginning September 2, 2008, DTCC will require underwriters to use NIIDS in connection with the filing of an application for depository eligibility in UW SOURCE for new issues of municipal securities.[6] To allow underwriters to gain experience with UW SOURCE in advance of September 2, 2008, DTCC has made UW SOURCE available on an optional basis to allow all registered underwriters to test their ability to use UW SOURCE, including the NIIDS component. DTCC has developed educational training materials on UW SOURCE and NIIDS that are available on DTCC's Web site.

MSRB NIIDS Registration Requirement

Under the proposed rule change, all dealers that underwrite municipal securities with nine months or greater effective maturity would be required to register to use NIIDS with DTCC. Registration with DTCC is required in order for an underwriter to gain access to UW SOURCE to test NIIDS.

MSRB NIIDS Testing Requirement

Once an underwriter has completed DTCC NIIDS registration requirements, the underwriter is allowed to submit test data into NIIDS. DTCC has published a test plan that underwriters can use to gain familiarity with NIIDS. DTCC's UW SOURCE Testing and Implementation Plan is available on DTCC's Web site.

DTCC's UW SOURCE Testing and Implementation Plan includes the capability for underwriters to test the submission of information for several different types of securities. The proposed rule change only requires underwriters to test submitting information about securities with nine months or greater effective maturity since the changes to MSRB rules to require underwriter participation with NIIDS that become effective on September 30, 2008 provide an exception for short-term instruments with less than nine months in effective maturity.

Two methods of inputting new issue information into NIIDS are provided by DTCC: (i) NIIDS Web Interface and (ii) NIIDS ''Autofeed'' Interface. The NIIDS Web Interface allows underwriters to input information about a new issue using an Internet portal manually or by uploading a formatted Excel spreadsheet. The proposed rule change would require all underwriters to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57750 (May 1, 2008), 73 FR 25815 (May 7, 2008).

[4] Rule G–34 defines ''underwriter'' very broadly to include a dealer acting as a placement agent as well as any dealer purchasing new issue securities from the issuer as principal. If there is an underwriting syndicate, the lead manager is considered to be the ''underwriter'' for purposes of Rule G–34.

[5] Many underwriters have already registered with DTCC and initiated NIIDS testing. The proposed rule change would place a deadline on underwriters to register with DTCC and complete NIIDS testing. Underwriters that have already satisfied the requirements of the proposed rule change prior to SEC approval are not required to re-register or re-test.

[6] *See* Securities Exchange Act Release No. 57768 (May 2, 2008), 73 FR 26181 (May 8, 2008).

submit two test new issues using the NIIDS Web Interface.

The NIIDS Autofeed Interface allows underwriters to establish computer-to-computer connections with DTCC either directly or through a vendor to submit automated files directly to NIIDS. For underwriters planning to use the NIIDS Autofeed Interface, the proposed rule change would require underwriters to submit two test new issues using computer-to-computer connections.

DTCC will monitor underwriter testing and provide status updates to the MSRB. For purposes of determining whether an underwriter has successfully tested the NIIDS Web Interface or the NIIDS Autofeed Interface, underwriters must be able to submit a test new issue in NIIDS and achieve ''Trade Eligibility'' status in less than two hours. To assist in monitoring whether a test was successful, underwriters should enter a ''Time of Formal Award'' in NIIDS that reflects the time that the underwriter begins submitting data into NIIDS so that the Time of Formal Award can be compared with the time at which Trade Eligibility status is achieved.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act,[7] which provides that the MSRB's rules shall:

> Be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

The MSRB believes that the proposed rule change is consistent with the Act because it will allow the municipal securities industry to produce more accurate trade reporting and transparency.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB 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 since it would apply equally to all brokers, dealers and municipal securities dealers.

[7] 15 U.S.C. 78o–4(b)(2)(C).

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 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 Number SR–MSRB–2008–04 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–MSRB–2008–04. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MSRB–2008–04 and should be submitted on or before June 12, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–11434 Filed 5–21–08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57822; File No. SR–NASDAQ–2008–045]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify the Opening of Trading on the NASDAQ Options Market

May 15, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 13, 2008, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. Nasdaq has filed the proposal pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(5) 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.

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(5).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to modify the opening of trading on the NASDAQ Options Market (''NOM'') as set forth in Chapter VI, Section 8 of the Nasdaq Rules governing options trading. The text of the proposed rule change is available at Nasdaq, the Commission's Public Reference Room, and *http://nasdaq.complinet.com*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq proposes to modify Chapter VI, Section 8 of the rules governing NOM, and in particular governing the opening of trading in that market. Since Nasdaq launched NOM on March 31, 2008, Nasdaq has monitored the operation of the market to identify instances where market efficiency can be enhanced. Nasdaq believes that the opening of the market, while currently quite effective, can be further enhanced.

Nasdaq's current opening processes are set to occur at a fixed time (9:30 a.m.) even when it appears that NOM would open at a price that is away from the prevailing market. Deviation from the prevailing market is somewhat reconciled by automated adjustments that occur within NOM's execution engine, preventing unacceptable harm to investors or NOM participants.

Nonetheless, Nasdaq has determined that the opening of options trading can be enhanced by delaying the opening until such time as the execution of the Opening Cross or, where no Opening Cross will occur, the opening print is in line with the overall marketplace. Specifically, Nasdaq proposes to enhance its opening process by (1) delaying the Opening Cross in the event that after the execution of the Opening Cross the NOM best bid and offer would be outside certain pre-determined threshold amounts, and (2) delaying the opening of trading if after the opening print the NOM best bid and offer would be outside the same pre-determined threshold amounts in instances where there is insufficient interest available to initiate the Opening Cross.

Nasdaq believes this proposed modification is superior to the current process of opening of trading at a fixed time at a price that is adjusted to fall within the pre-determined threshold. Delaying the opening will allow NOM participants time to enter additional liquidity into the system, resulting in a more efficient opening process and reducing potential volatility around the open. If such a delay were to occur, the Opening Cross, and thus regular market trading, would not commence until such time as it is determined that the width requirements can be met. Nasdaq believes this amendment will increase efficiency of trading around the open. Nasdaq plans to use the threshold amounts prescribed in the obvious error guidelines set forth in Chapter V, Sec. 6 of the NOM rules.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6(b) of the Act,[5] in general, and with Section 6(b)(5) of the Act,[6] in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Nasdaq believes that the proposal is consistent with this standard because the proposed rule change is designed to improve execution quality at the critical opening of the market.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, Nasdaq believes that by enhancing NOM's opening of trading, the proposed rule change will require competing markets to improve their opening processes and thereby enhance competition between the markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) have the effect of limiting the access to or availability of an existing order entry or trading system of the Exchange, the foregoing rule change has become effective immediately pursuant to Section 19(b)(3)(A)(iii) of the Act[7] and Rule 19b–4(f)(5) thereunder.[8] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2008–045 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–NASDAQ–2008–045. 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

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A)(iii).

[8] 17 CFR 240.19b–4(f)(5).

submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2008–045 and should be submitted on or before June 12, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–11426 Filed 5–21–08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57826; File No. SR–NASDAQ–2007–001]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Amendment No. 3 to an Order Granting Accelerated Approval to Proposed Rule Change, as Modified by Amendment Nos. 2 and 3 Thereto, To Amend Nasdaq's Clearly Erroneous Rule

May 15, 2008.

I. Introduction

On January 22, 2007, The NASDAQ Stock Market LLC (''Nasdaq'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Rule 11890, Nasdaq's ''Clearly Erroneous Rule,'' and related Interpretive Material. Nasdaq filed Amendment Nos. 1 and 2 to the proposal on June 1, 2007 and June 12, 2007, respectively.[3] The proposed rule change, as modified by Amendment No. 2, was published for comment in the **Federal Register** on June 27, 2007.[4] The Commission received two comment letters regarding the proposed rule change.[5] On May 15, 2008, Nasdaq filed Amendment No. 3 to the proposal.[6] The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment Nos. 2 and 3 and simultaneously is approving the proposed rule change, as modified by Amendment Nos. 2 and 3, on an accelerated basis.

II. Description of the Proposal

Nasdaq proposes several changes to its Clearly Erroneous Rule and related Interpretive Material. Specifically, Nasdaq proposes to: (i) Set forth price-based standards and provide guidance on the application of those standards when Nasdaq considers whether one or more transactions are clearly erroneous under Rule 11890; (ii) modify the numerical threshold as applied to trades occurring outside of the Regular Session;[7] (iii) amend the time limits for market participants to file for review under Rule 11890(a) in cases where the price of the transaction is significantly different from the applicable inside price; and (iii) make several procedural modifications to the rule.

Nasdaq proposes to amend IM–11890–4 and IM–11890–5 to incorporate objective price-based standards and provide guidance regarding the application of those standards under Rule 11890. Under Rule 11890, Nasdaq is authorized to break trades when the execution price is more than a specified percentage (*i.e.*, a Numerical Threshold) away from a ''Reference Price'' that is indicative of prior market conditions. The Reference Price generally used under Rule 11890 would be, for Nasdaq securities, the best bid/best offer (''BBO'') in Nasdaq at the time the disputed transactions were first executed (or the national BBO for non-Nasdaq securities) for trading during the Regular Session, and the closing price for the security on its Primary Market for trades outside the Regular Session. Nasdaq, however, may use a different Reference Price in unusual circumstances. Thus, in a case where material news about a security was released after the market close for the security and a trade occurred outside of the Regular Session, Nasdaq may use a Reference Price derived from after-hours trading activity rather than the closing price of the security. Similarly, in the case of several large orders that execute at multiple prices, a Reference Price based on a weighted average of the BBO at relevant times may be used rather than a Reference Price based solely on the BBO immediately prior to the execution of the first share of the order. Nasdaq proposes to amend the Interpretive Material to add examples of cases where Nasdaq may apply alternative Numerical Thresholds in determining which trades to break. Nasdaq also may use different Numerical Thresholds in events that involve other markets in order to coordinate a point beyond which trades would be adjusted or broken that is consistent across markets.

The Interpretive Material would provide that Nasdaq could break or modify all trades in a security if a pervasive mistake resulted in trading that should not have occurred. For example, trades in a security that was incorrectly authorized for trading prior to the date of its actual initial public offering could all be broken. Similarly, if Nasdaq systems executed orders in the Nasdaq opening cross or closing cross at a price that was inconsistent with the rules governing the operation of the crosses, either due to a Nasdaq system error or because an underlying erroneous order resulted in an erroneous opening or closing price, Nasdaq could break or adjust all of the affected trades.

Nasdaq also proposes to amend the Numerical Thresholds under IM–11890–4 for trading outside the Regular Session, to establish wider ranges within which trades would stand. According to Nasdaq, this proposed change reflects the diminished depth of the market during after-hours and pre-market trading sessions. Accordingly,

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[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 replaced the proposed rule change in its entirety and was withdrawn by Nasdaq on June 14, 2007. Amendment No. 2 replaced the proposed rule change in its entirety.

[4] *See* Securities Exchange Act Release No. 55937 (June 21, 2007), 72 FR 35279.

[5] *See* letter from Michael T. Dorsey, Managing Director, Trading Services & Compliance, Pink Sheets LLC (''Pink Sheets''), dated July 18, 2007 (''Pink Sheets Letter''), and letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, Financial Industry Regulatory Authority (''FINRA''), dated August 29, 2007 (''FINRA Letter'').

[6] Amendment No. 3 deleted the proposed revisions to the Clearly Erroneous Rule relating to the submission of unauthorized orders and use of an account for manipulative purposes and clarified the manner in which a request for review can be submitted.

[7] Regular Session means the primary trading session for a particular security on its Primary Market, which is generally 9:30 a.m. through 4 or 4:15 p.m. Primary Market means: (i) For a Nasdaq security, the Nasdaq Market Center; and (ii) for a non-Nasdaq security, the market designated as the primary market under the Consolidated Tape Association Plan.

Nasdaq proposes to double the Numerical Thresholds for transactions occurring during these times. For example, a trade at $40 per share could be broken if more than 10% away from the Reference Price during the Regular Session, but could not be broken during the pre-market or after-hours sessions unless it was more than 20% away from the Reference Price.

In addition, Nasdaq proposes to amend the language of Rule 11890(a)(2)(B) to set forth that persons seeking review of transactions must present a factual basis for believing that the trade is clearly erroneous. Nasdaq states that it cannot, within the context of an adjudication that must be conducted within a short period of time, determine all of the factual circumstances associated with a particular trade or set of trades. Nasdaq believes that it is generally incumbent on persons seeking review actually to allege a human or system error, rather than merely stating that the order was ''filled away'' or at ''a bad price.'' Requiring the statement of a factual basis also would allow FINRA to evaluate, after the fact, whether a particular market participant is abusing the clearly erroneous process or employing poor internal controls.[8] According to Nasdaq, individuals and firms found to have misled Nasdaq about the cause of the alleged error would be subject to disciplinary action for misleading a self-regulatory organization.

Further, Nasdaq proposes to amend the time limits for market participants to file for an adjudication under Rule 11890(a) in cases where the price of the transaction at issue is more than 50% away from the applicable inside price (or the closing price, for trading outside Nasdaq's Regular Session or before the primary market has posted its first two-sided quote), provided that the value of the transactions at issue is more than $10,000. If these criteria are met, the transaction is defined as an ''Outlier Transaction,'' and the parties to the trade are given an extra hour to petition for review, if the trade occurred during the Regular Session or during pre-market hours, or until 9:30 a.m. the next trading day if the trade occurred after hours. The reason for this change is to provide greater assurance that trades that are egregiously out of line with prevailing market prices are not permitted to stand, provided that the dollar value of the trades is significant and the request for review is made within the proposed timeframe.

Finally, Nasdaq proposes to make several procedural modifications to Rule 11890 and the Interpretative Material to: (i) Allow Nasdaq to notify the counterparty to a trade about an erroneous event by telephone or other means consistent with the communications provisions of Rule 11890(d); (ii) specify that requests for review must be submitted to Nasdaq in writing, using an online complaint form, facsimile, or such other communications procedures specified by Nasdaq; (iii) rather than specifying that Nasdaq must act within 30 minutes, Nasdaq would be permitted to act as soon as possible, in circumstances when Nasdaq acts on its own motion under Rule 11890(b), except in extraordinary circumstances, in which case the time limit for a determination would be 9:30 a.m. the next trading day; (iv) replace references to Nasdaq ''officer'' with Nasdaq ''official'' throughout the Rule; (v) add a section listing definitions of terms used in the rule; and (vi) delete obsolete references to transactions entered into by a member of a national securities exchange with unlisted trading privileges in Nasdaq securities.

III. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

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[9] and, in particular, the requirements of Section 6(b) of the Act[10] and the rules and regulations thereunder. Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[11] in that the proposal is designed to promote just and equitable principles of trade, prevent fraudulent and manipulative acts, remove impediments to and perfects the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest.

The Commission considers that, except in extraordinary circumstances, trades that are executed between parties should be honored. On rare occasions, the price of the executed trade indicates an obvious error may exist, suggesting that it is unrealistic to expect that the parties to the trade had come to a meeting of the minds regarding the terms of the transaction and therefore that a clearly erroneous transaction may have taken place. In the Commission's view, the determination of whether a clearly erroneous trade has occurred should be based on specific and objective criteria and subject to specific and objective procedures.

Nasdaq proposes to modify certain price-based parameters that it uses for review of transactions alleged to be clearly erroneous under Rule 11890 and related Interpretive Material. The proposed numerical thresholds in the Interpretative Material set forth a clear and objective methodology for use in determining whether a transaction or transactions executed on Nasdaq are clearly erroneous. The proposed amendments also establish specific and objective criteria governing the review of such trades.

The Pink Sheets expressed general support for the proposal and stated that similar authority with respect to unauthorized use of accounts should be included in NASD Rule 11890.[12] FINRA expressed its view that account intrusions are fundamentally a type of fraud that does not and should not fall within the scope of the Clearly Erroneous Rule.[13] FINRA believed that the Clearly Erroneous Rule is not the appropriate way to address unauthorized or illegal activity such as account intrusions.[14] In Amendment No. 3, Nasdaq proposes to delete the provisions relating to unauthorized use of an account and use of an account for manipulative activity. Given the fact that the Clearly Erroneous Rule is designed to address trades made in error and the more difficult factual analysis presented by expanding the rule's application beyond obvious errors, the Commission believes that it is appropriate for Nasdaq to retain the original scope of the rule.

In addition, FINRA believed that numerical thresholds that can trigger a clearly erroneous determination should be set high enough to protect market integrity but not so low that the determination is most likely to primarily protect the individual who made the error.[15] FINRA noted its view that thresholds of 10% to 20% are more appropriate because they will reduce

[8] FINRA performs certain regulatory functions for Nasdaq, including a review, in certain circumstances, of clearly erroneous transactions submitted by member firms. Telephone conversation between John Zecca, Vice President MarketWatch, Nasdaq and David Michehl, Special Counsel, Division of Trading and Markets, Commission on May 14, 2008.

[9] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] Pink Sheets Letter, *supra* note 5. The Commission notes that revisions to NASD Rule 11890 are outside of the scope of the proposal before it.

[13] FINRA Letter, *supra* note 5.

[14] *Id.*

[15] *Id.*

the incidence of regulatory intervention in market transactions while still maintaining the integrity of the marketplace.[16] The Commission believes that Nasdaq's proposed Reference Price thresholds are commensurate with the manner in which Nasdaq currently applies its Clearly Erroneous Rule and are not unreasonable.

The Commission finds good cause for approving the proposed rule change, as modified by Amendment Nos. 2 and 3 thereto, before the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Accelerating approval of this proposal should benefit investors by creating, without undue delay, greater certainty in the application of Nasdaq's Clearly Erroneous Rule because the proposal establishes objective standards to be applied by Nasdaq in reviewing clearly erroneous transactions. Therefore, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,[17] to approve the proposed rule change, as modified by Amendment Nos. 2 and 3, on an accelerated basis.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 3, including whether Amendment No. 3 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2007–001 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–NASDAQ–2007–001. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2007–001 and should be submitted on or before June 12, 2008.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–NASDAQ–2007–001), as modified by Amendment Nos. 2 and 3, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–11429 Filed 5–21–08; 8:45 am]

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[16] *Id.*

[17] 15 U.S.C. 78s(b)(2).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57823; File No. SR–NYSE–2008–38]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend, Through December 31, 2008, the Pilot Program That Offers Liquidity Takers a Reduced Transaction Fee Structure for Certain Bond Trades Executed on the NYSE Bonds System

May 15, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 15, 2008, the New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by NYSE. The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the pilot program that offers liquidity takers a reduced transaction fee structure for certain bond trades executed on the NYSE Bonds℠ system (''NYSE Bonds''). The pilot program would thus end on December 31, 2008. The text of the proposed rule change is available at the Exchange's principal office, in the Commission's Public Reference Room, and at *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NYSE included statements concerning the purpose of, and basis for, the proposed rule change 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. 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

The Exchange proposes to extend the pilot program that offers liquidity takers a reduced transaction fee structure for certain bond trades executed on NYSE Bonds. The pilot program would thus end on December 31, 2008.

The Exchange's pilot program reduces transaction fees charged to liquidity takers for transactions executed on NYSE Bonds with a staggered transaction fee schedule based on the number of bonds purchased or sold in

[1] 15 U.S.C. 78s(b)(1).

[2] 7 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

excess of ten bonds. Currently, the transaction fee for orders that take liquidity from the market is $0.50 per bond. This fee remains unchanged for orders up to ten bonds. The extended fee filing pilot program provides for the following transaction fee schedule: (1) When the liquidity taker purchases or sells between one and ten bonds, the Exchange will charge an execution fee of $0.50 per bond; (2) when the liquidity taker purchases or sells between 11 and 25 bonds, the Exchange will charge an execution fee of $0.20 per bond; and (3) when the liquidity taker purchases or sells 26 bonds or more, the Exchange will charge an execution fee of $0.10 per bond.

For example, if a liquidity taker purchases or sells five bonds, the Exchange will charge $0.50 per bond, or a total $2.50 execution fee. If a liquidity taker purchases or sells 20 bonds, the Exchange will charge $0.20 per bond or a total $4.00 execution fee. If a liquidity taker purchases or sells 30 bonds, the Exchange will charge $0.10 per bond or a total $3.00 execution fee.

The Exchange will impose a $100 fee cap per transaction.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act [5] in general and furthers the objectives of Section 6(b)(4) of the Act [6] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

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 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

Because the foregoing rule change establishes or changes a 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 the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2008–38 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–NYSE–2008–38. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2008–38 and should be submitted on or before June 12, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

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[5] 15 U.S.C. 78f.

[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] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57824; File No. SR–Phlx–2008–35]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to FLEX Equity Option Opening Transactions

May 15, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 5, 2008, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Phlx. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to amend Phlx Rule 1079 (FLEX Index, Equity and Currency Options) to establish a pilot program that would reduce from 250 contracts to 150 contracts the minimum value size for an opening transaction (other than FLEX Quotes responsive to a FLEX Request for Quotes) [5] in any

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] FLEX Quotes responsive to a FLEX Request for Quote (''RFQ'') have different parameters that are

Continued

FLEX Equity Option[6] series in which there is no open interest at the time a FLEX Request for Quotes (''RFQ'') is submitted (the ''Pilot Program''). The Exchange also proposes to modify the minimum value size for an opening transaction in a currently-opened FLEX Equity series (other than FLEX Quotes responsive to a RFQ) to the lesser of 100 contracts or the number of contracts overlying $1 million in the underlying securities.

The text of the proposed rule change is available at the Phlx, the Commission's Public Reference Room, and *http://www.phlx.com*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to initiate a year and a half long Pilot Program that would reduce the minimum value size for an opening transaction (other than FLEX Quotes responsive to a FLEX RFQ) in any FLEX Equity Option series in which there is no open interest at the time an RFQ is submitted, and to modify the minimum value size for an opening transaction in a currently-opened FLEX Equity series (other than FLEX Quotes responsive to a FLEX RFQ). The proposed clarification of the criteria for opening FLEX option transactions should provide members that use FLEX Equity Options greater flexibility in structuring the terms of such options to better comport with the particular needs of the members and their customers.

Currently, Phlx Rule 1079(a)(8)(A) sets the minimum opening transaction value size in the case of a FLEX Equity Option in a newly established series as the lesser of (i) 250 contracts or (ii) the number of contracts overlying $1 million in the underlying securities.[7] Under the Pilot Program, the Exchange proposes to reduce the ''250 contracts'' component to ''150 contracts;'' the $1 million underlying value component will continue to apply unchanged.[8] The proposed Pilot Program would be similar to one that has already been approved for other options exchanges.[9]

Given that FLEX Equity Option transactions can occur in increments of 100 or more contracts in subsequent opening transactions,[10] the Exchange believes it is reasonable to permit the initial series opening transaction size to be 150 contracts (or $1 million in underlying value, whichever is less). The Exchange believes that the proposed reduction of the minimum value size for opening a series provides FLEX-participating members and their customers with greater flexibility in structuring the terms of FLEX Equity Options to better suit the FLEX traders' particular needs.

The Exchange notes that the opening size requirement for FLEX Equity Options was originally put in place to limit participation in FLEX Equity Options to sophisticated, high net worth investors rather than retail investors.[11] According to the Chicago Board Options Exchange, Incorporated (''CBOE''), which has a pilot program that is similar to the one proposed herein, it received requests from broker-dealers representing institutional clients that the minimum value size for opening transactions be reduced.[12] In proposing the reduction of the 250 contract component to 150 contracts, CBOE stated in its filing that it is cognizant of the desire to continue to provide both the requisite amount of investor protection that the minimum opening size requirement was originally designed to achieve, as well as the need for market participants to have the flexibility to serve their customers' particular investment needs.[13]

The Exchange believes that modifying the minimum opening transaction value size in this way will further broaden the base of institutional investors that use FLEX Equity Options to manage their trading and investment risk, including investors that currently trade in the over-the-counter market for customized options that can take on contract characteristics similar to FLEX Options but for which similar opening size restrictions do not apply. The Exchange believes that market participants benefit from being able to trade these customized options in an exchange environment in several ways, including, but not limited to, enhanced efficiency in initiating and closing out positions; increased market transparency; and heightened contra-party creditworthiness due to the role of The Options Clearing Corporation as issuer and guarantor of FLEX Equity Options.

Should the Exchange desire to propose an extension, expansion, or permanent implementation of the Pilot Program, the Exchange would submit, along with a filing proposing any necessary amendments to the Pilot Program, a pilot program report.[14] The report would be submitted to the Commission at least ninety days prior to the expiration date of the one-and-a-half year Pilot Program.

Finally, the Exchange is also proposing to modify the minimum value

not changed by this filing. *See* Phlx Rule 1079(a)(8)(C).

[6] FLEX Equity Options are flexible exchange-traded options contracts that overlie equity securities. FLEX Equity Options provide investors with the ability to customize basic option features including size, expiration date, exercise style, and certain exercise prices. FLEX Equity Options (as also FLEX index options) may have expiration dates within five years. *See* Phlx Rule 1079.

[7] Under this formula, an opening transaction in a FLEX Equity series in a stock priced at $40 or more would reach the $1 million limit before it would reach the contract size limit, *i.e.*, 250 contracts times the multiplier (100) times the stock price ($40) equals $1 million in underlying value. For a FLEX Equity series in a stock priced at less than $40, the 250 contract size limit applies.

[8] Under this proposed formula, an opening transaction in a FLEX Equity series in a stock priced at approximately $66.67 or more would reach the $1 million limit before it would reach the contract size limit, *i.e.*, 150 contracts times the multiplier (100) times the stock price ($66.67) equals just over $1 million in underlying value. For a FLEX Equity series in a stock priced at less than $66.67, the 150 contract size limit would apply.

[9] *See* Securities Exchange Act Release No. 57429 (March 4, 2008), 73 FR 13058 (March 11, 2008) (SR–CBOE–2006–36) (''CBOE Pilot Program Order'').

[10] Specifically, for FLEX Equity Options the minimum value size for a transaction in any currently-opened FLEX series is, as proposed, the lesser of 100 contracts or the number of contracts overlying $1 million in the underlying securities; or the lesser of 25 contracts or the remaining size in the case of a closing transaction. Additionally, the minimum value size for a FLEX Quote entered in response to a RFQ in FLEX Equity Options is the lesser of 25 contracts or the remaining size in a closing transaction. *See* Phlx Rules 1079(a)(8)(B)(ii) and 1079(a)(8)(C)(ii).

[11] The existing customer base for FLEX Options includes both institutional investors and high net worth individuals.

[12] *See* CBOE Pilot Program Order, *supra* note 9, at 73 FR 13059.

[13] *See id*.

[14] At a minimum the report must provide (i) data and analysis on the open interest and trading volume in FLEX Equity Options for which series were opened with a minimum opening size of 150 to 249 contracts and less than $1 million in underlying value; and (ii) analysis on the types of investors that initiated opening FLEX Equity Options transactions (*i.e.*, institutional, high net worth, or retail, if any). The proposed reporting requirements for the instant proposal are identical to the CBOE Pilot Program. This information was confirmed pursuant to a telephone conversation between Jurij Trypupenko, Director and Counsel, Phlx and Marc McKayle, Special Counsel, Division of Trading and Markets, SEC on May 12, 2008.

size for an opening transaction in a currently-opened FLEX Equity series (other than FLEX Quotes responsive to a FLEX RFQ). Presently, Phlx Rule 1079(a)(8)(B) sets the minimum transaction value size for an opening transaction in a currently-opened series at 100 contracts. The Exchange is proposing to modify the minimum size formula to the lesser of (i) 100 contracts or (ii) the number of contracts overlying $1 million in the underlying securities. This change would only impact those FLEX Equity series in which the underlying stock is trading at more than $100.[15]

The FLEX minimum size requirements for subsequent opening transactions in a currently-opened series is higher for certain stocks priced over $100 than the minimum size needed to initially open the series in similarly priced stocks. The Exchange therefore believes that this proposal is necessary for there to be consistency between the minimum size requirements for new series and currently-opened series when the underlying stock is trading at more than $100.[16]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[17] in general, and furthers the objectives of Section 6(b)(5) of the Act[18] in particular, in that it is 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, by, among other things, lowering from 250 to 150 the minimum number of contracts required to open a FLEX series and thereby providing FLEX-participating members and their customers greater flexibility to trade FLEX Equity Options.

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 not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has designated the proposed rule change as one that may take effect upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act[19] and Rule 19b–4(f)(6)(iii) thereunder[20] because it does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate.[21]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative prior to 30 days after the date of filing. Rule 19b–4(f)(6)(iii), however, permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requested that the Commission waive the 30-day operative delay and designate the proposed rule change immediately operative, so the Exchange can implement the rule change, which is based on a CBOE proposal recently approved by the Commission, without delay.[22] The Exchange believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest in that it would provide it with the ability to trade products that are traded or available on other options exchanges.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[23] Therefore, the Commission designates the proposal to be operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2008–35 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–Phlx–2008–35. 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

[15] Under this proposed formula, a transaction in a currently-opened FLEX Equity series in a stock priced at more than $100 would reach the $1 million limit before it would reach the contract size limit, *i.e.*, 100 contracts times the multiplier (100) times the stock price ($100) equals $1 million in underlying value.

[16] For example, a new FLEX Equity series in a stock trading at $110 could open with an initial transaction size of 91 contracts, *i.e.*, 91 contracts times the multiplier (100) times the stock price ($110) equals just over $1 million in underlying value. Once the series is opened, absent the proposed change, any further opening transactions would require a minimum contract size of 100 contracts, despite the fact that with the stock price of $110, this would be valued at $1.1 million, more than the value of the initial opening transaction.

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(6)(iii).

[21] In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file a proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement. In particular, the Commission notes that the proposal was originally designated under Section 19(b)(2) of the Act (File No. SR–Phlx–2008–29). Following a conversation with Commission staff, the Phlx withdrew that filing and submitted the present filing designated for immediate effectiveness under Section 19(b)(3)(A).

[22] *See* CBOE Pilot Program Order, *supra* note 9.

[23] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2008–35 and should be submitted on or before June 12, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–11428 Filed 5–21–08; 8:45 am]

BILLING CODE 8010–01–P

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 33–8918; 34–57819; File No. 265–24]

Subcommittee Reports of the SEC Advisory Committee on Improvements to Financial Reporting

AGENCY: Securities and Exchange Commission.

ACTION: Request for comments.

SUMMARY: The Advisory Committee is publishing four subcommittee reports that were presented to the Advisory Committee at its May 2, 2008 open meeting and is soliciting public comment on those subcommittee reports. The subcommittee reports contain the subcommittees' updates of their work through the May 2, 2008 open meeting and contain preliminary hypotheses and other material that will be considered by the full Committee in developing recommendations for the Committee's final report.

DATES: Comments should be received on or before June 23, 2008.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number 265–24 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Federal Advisory Committee Management Officer, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. 265–24. This file number should be included on the subject line if e-mail is used. To help us process and review your comment more efficiently, please use only one method. The Commission will post all comments on its Web site (*http://www.sec.gov/about/offices/oca/acifr.shtml*). Comments also will be available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Questions about this release should be referred to James L. Kroeker, Deputy Chief Accountant, or Shelly C. Luisi, Senior Associate Chief Accountant, at (202) 551–5300, Office of the Chief Accountant, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–6561.

SUPPLEMENTARY INFORMATION: At the request of the SEC Advisory Committee on Improvements to Financial Reporting, the Commission is publishing this release soliciting public comment on the subcommittees' reports. The full text of these subcommittee reports are attached as Exhibits A–D and also may be found on the Committee's Web page at *http://www.sec.gov/about/offices/oca/acifr.shtml*. The subcommittee reports contain the subcommittees' updates of their work through the May 2, 2008 open meeting of the full Committee and contain preliminary hypotheses and other material that may be deliberated by the full Committee in considering recommendations for the Committee's final report. As such, the Committee would like to request public input on the material in these subcommittee reports. The subcommittee reports have been prepared by the individual subcommittees and do not necessarily reflect either the views of the Committee or other members of the Committee, or the views or regulatory agenda of the Commission or its staff.

All interested parties are invited to comment on the enclosed subcommittee reports. Comments on the reports are most helpful if they (1) Indicate the specific exhibit and paragraph to which the comments relate, (2) contain a clear rationale, and (3) include any alternative(s) the Committee should consider.

Authority: In accordance with Section 10(a) of the Federal Advisory Committee Act, 5 U.S.C. App. 1, § 10(a), James L. Kroeker, Designated Federal Officer of the Committee, has approved publication of this release at the request of the Committee. The solicitation of comments is being made solely by the Committee and not by the Commission. The Commission is merely providing its facilities to assist the Committee in soliciting public comment from the widest possible audience.

Dated: May 15, 2008.

Nancy M. Morris,

Committee Management Officer.

Note: These subcommittee reports have been prepared by the individual subcommittees and do not necessarily reflect either the views of the Committee or other members of the Committee, or the views or regulatory agenda of the Commission or its staff.

Exhibit A

SEC Advisory Committee on Improvements to Financial Reporting

Substantive Complexity Subcommittee Update

May 2, 2008 Full Committee Meeting

I. Introduction

The SEC's Advisory Committee on Improvements to Financial Reporting (Committee) issued a progress report (Progress Report) on February 14, 2008.[1] In chapter 1 of the Progress Report, the Committee discussed its work-to-date in the area of substantive complexity, namely, its developed proposals related to industry-specific guidance and alternative accounting policies; its conceptual approaches regarding the use of bright lines and the mixed attribute model; and its future considerations related to scope exceptions[2] and competing models.

Since the issuance of the Progress Report, the substantive complexity subcommittee (Subcommittee I) has deliberated each of these areas further, particularly its conceptual approaches and future considerations, and refined them accordingly. This report represents Subcommittee I's latest thinking. The Subcommittee's consideration of comment letters received thus far by the Committee is ongoing and may result in additional changes. The purpose of this

[1] Refer to Progress Report at *http://www.sec.gov/rules/other/2008/33–8896.pdf.*

[2] Throughout this report, the term ''scope exceptions'' refers to scope exceptions other than industry-specific guidance.

report is to update the full Committee, and also to serve as a basis for the substantive complexity panel discussions scheduled for May 2, 2008 in Chicago. Subject to further public comment, Subcommittee I intends to deliberate whether to recommend these preliminary hypotheses to the full Committee for its consideration in developing the final report, which it expects to issue in July 2008.

II. Exceptions to General Principles

II.A. Industry-Specific Guidance

In the Progress Report, the Committee issued a developed proposal related to industry-specific guidance (developed proposal 1.1). Refer to the Progress Report for additional discussion of this developed proposal. Subcommittee I will consider the panel discussions on May 2, 2008, as well as the public comment letters received, before submitting a final recommendation to the Committee, but at this time, is not intending to propose any significant revisions.

II.B. Alternative Accounting Policies

In the Progress Report, the Committee issued a developed proposal related to alternative accounting policies (developed proposal 1.2). Refer to the Progress Report for additional discussion of this developed proposal. Subcommittee I will consider the panel discussions on May 2, 2008, as well as the public comment letters received, before submitting a final recommendation to the Committee, but at this time, is not intending to propose any significant revisions.

II.C. Scope Exceptions

Preliminary Hypothesis 1: GAAP should be based on a presumption that scope exceptions should not exist. As such, the SEC should recommend that any new projects undertaken jointly or separately by the FASB should not provide additional scope exceptions, except in rare circumstances. Any new projects should also include the elimination of existing scope exceptions in relevant areas as a specific objective of these projects, except in rare circumstances.

Background

Scope exceptions represent departures from the application of a principle to certain transactions. For example: [3]

- SFAS No. 133, *Accounting for Derivative Instruments and Hedging Activities*, excludes certain financial guarantee contracts, employee share-based payments, and contingent consideration from a business combination, among others.
- SFAS No. 157, *Fair Value Measurements*, excludes employee share-based payments and lease classification and measurement, among others.
- FIN 46R, *Consolidation of Variable Interest Entities*, excludes employee benefit plans, qualifying special-purpose entities,[4] certain entities for which the company is unable to obtain the information necessary to apply FIN 46R, and certain businesses, among others.

Similar to other exceptions to general principles, scope exceptions arise for a number of reasons. These reasons include: (1) Cost-benefit considerations, (2) the need for temporary measures to quickly minimize the effect of unacceptable practices, rather than waiting for a final ''perfect'' standard to be developed, (3) avoidance of conflicts with standards that would otherwise overlap, and (4) political pressure.

Scope exceptions contribute to avoidable complexity in several ways. First, where accounting standards specify the treatment of transactions that would otherwise be within scope, exceptions may result in different accounting for similar activities (refer to competing models section below for further discussion). Second, scope exceptions contribute to avoidable complexity because of difficulty in defining the bounds of the scope exception. As a result, scope exceptions require detailed analyses to determine whether they apply in particular situations, and consequently, increase the volume of accounting literature. For example, the Derivatives Implementation Group has issued guidance on twenty implementation issues related to the scope exceptions in SFAS No. 133. Further, companies may try to justify aggressive accounting by analogizing to scope exceptions, rather than more generalized principles.

Nonetheless, scope exceptions may alleviate complexity in situations where the costs of a standard outweigh the benefits. For example, many constituents would contend that derivative accounting and disclosures for ''normal purchases and normal sales'' contracts are not meaningful, and thus, are appropriately excluded from the scope of SFAS No. 133.

Discussion

Subcommittee I preliminarily believes that scope exceptions should be minimized to the extent feasible. Possible justifications for retaining scope exceptions include: (1) Cost-benefit considerations, (2) the need for temporary measures to quickly minimize the effect of unacceptable practices, rather than waiting for a final ''perfect'' standard to be developed, and (3) the need for temporary measures to avoid conflicts in GAAP. However, in cases where scope exceptions are provided as a temporary measure, they should be coupled with a long-term plan by the FASB to eliminate the scope exception through the use of sunset provisions.

Subcommittee I also notes that in certain areas, the SEC staff has issued guidance to address transactions that are not within the scope of FASB guidance, e.g., literature addressing the balance sheet classification of redeemable preferred stock not covered by SFAS No. 150.[5] Accordingly, as the FASB develops standards to address these transactions, the SEC should eliminate its related guidance.

From an international perspective, Subcommittee I notes that IFRS currently has fewer scope exceptions than U.S. GAAP. Accordingly, the Subcommittee will draft language for the full Committee's consideration, which if adopted, would encourage the SEC to affirm the IASB's efforts on this path. However, Subcommittee I also notes that, in certain circumstances where IFRS includes scope exceptions, they are sometimes more expansive than those under U.S. GAAP. For example, IFRS 3, *Business Combinations*, scopes out business combinations involving entities under common control, which results in no on-point guidance for such transactions. Accordingly, Subcommittee I also believes that where IFRS provides scope exceptions, the IASB should ensure any significant business activities that are excluded from one standard are in fact addressed elsewhere. Said differently, the IASB should avoid leaving large areas of business activities unaddressed in the professional standards.

II.D. Competing Models

Preliminary Hypothesis 2: GAAP should be based on a presumption that similar activities should be accounted for in a similar manner. As such, the SEC should recommend that any new projects undertaken jointly or separately by the FASB should not create

[3] Refer to appendix A for additional examples.

[4] Subcommittee I notes that the FASB has tentatively decided to remove the qualifying special-purpose entity concept from U.S. GAAP and its exception from consolidation.

[5] *Accounting for Certain Financial Instruments with Characteristics of both Liabilities and Equity.*

additional competing models, except in rare circumstances. Any new projects should also include the elimination of competing models in relevant areas as a specific objective of these projects, except in rare circumstances.

Background

Competing models are distinguished here from alternative accounting policies. Alternative accounting policies, as explained in the Progress Report, refer to different accounting treatments that preparers are allowed to choose under existing GAAP (e.g., whether to apply the direct or indirect method of cash flows). By contrast, competing models refer to requirements to apply different accounting models to account for similar types of transactions or events, depending on the balance sheet or income statement items involved.

Examples of competing models [6] include different methods of impairment testing for assets such as inventory, goodwill, and deferred tax assets.[7] Other examples include different methods of revenue recognition in the absence of a general principle, as well as the derecognition of most liabilities (i.e., removal from the balance sheet) on the basis of legal extinguishment compared to the derecognition of a pension or other post-retirement benefit obligation via settlement, curtailment, or negative plan amendment.

Similar to other exceptions to general principles, competing models arise for a number of reasons. These include: (1) Scope exceptions, which, as discussed above, arise from cost-benefit considerations, temporary measures, and political pressure, and (2) the lack of a consistent and comprehensive conceptual framework, which results in piecemeal standards-setting.

Competing models contribute to avoidable complexity in that they lead to inconsistent accounting for similar activities, and they contribute to the volume of accounting literature.

On the other hand, competing models alleviate avoidable complexity to the extent that costs of a certain model exceed the benefits for a subset of activities.

Discussion

Subcommittee I preliminarily believes that similar activities should be accounted for in a similar manner. Specifically, Subcommittee I acknowledges that competing models may be justified in circumstances in which the costs of applying a certain model to a subset of activities exceed the benefits. Further, Subcommittee I preliminarily believes that competing models may be justified as temporary measures (such as when they are temporarily needed to minimize the effect of unacceptable practices quickly, rather than waiting for a final ''perfect'' standard to be developed), as long as they are coupled with a sunset provision. To the extent a competing model meets one or more of the justifications above, it would not seem objectionable to use scope exceptions to clarify which accounting models cover various transactions (e.g., standard A ought to refer preparers to standard B for transactions excluded from the scope of A).

Subcommittee I recognizes that the FASB and IASB's joint project on the conceptual framework will alleviate some of the competing models in GAAP. However, Subcommittee I would encourage the implementation of this preliminary hypothesis prior to the completion of conceptual framework, where practical, as: (1) The conceptual framework is a long-term project and (2) current practice issues encountered in the standard-setting process will inform the deliberations on the conceptual framework.

Further, as new accounting standards are issued, including that which is issued through the convergence process, any competing models in related SEC literature should be revised and/or eliminated, as appropriate. Subcommittee I notes that, in certain cases, IFRS currently has fewer competing models. For example, Subcommittee I notes that, unlike U.S. GAAP, the IFRS impairment model is generally consistent for tangible assets, intangible assets, and goodwill. As such, Subcommittee I will draft language for the full Committee's consideration, which if adopted, would encourage the SEC to affirm the IASB's efforts on this path, particularly as it works with the FASB on the joint conceptual framework.

III. Bright Lines

Preliminary Hypothesis 3.1: GAAP should be based on a presumption that bright lines should not exist. As such, the SEC should recommend that any new projects undertaken jointly or separately by the FASB avoid the use of bright lines, in favor of proportionate recognition. Where proportionate recognition is not feasible or applicable, the FASB should provide qualitative factors for the selection of a single accounting treatment. Finally, enhanced disclosure should be used as a supplement or alternative to the two approaches above.

Any new projects should also include the elimination of existing bright lines in relevant areas to the extent feasible as a specific objective of those projects, in favor of the two approaches above.

Preliminary Hypothesis 3.2: Constituents should be better trained to consider the economic substance and business purpose of transactions in determining the appropriate accounting, rather than relying on mechanical compliance with rules. As such, the SEC should undertake efforts, and also encourage the FASB, academics and professional organizations, to better educate students, investors, preparers, auditors, and regulators in this respect.

Background

As noted in the Progress Report, bright lines refer to two main areas related to financial statement recognition: quantified thresholds and pass/fail tests.[8]

Lease accounting is often cited as an example of bright lines in the form of quantified thresholds. Consider, for example, a lessee's accounting for a piece of machinery. Under current requirements, the lessee will account for the lease in one of two significantly different ways: Either (1) reflect an asset and a liability on its balance sheet, as if it owns the leased asset, or (2) reflect nothing on its balance sheet. The accounting conclusion depends on the results of two quantitative tests,[9] where

[6] Refer to appendix A for additional examples.

[7] For instance, inventory is assessed for recoverability (i.e., potential loss of usefulness) and remeasured at the lower of cost or market value on a periodic basis. To the extent the value of inventory recorded on the balance sheet (i.e., its ''cost'') exceeds a current market value, a loss is recorded. In contrast, goodwill is tested for impairment annually, unless there are indications of loss before the next annual test. To determine the amount of any loss, the fair value of a ''reporting unit'' (as defined in GAAP) is compared to its carrying value on the balance sheet. If fair value is greater than carrying value, no impairment exists. If fair value is less, then companies are required to allocate the fair value to the assets and liabilities in the reporting unit, similar to a purchase price allocation in a business combination. Any fair value remaining after the allocation represents ''implied'' goodwill. The excess of actual goodwill compared to implied goodwill, if any, is recorded as a loss. Deferred tax assets are tested for realizability on the basis of future expectations. The amount of tax assets is reduced if, based on the weight of available evidence, it is more likely than not (i.e., greater than 50% probability) that some portion or all of the deferred tax asset will not be realized. Future realization of a deferred tax asset ultimately depends on the existence of sufficient taxable income of the appropriate character (e.g., ordinary income or capital gain) within the carryback and carryforward periods available under the tax law.

[8] Refer to appendix B of the Progress Report for additional examples of bright lines.

[9] Specifically, SFAS No. 13, *Accounting for Leases*, requires that leases be classified as capital leases and recognized on the lessee's balance sheet where (1) the lease term is greater than or equal to

a mere 1% difference in the results of the quantitative tests leads to very different accounting.

The other area of bright lines in this section includes pass/fail tests, which are similar to quantitative thresholds because they result in recognition on an all-or-nothing basis. However, these types of pass/fail tests do not involve quantification. For example, a software sales contract may require delivery of four elements. Revenue may, in certain circumstances, be recognized as each element is delivered. However, if appropriate evidence does not exist to support the allocation of the sales price to, for example, the second element, software revenue recognition guidance requires that the timing of recognition of all revenue be deferred until such evidence exists or all four elements are delivered.

Bright lines arise for a number of reasons. These include a drive to enhance comparability across companies by making it more convenient for preparers, auditors, and regulators to reduce the amount of effort that would otherwise be required in applying judgment (i.e., debating potential accounting treatments and documenting an analysis to support the final judgment), and the belief that they reduce the chance of being second-guessed. Bright lines are also created in response to requests for additional guidance on exactly how to apply the underlying principle. These requests often arise from concern on the part of preparers and auditors of using judgment that may be second-guessed by inspectors, regulators, and the trial bar. Finally, bright lines reflect efforts to curb abuse by establishing precise rules to avoid problems that have occurred in the past.

Bright lines can contribute to avoidable complexity by making financial reports less comparable. This is evident in accounting that is not faithful to a transaction's substance, particularly when application of the all-or-nothing guidance described above is required. Bright lines produce less comparability because two similar transactions may be accounted for differently. For example, as described above, a mere 1% difference in the quantitative tests associated with lease accounting could result in very different accounting consequences. Some bright lines also permit structuring opportunities to achieve a specific financial reporting result (e.g., whole industries have been developed to create structures to work around the lease accounting rules). Further, bright lines increase the volume of accounting literature as standards-setters and regulators attempt to curb abusively structured transactions. The extra literature creates demand for additional expertise to account for certain transactions. All of these factors add to the total cost of accounting and the risk of restatement.

On the other hand, bright lines may, in some cases, alleviate complexity by reducing judgment and limiting aggressive accounting policies. They may also enhance perceived uniformity across companies, provide convenience as discussed above, and limit the application of new accounting guidance to a small group of companies, where no underlying standard exists. In these situations, the issuance of narrowly-scoped guidance may allow for issues to be addressed on a more timely basis. In other words, narrowly-scoped guidance and the bright lines that accompany them may function as a short-term fix on the road to ideal accounting.

Discussion

Subcommittee I preliminarily believes that bright lines in GAAP should be minimized in favor of proportionate recognition. As a secondary approach, where proportionate recognition is not feasible or applicable, the Subcommittee recommends that GAAP be based on qualitative factors, supported by presumptions [10] as necessary. Subcommittee I also preliminarily believes that disclosure may be used as a supplement or alternative to the approaches above.

Subcommittee I uses the term ''proportionate recognition'' to describe accounting for the rights and obligations in a contract. In contrast to the current all-or-nothing recognition approach in GAAP, Subcommittee I preliminarily believes that accounting for rights and obligations would be appropriate in areas such as lease accounting—in effect, an entity would fully recognize its rights to use an asset, rather than the physical asset itself. In these cases, regardless of whether the lease is considered to be operating or capital (based on today's dichotomy), all entities would record amounts in the financial statements to the extent of their involvement in the related business activities. For example, consider a lease in which the lessee has the right to use a machine, valued at $100, for four years. Also assume that the machine has a 10-year useful life. Under proportionate recognition, a lessee would recognize an asset for its right to use the machine (rather than for a proportion of the asset) at approximately $35 [11] on its balance sheet. Under the current accounting literature, the lessee would either recognize the machine at $100 or recognize nothing on its balance sheet, depending on the results of certain bright line tests. Similarly, this rights-and-obligations approach may also be relevant in the context of revenue recognition, in particular, in comparison to today's software revenue recognition model.

However, Subcommittee I recognizes that proportionate recognition is not universally applicable. For example, proportionate recognition is not applicable in situations where the economics of a transaction legitimately represent an all-or-nothing scenario.[12] In situations like these, the FASB should consider providing qualitative factors, supported by presumptions, to guide the selection of a single appropriate accounting treatment by preparers. Subcommittee I preliminarily believes qualitative factors, including presumptions, would promote the application of principles over compliance with rules, while still narrowing the range of interpretation in practice to facilitate comparability across companies. Admittedly, presumptions may result in all-or-nothing accounting, but differ from bright lines because they are not arbitrary or determinative in their own right.

Subcommittee I uses the term ''presumptions'' to describe a method by which an accounting conclusion may be initially favored (i.e., not stringently applied), subject to the consideration of additional factors. This approach is used to some extent today. For instance, the business combination literature contains an example of a presumption

75% of the estimated economic life of the leased property or (2) the present value at the beginning of the lease term of the minimum lease payments equals or exceeds *90%* of the fair value of the leased property, among other criteria.

[10] In order for the use of presumptions to be meaningful and consistently applied, Subcommittee I preliminarily believes that the FASB should adopt consistent use of terms describing likelihood (e.g., rare, remote, reasonably possible, more likely than not, probable), time frames (e.g., contemporaneous, immediate, imminent, near term, reasonable period of time), and magnitude (e.g., insignificant, material, significant, severe).

[11] For purposes of illustration, $35 represents a company's net present value calculations. The example is only intended to be illustrative and is not prescriptive. The basis of proportionate recognition may be an asset's estimated useful life, its future cash flows or some other approach depending on the facts and circumstances.

[12] Examples include determining (1) whether a contract should be accounted for as a single unit of account or whether it should be split into multiple components, and (2) whether a contract that has characteristics of both liabilities and equity should be treated as one instead of the other.

coupled with additional considerations.[13] There are situations in which selling shareholders of a target company are hired as employees by the purchaser because the purchaser may wish to retain the sellers' business expertise. The payments to the selling shareholders may either be treated as: (1) Part of the cost of the acquisition, which means the payments are allocated to certain accounts on the purchaser's balance sheet, such as goodwill, or (2) compensation to the newly-hired employees, which are recorded as an expense in the purchaser's income statement, reducing net income. Some of these payments may be contingent on the selling shareholders' continued employment with the purchaser, e.g., the individual must still be employed three years after the acquisition in order to maximize the total sales price. GAAP provides several factors to consider when deciding whether these payments should be treated as an expense or not, but establishes a presumption that any future payments linked to continued employment should be treated as an expense. It is possible this presumption may be overcome depending on the circumstances.

Finally, Subcommittee I notes that disclosure is critical to communicating with users, either by supplementing financial statement recognition (proportionate or otherwise) or by discussing events and uncertainties outside of the financial statements. Subcommittee I preliminarily believes that in some cases, disclosure may be more informative than recognition, as point estimates recognized in financial statements may provide a misleading sense of precision. Subcommittee I discusses examples of this situation in its consideration of a disclosure framework (section V of this report).

In order for these preliminary hypotheses to be operational, Subcommittee I recognizes the need for a cultural shift towards the acceptance of more judgment. In this regard, Subcommittee I preliminarily believes that professional judgment framework discussed in developed proposal 3.4 is critical to the success of these preliminary hypotheses. Subcommittee I further notes that even if the FASB limits its use of bright lines, other parties may continue to create similar non-authoritative guidance, which may proliferate the use of bright lines. As such, Subcommittee I preliminarily believes that developed proposal 2.4 regarding the reduction of parties that formally or informally interpret GAAP is helpful.

From an international perspective, Subcommittee I notes that IFRS currently has fewer bright lines than U.S. GAAP. Consequently, Subcommittee I will draft language for the full Committee's consideration, which if adopted, would encourage the SEC to affirm the IASB's efforts on this path.

With respect to training and educational efforts, Subcommittee I notes the U.S. Treasury Department's Advisory Committee on the Auditing Profession has offered a number of preliminary recommendations on this topic. The Subcommittee is generally supportive of their direction, and will draft language for the full Committee's consideration, which if adopted, would encourage the SEC to monitor these developments as it takes steps, in coordination with the FASB, to promote the ongoing education of all financial reporting constituents.

IV. Mixed Attribute Model

As previously noted in the Progress Report, the mixed attribute model is one in which the carrying amounts of some assets and liabilities are measured at historic cost, others at lower of cost or market, and still others at fair value. There are several measurement attributes that currently exist in GAAP, all of which result in combinations and subtotals of amounts that are not intuitively useful. This complexity is compounded by requirements to record some adjustments in earnings, while others are recorded in equity (i.e., comprehensive income). For example, changes in the fair value of a derivative may be charged directly to equity, while an asset's current period depreciation expense reduces net income.

Optimally, the FASB should develop a consistent approach to determine which measurement attribute should apply to different types of business activities. While Subcommittee I is aware the FASB has a long-term project to develop such an approach, known as the measurement framework, it advocates three steps in the near term for the Committee's consideration to improve the clarity of financial statements for investors.

First, the Committee should advise caution about expanding the use of fair value in financial reporting until a number of practice issues are better understood and resolved, providing time for the FASB to complete its measurement framework. Second, the Committee should recommend a presentation of distinct measurement attributes on the face of the primary financial statements, grouped by business activities. This will make subtotals of individual line items in the statements more meaningful. Third, the Committee should propose the development of a disclosure framework, which would enable users to better understand the key risks and uncertainties associated with different measurement attributes (refer to section V below).

Preliminary Hypothesis 4: Avoidable complexity caused by the mixed attribute model should be reduced in three respects:

- Measurement framework—The SEC should recommend that the FASB be judicious in issuing new standards and interpretations that expand the use of fair value in areas where it is not already required,[14] until completion of a measurement framework. The SEC should also recommend that, to the maximum extent feasible, the FASB use a single measurement attribute for each type of business activity presented in the financial statements.[15]
- Financial statement presentation—The SEC should encourage the FASB to:
  - Assign a single measurement attribute within each business activity that is consistent across the financial statements.
  - Aggregate business activities into operating, investing and financing sections.[16]

[13] Emerging Issues Task Force (EITF) 95–8, *Accounting for Contingent Consideration Paid to the Shareholders of an Acquired Enterprise in a Purchase Business Combination.* Subcommittee I notes EITF 95–8 is nullified by a new FASB standard, SFAS No. 141 (revised 2007), *Business Combinations.* SFAS No. 141 (revised 2007) states ''A contingent consideration arrangement in which the payments are automatically forfeited if employment terminates is compensation * * *'' However, the guidance in EITF 95–8 is still helpful in describing our approach with respect to the use of presumptions coupled with additional considerations in GAAP.

[14] For instance, improvements to certain existing, particularly complex standards, such as SFAS No. 133, *Accounting for Derivatives and Hedging Activities* and SFAS No. 140, *Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities,* may be warranted in the near term.

[15] To make this approach operational, the FASB might establish a rebuttable presumption in favor of a single measurement attribute within each business activity (i.e., operating, investing and financing). For example, the Board may determine amortized cost is the presumptive measurement attribute within the operating section of a company's financial statements. Nevertheless, the Board would also have to consider whether fair value is appropriate for financial assets and liabilities employed in those business activities, such as certain derivative contracts used to hedge commodity price risk for materials used in the production process.

[16] Subcommittee I is aware of the FASB and IASB's joint financial statement presentation project and is generally supportive of its direction. Subcommittee I also notes that in addition to the three business activities listed here, the FASB's project contemplates two additional types of

○ Add a new primary financial statement to reconcile the statements of income and cash flows by measurement attribute.[17]

• Enhanced disclosure—refer to section V of this report.

Background

As the Committee noted in the Progress Report, examples of accounting standards that result in mixed attribute measurement include two FASB standards related to financial instruments. SFAS No. 159, *The Fair Value Option for Financial Assets and Financial Liabilities,* permits the fair valuation of certain assets and liabilities. As a result, some assets and liabilities are measured at fair value, while others are measured at amortized cost or some other basis. SFAS No. 115, *Accounting for Certain Investments in Debt and Equity Securities,* requires certain investments to be recognized at fair value and others at amortized cost.

In practice, the costs associated with (potentially uncertain) fair value estimates can be considerable. Some preparers' knowledge of valuation methodology is limited, requiring the use of valuation specialists. Auditors often require valuation specialists of their own to support the audit. Some view the need for these valuation specialists as a duplication of efforts, at the expense of the preparer. In addition, there are recurring concerns about second-guessing by auditors, regulators, and courts in light of the many judgments and imprecision involved with fair value estimates. Regardless of whether such estimates are prepared internally or by valuation specialists, the effort and elapsed time required to implement and maintain mark-to-model fair values is significant. For these reasons, preparers and auditors will likely have to incur costs to broaden their proficiency in basic valuation matters,[18] and additional education may be required for the larger financial reporting community to become further accustomed to fair value information.

Nevertheless, some have advocated mandatory and comprehensive use of fair value as a solution to the complexities arising from the mixed attribute model. However, opponents argue that this would only shift the burden of complexity from investors to preparers and auditors, among others. Specifically, certain investors may find uniform fair value reporting simpler and more meaningful than the current mixed attribute model. But under a full fair value approach, some objectivity would be sacrificed because many amounts that would change to fair value are currently reported on a more verifiable basis, such as historic cost. These amounts would have to be estimated by preparers and certified by auditors, as discussed above. Such estimates are made even more subjective by the lack of a single set of generally accepted valuation standards and the use of inputs to valuation models that vary from one company to the next. Likewise, significant variance exists in the quality, skill, and reports of valuation specialists, which preparers have limited ability to assess. Finally, there is no mechanism to ensure the ongoing quality, training, and oversight of valuation specialists. As a result, some believe a wholesale transition to fair value would reduce the reliability of financial reports to an unacceptable degree.

Therefore, as the Committee noted in its Progress Report, Subcommittee I assumes that a complete move to fair value is most unlikely. Within this context, the partial use of fair value increases the volume of accounting literature. Said differently, when more than one measurement attribute is used, guidance is required for each one. In addition, some entities may operate under the impression that investors are averse to market-driven volatility. Consequently, entities have demanded exceptions from the use of fair value in financial reporting, resisted its use, and/or entered into transactions that they otherwise would not have undertaken to artificially limit earnings volatility. These actions have resulted in a build up in the volume of accounting literature. More generally, some believe that attempts by companies to smooth amounts that are not smooth in their underlying economics reduce the efficiency and the effectiveness of capital markets.

With respect to users, information delivery is made more difficult by fair value. Investors may not understand the uncertainty associated with fair value measurements (i.e., that they are merely estimates and, in many instances, lack precision), including the quality of unrealized gains and losses in earnings that arise from changes in fair value. Some question whether the use of fair value may lead to counterintuitive results. For example, an entity that opts to fair value its debt may recognize a gain when its credit rating declines. Others question whether the use of fair value for held to maturity investments is meaningful. Finally, preparers may view disclosure of some of the inputs to the assumptions as sensitive and competitively harmful.

Despite these difficulties, the use of fair value may alleviate some aspects of avoidable complexity. Such information may provide investors with management's perspective, to the extent management makes decisions based on fair value, and it may improve the relevance of information in many cases, as historical cost is not meaningful for certain items.

Fair value may also enhance consistency by reducing confusion related to measurement mismatches. For example, an entity may enter into a derivative instrument to hedge its exposure to changes in the fair value of debt attributable to changes in the benchmark interest rate. The derivative instrument is required to be recognized at fair value, but, assuming no application of hedge accounting or the fair value option, the debt would be measured at amortized cost, resulting in measurement mismatches. In addition, fair value might mitigate the need for detailed application guidance explaining which instruments must be recorded at fair value and help prevent some transaction structuring. Specifically, if fair value were consistently required for all similar activities, entities would not be able to structure a transaction to achieve a desired measurement attribute.

Fair value also eliminates issues surrounding management's intent. For example, entities are required to evaluate whether investments are impaired. Under certain impairment models, entities are currently required to assess whether they have the intent and ability to hold the investment for a period of time sufficient to allow for any anticipated recovery in market value. As the Committee noted in the Progress Report (see discussion supporting developed proposal 1.2 to minimize alternative accounting policies) management intent is subjective and, thus, less auditable. However, use of fair value would generally make management intent irrelevant in assessing the value of an investment.

Discussion

Subcommittee I acknowledges the view that a complete transition to fair value would alleviate avoidable complexity resulting from the mixed attribute model. However, Subcommittee I also recognizes that expanded use of fair value would increase avoidable complexity unless numerous implementation questions related to relevance and reliability are

business activities—income taxes and discontinued operations.

[17] An example of this presentation is included below.

[18] For instance, additional training for field auditors may be necessary to lessen dependency on valuation experts.

addressed (as discussed above), which extend beyond the scope of our work.

Therefore, consistent with current practice, Subcommittee I preliminarily believes fair value should not be the only measurement attribute in GAAP. At present, Subcommittee I believes the Committee should advise caution about expanding the use of fair value until a systematic measurement framework is developed, and in this regard, that phase two of the FASB's fair value option project, which will consider permitting fair value measurement for certain nonfinancial assets and liabilities, should not be finalized prior to completion of a measurement framework.[19]

At that point, the FASB should determine measurement attributes based on considerations such as business activity, the relevance and reliability of fair value inputs, and other considerations vetted during the measurement phase of its conceptual framework project. While Subcommittee I prefers an activity-based approach to assigning measurement attributes, Subcommittee I is sympathetic to an approach based on the type of asset or liability in question, such as financial instruments vs. non-financial instruments. This is a natural tension that the FASB should address as part of the measurement framework. For example, in one scenario, the Board may determine amortized cost is the presumptive measurement attribute within the operating section of a company's financial statements. Nevertheless, the Board would also have to consider whether fair value is appropriate for financial assets and liabilities employed in those business activities such as certain derivative contracts used to hedge commodity price risk for materials used in the production process.

With respect to financial statement presentation, Subcommittee I preliminarily believes the grouping of individual line items (and related measurement attributes) by operating, investing and financing activities would alleviate some of the concerns about fair value in particular. It would also reduce confusion caused by the commingling of all measurement attributes. Subcommittee I preliminarily believes this presentation would be more understandable to investors, particularly because it would delineate the nature of changes in income (e.g., fair value volatility, changes in estimate) and allow users to assess the degree to which management controls each one.

It may also facilitate earnings analyses by business activities that correspond to the natural elements of most profit-driven entities, for instance, operating income compared to investing or financing results. Under this approach, companies should present earnings per-share computations of the net activity in each section. Further, the addition of a new primary financial statement—the reconciliation of the statements of comprehensive income and cash flows—would disaggregate changes in assets and liabilities based on cash, accruals, and changes in fair value, among others. A visual example of this statement might include the following:[20]

RECONCILIATION OF THE STATEMENTS OF INCOME AND CASH FLOWS

	Cash flow statement	Non-cash items affecting income				Income statement (A+B+C+D+E)	
		Cash flows not affecting income	Accruals and systematic allocations	Recurring valuation changes	Other valuation changes		
	A	B	C	D	E	F	
Operating:							
Cash received from sales.	2,700,000	.....	75,000	.....	.....	2,775,000	Sales.
	0	.....	(9,000)	.....	.....	(9,000)	Depreciation expense.
	0	.....	.....	.....	(15,000)	(15,000)	Impairment expense.
	0	.....	.....	(7,500)	.....	(7,500)	Forward contract adj.
Investing:							
Capital expenditures	(500,000)	500,000	.....	.....	.....	0	
Sale of available for sale securities.	5,000	(4,900)	.....	350	.....	450	Realized gain on sale.
Financing:							
Interest paid	(125,000)	.....	(100,000)	.....	.....	(225,000)	Interest expense.

Subcommittee I preliminarily believes that the correlation of rows and columns in this schedule will help users assess different elements of financial performance, e.g., sales is comprised primarily of cash receipts, but also end of period accruals. Recognizing companies will use different titles for income statement line items, Subcommittee I preliminarily believes the predominant value of this schedule is the columnar depiction of measurement attributes and the context it provides for earnings analysis. For example, users should be better equipped to form opinions about a company's earnings quality and the predictability of its future cash flows because they are generally unable to prepare similar reconciliations based on today's financial statements. While this revised presentation does not resolve all of the challenges posed by the mixed attribute model, it represents an improvement over the current approach for investors to understand a company's financial condition and operating results.

From an international perspective Subcommittee I notes the mixed attribute model also exists under IFRS. As such, Subcommittee I preliminarily believes that this preliminary hypothesis applies equally to IFRS, particularly as the IASB works with the

[19] Similarly, Subcommittee I preliminarily believes the Committee should recommend that the FASB consider deferring provisions of new standards that are issued, but not yet effective, which expand the use of fair value measurement where it has not been previously required.

[20] Subcommittee I has adapted and modified this table from a similar schedule in the FASB's financial statement presentation project.

FASB on the joint financial statement presentation project.

V. Disclosure Framework

Disclosure provides important context for the estimates and judgments reflected in the financial statements. It also highlights uncertainties outside of the statements that could impact financial performance in the future.

Subcommittee I preliminarily believes that any recommendations regarding new disclosure guidance will be most effective and informative for investors if the FASB and SEC update, or as necessary, rescind outdated or duplicative disclosure requirements. Subcommittee I's preliminary hypothesis advocates establishing a process to achieve this goal.

Preliminary Hypothesis 5: The SEC should request the FASB to develop a disclosure framework to:

- Require disclosure of the principal assumptions, estimates and sensitivity analyses that may impact a company's business, as well as a qualitative discussion of the key risks and uncertainties that could significantly change these amounts over time. This would encompass transactions recognized and measured in the financial statements, as well as events and uncertainties that are not recorded, such as certain litigation and regulatory developments.
- Integrate existing disclosure requirements into a cohesive whole by eliminating redundant disclosures and providing a single source of disclosure guidance across all accounting standards.

The SEC and FASB should also establish a process of coordination for the Commission to regularly update and, as appropriate, remove portions of its disclosure requirements as new FASB standards are issued.[21]

Background

Historically, disclosure standards have developed in a piecemeal manner (i.e., standard-by-standard). The lack of an underlying framework has contributed to (1) Repetitive disclosures, (2) excessively detailed disclosures that may confuse rather than inform, and (3) disorganized presentations in financial reports. These factors make fulsome and meaningful communication of all material information challenging.

As noted above, disclosure provides important context for the estimates and judgments reflected in the financial statements. However, Subcommittee I acknowledges the perception that amounts recognized in financial statements are generally subject to more refined calculations by preparers and higher degrees of scrutiny by users compared to mere disclosure. As a result, the effectiveness of disclosure standards—whether existing or new—will be governed by the degree to which constituents view them as another compliance exercise rather than an avenue for meaningful dialogue.

Subcommittee I preliminarily believes that a disclosure framework would facilitate this meaningful dialogue between preparers and users. In order for such a disclosure framework to be useful over the long-run, however, it should establish objectives, whose application will vary. Otherwise, disclosure standards will degenerate into myriad rules because it is not feasible for standards-setters to envision all of the specific future disclosure requirements that would be necessary in different settings.

For example, in the wake of the recent ''liquidity crisis,'' there has been significant focus on disclosures related to off-balance-sheet entities. Of particular interest is disclosure of structured investment vehicles (SIVs).[22] Recently, certain sponsoring banks have provided liquidity support to SIVs that were unable to sustain financing in the short-term commercial paper market. In some cases, this led the sponsors to consolidate the SIVs under FASB Interpretation No. 46(R), which added billions of dollars of assets and liabilities to the sponsors' balance sheets. Consequently, some constituents have criticized existing disclosure practices and called for standards-setters to require additional ''early warning'' disclosure about off-balance sheet activity (e.g., types of assets held by the SIVs, circumstances that may result in consolidation or loss, and methodologies used to determine fair value and related write-downs). Others counter that: (1) Major SIV sponsors already disclosed the magnitude of their investments in off-balance sheet entities prior to the liquidity crisis and (2) further detail would have been uninformative and potentially confusing to users because it would have amounted to ''disclosure overload.'' For instance, at the time the decision not to consolidate was reached, some sponsors may have concluded it was quite unlikely that events which might lead to consolidation would actually occur, and that discussion of these scenarios was unnecessary. These two opposing points of view highlight the tension noted above, namely, that some constituents prefer detailed, prescriptive disclosure guidance, while others favor a more principled approach.

Discussion

Specifically, Subcommittee I preliminarily believes that at a minimum, an effective disclosure framework is comprised of three basic elements: (1) A description of the transactions reflected in financial statement captions, (2) a discussion of the relevant accounting provisions, and (3) an analysis of the key supporting judgments, risks and uncertainties.[23] In the following commentary, we focus largely on the third element.

Within the financial statements, a disclosure framework should more effectively signal to investors the level of imprecision associated with significant estimates and assumptions, particularly some fair value measurements. This can be achieved by disclosing the principal assumptions, estimates and sensitivity analyses that impact a company's business, as well as a qualitative discussion of the key risks and uncertainties that could significantly change these amounts over time. For example, Subcommittee I notes that in certain cases, there is no ''right'' number in a probability distribution of figures, some of which may be more fairly representative of fair value than others. While SFAS No. 157, *Fair Value Measurements,* established disclosure requirements that provide insight into Level 2 and 3 fair value estimates,[24] it may not be sufficient in all cases. Many investors might find information about the key assumptions in a valuation model, key risks

[21] The Committee considers coordination between the SEC and the FASB in chapter 2 of the Progress Report, particularly conceptual approaches 2.A and 2.C.

[22] From a review of SEC filed documents, Subcommittee I has identified seven SEC filers that sponsored SIVs around the time of the liquidity crisis. Prior to the crisis, most of these filers did not provide quantified disclosure of the unconsolidated SIVs' assets and liabilities (in some cases, SIV assets and liabilities were aggregated with the assets and liabilities of other off-balance sheet arrangements—collectively, ''VIEs''). Subsequent to the crisis, Subcommittee I notes that some sponsors have expanded their disclosures to include additional quantitative information, as well as qualitative disclosures such as the nature of SIV assets, descriptions of SIV investment and operating strategies, risks related to the current environment, and sponsors' obligations to the SIVs.

[23] Subcommittee I acknowledges the work of the FASB's Investors Technical Advisory Committee on the topic of a disclosure framework. Subcommittee I preliminarily agrees with the need to establish a principles-based approach to future disclosure standards and has adapted certain elements of ITAC's thinking in this discussion.

[24] Statement 157 established a three level fair value hierarchy. It assigns highest priority to quoted prices in active markets (Level 1) and the lowest priority to unobservable inputs that rely heavily on assumptions (Level 3).

associated with those assumptions,[25] and related sensitivity analyses helpful, as well as an understanding of how ''fat'' or ''thin'' the tails of statistical modeling techniques are.[26]

Outside of the financial statements, disclosure of environmental factors may be more meaningful than attempting to ''force'' a wide range of probabilities into a single point estimate on the balance sheet or income statement. This would encompass events and uncertainties such as relevant market conditions, off-balance sheet activity, litigation and regulatory developments. Some constituents argue that recording an estimate to reflect these events, instead of disclosing them, may actually provide a misleading sense of precision. Alternatively, they suggest companies could communicate to investors more effectively by disclosing the factors that might trigger financial statement recognition, the magnitude of possible and/or probable transactions, and management's plans in those scenarios.

In any event, Subcommittee I acknowledges some disclosure guidance establishes a ''floor'' for communication between companies and investors, rather than a ''ceiling.''[27] Our preliminary hypothesis offers a more cohesive structure for the narrative that supports and explains the financial statements, but Subcommittee I believes preparers should take the initiative in tailoring financial reports for users.

Subcommittee I also recognizes the proposed disclosure framework incorporates factual information that, historically, is presented in audited footnotes, as well as analytical and forward-looking discussions that are typically part of MD&A narratives in SEC filings. Subcommittee I acknowledges that there are important considerations regarding assurance and legal issues when determining the placement of disclosures in a filing (e.g., footnotes or MD&A). Therefore, an optimally designed disclosure framework should be developed by the FASB under close coordination with the SEC so that the Commission can amend its guidance accordingly (e.g., Regulations S–K and S–X).

Beyond these concerns, the SEC or its staff should also update, and as needed remove, portions of public company disclosure guidance that are impacted by new FASB standards. Subcommittee I is aware of studies in the past conducted to identify overlaps of this type.[28] Unless the SEC or its staff establishes a monitoring process to update its disclosure requirements, similar studies may be necessary in the future. Additionally, if developed proposal 1.1 to minimize industry-specific accounting guidance is adopted, the SEC or its staff may need to consider revising its Industry Guides in Items 801 and 802 of Regulation S–K.

From an international perspective, Subcommittee I notes that IAS 1, *Presentation of Financial Statements,* includes some of the elements that Subcommittee I would expect of a disclosure framework, such as a principle for: (1) What the notes to the financial statements should disclose, (2) footnote structure. (3) disclosures of judgments, and (4) disclosures of key sources of estimation or uncertainty, including sensitivity analyses. Nonetheless, Subcommittee I preliminarily believes that its preliminary hypothesis in this area would also result in improvements to IFRS.

Appendix A

1. Scope Exceptions

Examples of scope exceptions include:

- SFAS No. 109, *Accounting for Income Taxes,* scopes out recognition of deferred taxes for undistributed earnings of certain subsidiaries and for goodwill for which amortization is not deductible, among others.
- SFAS No. 133, *Accounting for Derivative Instruments and Hedging Activities,* scopes out certain financial guarantee contracts, employee share-based payments, and contingent consideration from a business combination, among others.
- SFAS No. 144, *Accounting for the Impairment or Disposal of Long-Lived Assets,* scopes out goodwill, intangible assets not being amortized that are to be held and used, financial instruments, including cost and equity method investments, and deferred tax assets, among others.
- SFAS No. 157, *Fair Value Measurements*, scopes out its definition of fair value for guidance related to employee share-based payments and lease classification and measurement, among others. In addition, they delay in the adoption of SFAS No. 157 for nonfinancial assets and nonfinancial liabilities, except for items that are recognized or disclosed at fair value in the financial statements on a recurring basis (at least annually), effectively scoping out these items for a period of time.
- FIN 45, *Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness to Others,* scopes out contracts that have the characteristics of guarantees, but (1) are accounted for as contingent rent under SFAS No. 13 and (2) provide for payments that constitute vendor rebates (by the guarantor) based on either the sales revenues of, or the number of units sold by, the guaranteed party, among others.
- FIN 46R, *Consolidation of Variable Interest Entities,* scopes out employee benefit plans, qualifying special-purpose entities, certain entities for which the company is unable to obtain the information necessary to apply FIN 46R, and certain businesses, among others.
- SoP 81–1, *Accounting for Performance of Construction/Production Contracts,* scopes out certain sales of manufactured goods, even if produced to buyers' specifications, and service contracts of consumer-oriented organizations that provide their services to their clients over an extended period, among others.

2. Competing Models

Examples of competing models include:

- Different models for when to recognize for impairment of assets such as inventory, goodwill, long-lived assets, financial instruments, and deferred taxes.
- Different likelihood thresholds for recognizing contingent liabilities, such as probable for legal uncertainties versus more-likely-than-not for tax uncertainties.
- Different models for revenue recognition such as percentage of completion, completed contract, and pro-rata. Models also vary based on the nature of the industry involved, as discussed in other sections.
- Derecognition of most liabilities such as on the basis of legal extinguishment, as compared to the

[25] For example, if a valuation model relies on historical assumptions for a period of time that does not include economic downturns, that fact and its implications may need to be disclosed.

[26] In statistics, this notion is known as the ''goodness of fit,'' which describes how well a statistical model fits a set of observations. These are quantified measures that summarize the discrepancy between observed values compared to values predicted by the model. Large discrepancies can be described as ''fat,'' while small discrepancies are ''thin.''

[27] Subcommittee I notes companies are not precluded from providing disclosure of the type proposed here. Indeed, certain existing guidance is largely consistent with our views, such as APB Opinion No. 22, *Disclosure of Accounting Policies,* SOP No. 94–6, *Disclosure of Certain Significant Risks and Uncertainties,* Item 303(a) of Regulation S–K related to Management's Discussion and Analysis, and FRR 60, *Cautionary Advice Regarding Disclosure About Critical Accounting Policies.*

[28] In particular, the 2001 FASB report on ''GAAP-SEC Disclosure Requirements,'' which was a part of a larger Business Reporting Research Project.

derecognition of pension and other post-retirement benefit obligations via settlement, curtailment, or negative plan amendment.

• Different models for determining whether an arrangement is a liability or equity.

Exhibit B

SEC Advisory Committee on Improvements to Financial Reporting

Standards-Setting Subcommittee Update

May 2, 2008 Full Committee Meeting

I. Introduction

The SEC's Advisory Committee on Improvements to Financial Reporting (the Committee) issued a Progress Report (the Progress Report) on February 14, 2008. In chapter 2 of the Progress Report, the Committee discussed its work to date on the standards-setting process, namely its:

• Developed proposals related to increased investor participation, FAF and FASB governance, standards-setting process improvements and interpretive implementation guidance;

• Conceptual approaches regarding clarifying the SEC's role in standards-setting, design of standards and the FASB's priorities; and

• Future considerations related to international governance.

Since the issuance of the Progress Report, the standards-setting subcommittee (Subcommittee II) has deliberated each of these areas further, particularly its conceptual approaches and future considerations and is in the process of refining them accordingly. This report presents a summary of Subcommittee II's latest thinking and serves as an update to the Committee. The Committee is also hosting panel discussions on May 2, 2008, in Rosemont, IL. Subcommittee II will re-deliberate each of these topics based on testimony received, guidance to be provided by the Committee and comment letters received thus far by the Committee. The Committee will deliberate any new proposals and proposed revisions to existing developed proposals in July 2008.

II. Current Status and Further Work

International Considerations

The Committee deferred deliberation of international considerations until 2008. Subcommittee II acknowledges that the SEC has already received significant input associated with its (1) removal of the U.S. GAAP reconciliation for foreign private issuers reporting under IFRS as promulgated by the IASB and (2) concept release on the possibility of allowing domestic issuers to report under IFRS as promulgated by the IASB. Subcommittee II also observes that debates regarding both the end state of international convergence (that is, a single set of high quality global accounting standards) and the best way to accomplish that objective in the U.S. (that is, the transition) are underway among standards-setters, their governance bodies, the international regulatory community and others. After discussion with the SEC staff and in light of these ongoing deliberations, which include SEC staff consideration of comments received in response to the concept release, input from roundtables, and the staff's work on developing a roadmap for consideration by the Commission at the request of Chairman Cox, Subcommittee II does not intend to advance detailed proposals at this time.

Although an analysis of how the international standards-setting processes could be improved was not in the Committee's mandate, Subcommittee II believes that many of the Committee's developed proposals and conceptual approaches may be equally applicable in international standards-setting. Subcommittee II also noted that an important U.S. convergence question has not been openly debated in the public forum—how the SEC will fulfill its regulatory responsibility without creating a U.S. jurisdictional variant of IFRS.

Although not intending to recommend detailed proposals, Subcommittee II is deliberating whether the Committee should consider:

• Expressing high-level support for moving to a single set of high quality accounting standards in the U.S.,

• supporting the SEC's efforts to develop an international convergence roadmap, and

• encouraging all participants in the financial reporting community to increase coordination to foster consistency in global interpretations and avoid jurisdictional variants of IFRS.

The final determination of whether Subcommittee II's deliberations will result in a developed proposal will not be known until later in 2008.

FASB Dialogue

Since the Committee issued its Progress Report, Subcommittee II has engaged representatives of the FASB in a dialogue regarding the Committee's developed proposals and conceptual approaches. As a result of this dialogue, as well as the public comments received on the Progress Report, Subcommittee II is currently deliberating potential modifications to the Committee's proposal for Committee deliberation as its final recommendations.

A number of tentative modifications are being contemplated, which are summarized as follows:

• International—The Committee's proposals assume that U.S. GAAP will continue to be in use for a number of years. However, convergence matters significantly drive priorities in standards-setting. Subcommittee II plans to propose clarifying the Committee's proposals that will be impacted by the ultimate path chosen by the SEC regarding international convergence.

• Governance—Subcommittee II plans to propose updating the Committee's proposals for recent changes made by the FAF, including emphasizing which proposals have yet to be fully addressed. Specifically, Subcommittee II is deliberating whether the FAF resolutions regarding increased investor representation on the FAF and FASB will meet the objective underlying the Committee's developed proposal. Subcommittee II would also like to emphasize the importance of the FAF establishing clear performance metrics related to the efficiency and effectiveness of standards-setting and may propose withdrawing the statement that academic representation should not be mandated on the FASB.

• Investors—Subcommittee II plans to propose integrating the discussion of investor pre-reviews into developed proposal 2.1 and propose clarifying that although investor involvement in standards-setting has been improved recently, more formalized, structured involvement utilizing existing advisory groups would be warranted, particularly before a document is issued for exposure. In addition, Subcommittee II plans to propose clarifying the Committee's view about the ''significance'' of investor involvement to further promote balanced standards-setting.

• Agenda—Subcommittee II plans to propose clarifying that the proposed Agenda Advisory Group was intended to be comprised of key decision makers from the SEC, FASB, PCAOB and other constituent groups that would meet on a real-time basis to address immediate needs in the financial reporting system at large. Such a Financial Reporting Working Group would not solely advise the FASB on its agenda. Involvement of other constituents could be effectuated by leveraging members or executive committees from existing FASB advisory groups. This may require the FAF and FASB to reevaluate the composition and responsibilities of other FASB advisory groups and agenda

committees, as well as what input is requested of them and when, to improve the efficiency and effectiveness of standards-setting.

• Field Work—Subcommittee II plans to propose clarifying that the intent of the proposals on cost-benefit analyses and field work were that these processes would benefit from additional consistency across major projects and transparency of the process followed and conclusions reached.

• Periodic Reviews—Subcommittee II plans to propose clarifying that the Committee's proposals regarding periodic reviews of new and existing standards were intended to formalize existing standards-setting processes for major projects. Subcommittee II may also propose dispensing with a bright line time requirement, due to the inconsistency of this approach with other Committee proposals and the need for the standards-setter and its advisory groups to evaluate the facts and circumstances surrounding each major project.

Clarifying SEC Role in Interpreting GAAP

Subcommittee II understands that the SEC staff is already in the process of instituting internal processes that may address many, if not all, of the points in the Committee's conceptual approach 2.A regarding SEC interpretations of GAAP. Subcommittee II is in the process of formulating a developed proposal that considers such improvements, which will be presented to the Committee for consideration in July 2008.

Standards-Setting Priorities

Conceptual approach 3.C recommends revisiting standards-setting priorities. However, Subcommittee II acknowledges that convergence matters significantly drive priorities in standards-setting and that the convergence paths being considered by the SEC will directly impact certain of the Committee's proposals and U.S. standards-setting priorities. As such, conceptual approach 2.C may not lead to a proposal being presented to the Committee, as this reprioritization is likely already being considered by those involved in the international convergence dialogue and could be addressed with assistance from the proposed Financial Reporting Working Group. However, Subcommittee II is deliberating the feasibility of a phase II codification project, subject to its path-dependency on international convergence matters, within the Committee's discussion of the FASB's current codification project and proposed periodic reviews of existing standards. The Committee will deliberate this topic in July 2008.

Design of Standards

Subcommittee II has drafted a preliminary hypothesis related to the design of accounting standards based on conceptual approach 2.B from the Progress Report for the Committee's consideration, as follows:

Preliminary Hypothesis: The SEC should encourage the FASB to continue to improve the way accounting standards are written by using clearly-stated objectives, outcomes and principles that faithfully represent the economics of transactions and are responsive to investors' needs for clarity, transparency and comparability.

Design of Standards: As noted in the Progress Report, some participants in the U.S. financial reporting community believe that certain accounting standards do not clearly articulate the objectives, outcomes and principles upon which they are based, because they are sometimes obscured by dense language, detailed rules, examples and illustrative guidance. This can create uncertainty in the application of GAAP. Further, the proliferation of detailed rules fosters accounting-motivated structured transactions, as rules cannot cover all outcomes. As discussed in chapter 1 of the Progress Report, standards that have scope exceptions, safe harbors, cliffs, thresholds and bright lines are vulnerable to manipulation by those seeking to avoid accounting for the substance of transactions using structured transactions that are designed to achieve a particular accounting result. This ultimately hurts investors, because it reduces comparability and the usefulness of the resulting financial information. Therefore, a move toward the use of more objectives, outcomes and principles in accounting standards may ultimately improve the quality of the financial reporting upon which investors rely.

The Committee recognized in the Progress Report that the question of how to design accounting standards going forward is a critical aspect of the standards-setting process and is at the center of a decade-long principles-based versus rules-based accounting standards debate. There has been much discussion in the marketplace on this topic and there are differing views. The SEC has been a frequent participant in the debate and has long been supportive of objectives-oriented standards.[29] Rather than engage in such a spurious debate, the Committee preferred in the Progress Report to think of the design of accounting standards in terms of the characteristics they should possess. There are many publications on this topic written by well-known theorists from the FASB, the IASB, the SEC, accounting firms, academia and elsewhere. The most recent example is an omnibus of this collective thinking published by the CEOs of the World's Six Largest Audit Networks.[30] Their paper attempts to outline what optimal accounting standards should look like in the future and proposes a framework the standards-setter should refer to over time to ensure that these characteristics are consistently optimized.

The FASB has made recent improvements in how it writes accounting standards as part of its Understandability initiative and Codification project. We support the increased use of clearly-stated objectives, outcomes and principles in accounting standards that bring together this thinking. We believe the highest goal for accounting standards in the future is that they faithfully represent the economics of transactions and are responsive to investors' needs for clarity, transparency and comparability. Accounting standards that meet these criteria, when applied in good faith in a standards-setting system that employs the Committee's other proposals, will foster enhanced comparability and help to restore trust and confidence in financial reporting.

Although Subcommittee II supports increased use of objectives, outcomes and principles, the goal would not be to remove all rules. Rather, we agree with the notion that ideal accounting standards lay somewhere on the spectrum between principles-based and rules-based and that a framework may be helpful to consistently determine where on that spectrum new accounting standards should be written over time. This would assist the standards-setter in determining rules that might be necessary in certain circumstances. For example, if the standards-setter believes that there is only one way to reflect the

[29] For example, the SEC issued *Policy Statement: Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter* (April 2003), which included numerous recommendations for the FAF and FASB to consider, including greater use of principles-based accounting standards whenever reasonable to do so. The SEC staff also issued *Study Pursuant to Section 108(d) of the Sarbanes-Oxley Act of 2002 on the Adoption by the United States Financial Reporting System of a Principles-Based Accounting System* (July 2003), which further lauded the benefits of objectives-oriented standards.

[30] CEOs of the World's Six Largest Audit Networks, *A Proposed Framework for Establishing Principles-Based Accounting Standards*, Global Public Policy Symposium (January 2008).

economics of a transaction while promoting clarity, transparency and comparability for investors, it would be reasonable to provide prescriptive guidance in addition to objectives or principles.

Exhibit C

SEC Advisory Committee on Improvements to Financial Reporting

Audit Process and Compliance Subcommittee Update

May 2, 2008 Full Committee Meeting

I. Introduction

The SEC's Advisory Committee on Improvements to Financial Reporting (Committee) issued a progress report (Progress Report) on February 14, 2008.[31] In chapter 3 of the Progress Report, the Committee discussed its work-to-date in the area of audit process and compliance, namely, its developed proposals related to providing guidance with respect to the materiality and correction of errors; and judgments related to accounting matters.

Since the issuance of the Progress Report, the audit process and compliance subcommittee (Subcommittee III) has received a considerable amount of public comment regarding the developed proposals included in the Progress Report. This public input includes feedback obtained during the panel discussions regarding the developed proposals in Chapter 3 of the Progress Report held during the Committee's March 13 open meeting, feedback obtained when certain members of the subcommittee met with the PCAOB Standing Advisory Group (SAG) on February 27, 2008, feedback obtained when the subcommittee met with market participants at our subcommittee meetings and the numerous comment letters received by the Committee. Based on this considerable public feedback, Subcommittee III believes that there are several areas related to the Committee's original developed proposals that warrant clarification by the Committee as well as some additional items that need to be considered by the Committee. This report represents Subcommittee III's latest thinking related to the developed proposals in Chapter 3 of the Progress Report and reflects the subcommittee's proposed clarifications for the Committee's consideration related to the original developed proposals. Subject to further public comment and Committee input, Subcommittee III will recommend these revised developed proposals to the Committee for its consideration in developing the final report, which is expected to be issued in July 2008.

II. Financial Restatements

In the Progress Report, the Committee issued three developed proposals (developed proposals 3.1, 3.2 and 3.3) related to financial restatements. These developed proposals have been the subject of public debate and the subject of many comment letters received by the Committee. Subcommittee III believes that one cause of the debate surrounding these developed proposals relates to a lack of clarity regarding the developed proposals.

First, the developed proposals were not intended to recommend elimination of the guidance currently contained in SAB Topic 1M. Instead, the developed proposals were intended to enhance the guidance in SAB Topic 1M. As stated in the summary of SAB 99, which was codified in SAB Topic 1M, ''This staff accounting bulletin expresses the views of the staff that exclusive reliance on certain quantitative benchmarks to assess materiality in preparing financial statements and performing audits of those financial statements is inappropriate; misstatements are not immaterial simply because they fall beneath a numerical threshold.'' Subcommittee III believes that the guidance in SAB Topic 1M is appropriate and accomplishes what it was intended to do, which is to address situations where errors were not being evaluated for materiality simply due to the relatively small size of the error. As the SEC staff noted in SAB 99, this concept was not consistent with the total mix standard established by the Supreme Court. SAB Topic 1M was not written to address all situations one must consider when determining if an error is material, yet in practice, SAB Topic 1M is often cited as the guidance to use in all materiality decisions. Because SAB Topic 1M primarily addresses one issue, which was to correct the misperception in practice at the time that small errors need not be evaluated for materiality solely based on their size, Subcommittee III believes that this has resulted in less consideration to the total mix of information in the evaluation of whether an error is material or not. Since this is not consistent with the standard established by the Supreme Court or as we understand it the intent of SAB Topic 1M, Subcommittee III believes that additional guidance is needed to supplement the guidance contained in SAB Topic 1M.

Second, there have been some additional studies of restatements that have been published since the issuance of the Progress Report. The most significant study is the study commissioned by the U.S. Treasury entitled ''The Changing Nature and Consequences of Public Company Financial Restatements 1997–2006'', conducted by Professor Susan Scholz of the University of Kansas. Subcommittee III believes that the results of this study are not inconsistent with the developed proposals in the Committee's Progress Report.

Third, Subcommittee III believes clarifications are needed related to the use of the term ''current'' investor in the Progress Report. Some have concluded that this term only refers to investors who currently own securities of a company. Subcommittee III did not intend the Committee's developed proposal to convey such a narrow definition of current investor, so there are proposed edits to the developed proposal to reflect that the correction of an error should be based on the needs of all investors making current investment decisions.

Fourth, there were several public comments related to the use of the term ''sliding scale'' in the developed proposals in the Progress Report. Many of these comments were concerned that this term was confusing and did not help explain the principles in the developed proposal. Subcommittee III does not believe that the use of this term is critical to the principles articulated in the developed proposals in the Progress Report. Therefore Subcommittee III proposes to remove the use of this term in the developed proposals.

Finally, because Subcommittee III believes that issues related to the dark period, most notably the potential high cost to investors during the dark period, are very important, a new developed proposal is being recommended by the subcommittee to highlight the importance of this issue. This new developed proposal contains substantially the same wording that was included in the Progress Report, but has been moved to give more prominence to this important issue.

III. Judgment

Similar to the reaction to the Committee's developed proposals related to restatements in the Progress Report (Developed Proposals 3.1, 3.2 and 3.3), there has been much public comment related to the Committee's developed proposal 3.4 in the Progress Report related to professional judgment. Subcommittee III believes that the comments it has received during this

[31] Refer to Progress Report at *http://www.sec.gov/rules/other/2008/33-8896.pdf*.

process have been very helpful to its continuing deliberations on this matter. Based on the comments received, Subcommittee III believes that some changes are necessary to the developed proposal 3.4 in the Progress Report to allow the developed proposal to meet the goals established in that Progress Report without the risks that the subcommittee has been concerned about from the beginning, such as the risk that the developed proposal devolve into a checklist-based approach to making judgments and the risk that the proposed framework could be used as a shield to protect unreasonable judgments.

The primary change that Subcommittee III believes should be made is to refocus the developed proposal away from a recommendation for a framework. While Subcommittee III believes that there is great merit in the idea of a framework, the term ''framework'' can imply a mechanistic process. Making and evaluating judgments can involve a process, but the notion of a process is dangerous because it implies that an outcome can be achieved. Indeed, no matter how robust a process one uses to make judgments, there can be no guarantee that the outcome will be reasonable. Instead, Subcommittee III believes that a preferable way to accomplish the goals set forth in the Progress Report would be to have the SEC formally articulate in a statement of policy how the SEC evaluates judgments, including the factors that it uses as part of its evaluation. Therefore, Subcommittee III believes the developed proposal should be changed to formally propose such a statement of policy to be issued.

Some commenters have stated that developed proposal 3.4 in the Progress Report advocates a safe harbor be established for the exercise of professional judgment. Subcommittee III did not intend to advocate any particular way for the implementation of developed proposal 3.4. Instead, this decision was left to the SEC. With the change in focus outlined above, Subcommittee III believes that a statement of policy would be the preferred way to implement the revised proposal and therefore, there should be no reference to a safe harbor in the revised Chapter 3.

Subcommittee III also proposes to remove the use of the term professional when referring to judgment. Subcommittee III believes that there could be a misunderstanding that the term ''professional'' implies that one must have a professional certification in order to make or evaluate a professional judgment. While Subcommittee III believes that such professional certifications are important, it did not intend to suggest such a requirement for the application or evaluation of accounting judgments.

Appendix A

Subcommittee III has included as Appendix A to this update a revised version of Chapter 3 from the Progress Report that reflects the proposed edits for the Committee's consideration.

Chapter 3: Audit Process and Compliance

I. Introduction

We have concentrated our efforts to date regarding audit process and compliance on the subjects of financial restatements, including the potential benefits from providing guidance with respect to the materiality[32] and correction of errors; and judgments related to accounting matters: Specifically, whether guidance on the evaluation of judgments would enhance the quality of judgments and the willingness of others to respect judgments made.

II. Financial Restatements

II.A. Background

Likely Causes of Restatements

The number of financial restatements[33] in the U.S. financial markets has been increasing significantly over recent years, reaching approximately 1,600 companies in 2006.[34] Restatements generally occur because errors that are determined to be material are found in a financial statement previously provided to the public. Therefore, the increase in restatements appears to be due to an increase in the identification of errors that were determined to be material.

The increase in restatements has been attributed to various causes. These include more rigorous interpretations of accounting and reporting standards by preparers, outside auditors, the SEC, and the PCAOB; the considerable amount of work done by companies to prepare for and improve internal controls in applying the provisions of section 404 of the Sarbanes-Oxley Act; and the existence of control weaknesses that companies failed to identify or remediate. Some have also asserted that the increase in restatements is the result of an overly broad application of the concept of materiality and misinterpretations of the existing guidance regarding materiality in SAB 99, *Materiality* (as codified in SAB Topic 1M). SAB Topic 1M was written to primarily address a specific issue, when seemingly small errors could be material due to qualitative factors, however, the guidance in SAB Topic 1M is often utilized in all materiality decisions. As a result of this overly broad application of SAB Topic 1M, errors may have been deemed to be material when an investor[35] may not consider them to be important.

It is essential that companies, auditors, and regulators strive to reduce the frequency and magnitude of errors in financial reporting. When material errors occur, however, companies should restate their financial statements to correct errors that are important to current investors. Investors need accurate and comparable data, and restatement is the only means to achieve those goals when previously filed financial statements contain material errors. Efforts to improve company controls and audit quality in recent years should reduce errors, and there is evidence this is currently occurring.[36] We believe that public companies should focus on reducing errors in financial statements. At the same time, we believe that some of our developed proposals in the areas of substantive complexity, as discussed in chapter 1, and the standards-setting process, as discussed in chapter 2, will also be helpful in reducing some of the frequency of errors in financial statements.

While reducing errors is the primary goal, it is also important to reduce the number of restatements that do not provide important information to investors making current investment decisions. Restatements can be costly for companies and auditors, may reduce confidence in reporting, and may create

[32] A fact is material if there is a substantial likelihood that a reasonable investor in making an investment decision would consider it as having significantly altered the total mix of information available. *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 231–32 (1988); *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976).

[33] For the purposes of this chapter, a restatement is the process of revising previously issued financial statements to reflect the correction of a material error in those financial statements. An amendment is the process of filing a document with revised financial statements with the SEC to replace a previously filed document. A restatement could occur without an amendment, such as when prior periods are revised in a current filing with the SEC.

[34] U.S. Government Accountability Office (GAO) study, *Financial Restatements: Update of Public Company Trends, Market Impacts, and Regulatory Enforcement Updates* (March 2007), and Audit Analytics study, *2006 Financial Restatements A Six Year Comparison* (February 2007).

[35] We use the term investor to include all people using financial statements to make investment decisions.

[36] A Glass Lewis & Co. report, *The Tide is Turning* (January 15, 2008), shows that restatements in companies subject to section 404 of the Sarbanes-Oxley Act have declined for two consecutive years.

confusion that reduces the efficiency of investor analysis. This portion of this chapter describes our proposals regarding: (1) Additional guidance on the concept and application regarding materiality, and (2) the process for and disclosure of the correction of errors.

Our Research

We have considered several publicly-available studies [37] on restatements. The restatement studies we have reviewed all indicate that the total number of restatements has increased in recent years. The studies also indicate that there are many different types of errors that result in the need for restatements. Market reaction to restatements may be one indicator as to whether restatements contain information considered by investors to be material. Based on these studies, it appears to us that there may be restatements that investors may not consider important. We draw this conclusion in part based upon the lack of a statistically significant market reaction, particularly as it relates to certain types of restatements such as reclassifications and restatements affecting non-core expenses.[38] While there are limitations [39] to using market reaction as a proxy for materiality, other trends in these studies are not inconsistent with our conclusion—the trend toward restatements involving correction of smaller amounts, including amounts in the cash flow statement, and the trend toward restatements in cases where there is no evidence of fraud or intentional wrongdoing.[40] Also, while there is recent evidence [41] that the number of restatements has declined in 2007, we note that the total number of restatements is still significant. We, therefore, believe supplementing existing guidance on determining whether an error is material and providing additional guidance on when a restatement is necessary for certain types of errors, would be beneficial in reducing the frequency of restatements that do not provide important information to investors making current investment decisions.

We have also considered input from equity and credit analysts and others about investors' views on materiality and how restatements are viewed in the marketplace. Feedback we have received included:

- Bright lines are not really useful in making materiality judgments. Both qualitative and quantitative factors should be considered in determining if an error is material.
- Companies often provide the market with little financial data during the time between a restatement announcement and the final resolution of the restatement. Limited information seriously undermines the quality of investor analysis, and sometimes triggers potential loan default conditions or potential delisting of the company's stock.
- The disclosure provided in connection with restatements is not consistently adequate to allow an investor to evaluate the likelihood of errors in the future. Notably, disclosures often do not provide enough information about the nature and impact of the error, and the resulting actions the company is taking.
- Interim periods should be viewed as more than just a component of an annual financial statement for purposes of making materiality judgments.

II.B. Developed Proposals

Based on our work to date, we believe that, in addressing a financial statement error, it is helpful to consider two sequential questions: (1) Was the error in the financial statement material to those financial statements when originally filed? and (2) How should a material error in previously issued financial statements be corrected? We believe that framing the principles necessary to evaluate these questions would be helpful. We also believe that in many circumstances investors could benefit from improvements in the nature and timeliness of disclosure in the period between identifying an error and filing restated financial statements.

With this context, we have developed the following proposals regarding the assessment of the materiality of errors to financial statements and the correction of financial statements for errors.[42]

Developed Proposal 3.1: The FASB or the SEC, as appropriate, should supplement existing guidance to reinforce the following concepts:

- Those who evaluate the materiality of an error should make the decision based upon the perspective of a reasonable investor.
- Materiality should be judged based on how an error affects the total mix of information available to a reasonable investor.

Just as qualitative factors may lead to a conclusion that a small error is material, qualitative factors also may lead to a conclusion that a large error is not material.

The FASB or the SEC, as appropriate, should also conduct both education sessions internally and outreach efforts to financial statement preparers and auditors to raise awareness of these issues and to promote more consistent application of the concept of materiality.

The Supreme Court has established that ''a fact is material if there is a substantial likelihood that a reasonable investor in making an investment decision would consider it as having significantly altered the total mix of information available.'' We believe that those who judge the materiality of a financial statement error should make the decision based upon the interests, and the viewpoint, of a reasonable investor and based upon how that error impacts the total mix of information available to a reasonable investor. One must ''step into the shoes'' of a reasonable investor when making these judgments. We believe that too many

[37] Studies considered include the study commissioned by the Department of the Treasury, *The Changing Nature and Consequences of Public Company Financial Restatements 1997–2006*, by Professor Susan Scholz, *An Analysis of the Underlying Causes of Restatements* by Professors Marlene Plumlee and Teri Yohn, GAO study, *Financial Restatements: Update of Public Company Trends, Market Impacts, and Regulatory Enforcement Updates* (March 2007); Glass Lewis & Co. study, *The Errors of Their Ways (February 2007); and two Audit Analytics studies, 2006 Financial Restatements A Six Year Comparison* (February 2007) and *Financial Restatements and Market Reactions* (October 2007). We have also considered findings from the PCAOB's Office of Research and Analysis's (ORA) working paper, *Changes in Market Responses to Financial Statement Restatement Announcements in the Sarbanes-Oxley Era* (October 18, 2007), understanding that ORA's findings are still preliminary in nature as the study is still going through a peer review process.

[38] Professor Scholz's study defines restatements related to non-core expenses as ''Any restatement including correction of expense (or income) items that arise from accounting for non-operation or non-recurring activities''. This definition includes restatements related to debt and equity instruments, derivatives, gain or loss recognition, inter-company investments, contingency and commitments, fixed and intangible asset valuation or impairment and income taxes.

[39] Examples of the limitations in using market reaction as a proxy for materiality include (1) The difficultly of measuring market reaction because of the length of time between when the market becomes aware of a potential restatement and the ultimate resolution of the matter, (2) the impact on the market price of factors other than the restatement, and (3) the disclosure at the time of the restatement of other information, such as an earnings release, that may have an offsetting positive market reaction.

[40] These trends are addressed in Professor Scholz's study.

[41] Glass Lewis & Co. report, *The Tide is Turning* (January 15, 2008) indicates that approximately 1 out of every 11 public companies had a restatement during 2007.

[42] We have developed principles that we believe will be helpful in addressing financial statement errors. In developing these principles, we have not determined if the principles are inconsistent with existing GAAP, such as SFAS No. 154, *Accounting Changes and Error Corrections*, or APB Opinion No. 28, *Interim Financial Reporting*. To the extent that the implementation of our proposals would require a change to GAAP, the SEC should work with the FASB to revise GAAP.

materiality judgments are being made in practice without full consideration of how a reasonable investor would evaluate the error. When looking at how an error impacts the total mix of information, one must consider all of the qualitative factors that would impact the evaluation of the error. This is why bright lines or purely quantitative methods are not appropriate in determining the materiality of an error to annual financial statements.

We believe that the current materiality guidance in SAB Topic 1M is appropriate in making most materiality judgments. We believe that, in current practice, however, this materiality guidance is being interpreted generally as being one-directional, that is, as providing that qualitative considerations can result in a small error being considered material, but that a large error is material without regard to qualitative factors. This one-directional interpretation is not consistent with the standard established by the Supreme Court, which requires an assessment of the total mix of information available to the investor making an investment decision. We believe that, in general, qualitative factors not only can increase, but also can decrease, the importance of an error to the reasonable investor, although we acknowledge that there will probably be more times when qualitative considerations will result in a small error being considered material than they will result in a large error being considered not to be material.[43] Therefore, we recommend that the existing materiality guidance be enhanced to clarify that the total mix of information available to investors should be the main focus of a materiality judgment and that qualitative factors are relevant in analyzing the materiality of both large and small errors. We view this recommendation as a modest clarification of the existing guidance to conform practice to the standard established by the Supreme Court and not a wholesale revision to the concepts and principles embedded in existing SEC staff guidance in SAB Topic 1M.

The following are examples of some of the qualitative factors that could result in a conclusion that a large error is not material. (Note that this is not an exhaustive list of factors, nor should this list be considered a ''checklist'' whereby the presence of any one of these items would make an error not material. Companies and their auditors should continue to look at the totality of all factors when making a materiality judgment):

- The error impacts metrics that do not drive investor conclusions or are not important to investor models.
- The error is a one-time item and does not alter investors' perceptions of key trends affecting the company.
- The error does not impact a business segment or other portion of the registrant's business that investors regard as driving valuation or risks.

Finally, we recommend that the enhanced guidance suggest some factors that are relevant to the analysis of errors in the cash flow statement and the balance sheet. We note that the existing guidance suggests factors that are relevant primarily to the analysis of the materiality of an error in the income statement.

Internal education and external outreach efforts can be instrumental in increasing the awareness of these concepts and ensuring more consistent application of materiality. Many of the issues with materiality in practice are caused by misunderstandings by preparers, auditors and regulators. Elimination of these misunderstandings would be a significant step toward reducing restatements that do not provide useful information to investors.

Developed Proposal 3.2: The FASB or the SEC, as appropriate, should issue guidance on how to correct an error consistent with the principles outlined below:

- All errors, other than clearly insignificant errors, should be promptly corrected no later than in the financial statements of the period in which the error is discovered. All material errors should be disclosed when they are corrected.
- Prior period financial statements should only be restated for errors that are material to those prior periods.
- The determination of how to correct a material error should be based on the needs of current investors. For example, a material error that has no relevance to a current investment decision would not require amendment of the annual financial statements in which the error occurred, but would need to be promptly corrected and disclosed in the current period.
- There may be no need for the filing of amendments to previously filed annual or interim reports to reflect restated financial statement, if the next annual or interim period report is being filed in the near future and that report will contain all of the relevant information.
- Restatements of interim periods do not necessarily need to result in a restatement of an annual period.
- Corrections of large errors should always be disclosed, even if the error was determined not to be material.

We believe that all errors, excluding clearly insignificant errors, should be corrected no later than in the financial statements of the annual or interim period in which the error is discovered. The correction of errors, even errors that are not material, should not be deferred to future periods. Rather, companies should be required to correct all errors promptly and make appropriate disclosures about the correction, particularly when the errors are material, and should not have the option to defer recognition of errors until future financial statements. Notwithstanding the foregoing, immaterial errors discovered shortly before the issuance of the financial statements may not need to be corrected until the next annual or interim period being reported upon when earlier correction is impracticable.[44]

The current guidance that is detailed in SAB 108 (as codified in SAB Topic 1N) may result in the restatement of prior annual periods for immaterial errors occurring in those periods because the cumulative effect of these prior period errors would be material to the current annual period, if the prior period errors were corrected in the current annual period. By correcting small errors when they are identified, a company will eliminate the possibility that the continuation of the error over a period of time will result in the total amount of the error becoming material to a company's financial statements and requiring correction at that time. Newly discovered errors that had occurred over a period of time when they were not material, however, would still trigger the need for correction. In the process of reflecting these immaterial corrections to prior annual periods, some believe that the prior annual period financial statements should indicate that they have been restated.

[43] Some have argued that, under such guidance, a very large error that affects meaningful financial statement metrics could be deemed immaterial by virtue of qualitative factors. The Committee believes that when one focuses on the total mix of information, the probability of this situation occurring is remote.

[44] We understand that sometimes there may be immaterial differences between a preparer's estimate of an amount and the independent auditor's estimate of an amount that exist when financial statements are issued. These differences might or might not be errors, and may require additional work to determine the nature and actual amount of the error. This additional work is not necessary for the preparer or the auditor to agree to release the financial statements. Due care should be taken in developing any guidance in this area to provide an exception for these legitimate differences of opinion, and to ensure that any requirement to correct all ''errors'' would not result in unnecessary work for preparers or auditors.

There is diversity in practice on this issue, and clarification is needed from the SEC on the intent of SAB Topic 1N. We believe that prior annual period financial statements should not be restated for errors that are immaterial to the prior annual period. Instead of the approach specified in Topic 1N, we believe that, where errors are not material to the prior annual periods in which they occurred but would be material if corrected in the current annual period, the error could be corrected in the current annual period [45] with appropriate disclosure at the time the current annual period financial statements are filed with the SEC.

We believe that the determination of how errors should be corrected should be based on the needs of investors making current investment decisions. This determination should take into account the facts and circumstances of each error. For example, a prior period error that was material to that prior period but that does not affect the annual financial statements or financial information included within a company's most recent filing with the SEC may not need to be corrected through an amendment to prior period filings if the financial statements that contain the error are determined to be irrelevant to investors making current investment decisions. Such errors would be corrected in the period in which they are discovered with appropriate disclosure about the error and the periods impacted. This approach provides investors making current investment decisions with more timely financial reports and avoids the costs to investors of delaying prompt disclosure of current financial information in order for a company to correct multiple prior filings.

For material errors that are discovered within a very short time period prior to a company's next regularly scheduled reporting date, it may be appropriate in certain instances to report the restatement in the next filing with appropriate disclosure of the error and its impact on prior periods, instead of amending previous filings with the SEC. This option should be further studied with regard to the possibility of abuse and, if appropriate, should be included in the overall guidance on how to correct errors.

Assuming that there is an error in an interim period within an annual period for which financial statements have previously been filed with the SEC, the following guidance should be utilized:

- If the error is not material to either the previously issued interim period or to the previously issued annual period, the previously issued financial statements should not be restated.
- If the prior period error is determined to be material only to the previously issued interim period, but not the previously issued annual period, then only the previously issued interim period should be restated (i.e., the annual period that is already filed should not be restated and the Form 10–K should not be amended). However, there should be appropriate disclosure in the company's next Form 10–K to explain the discrepancy in the results for the interim periods during the previous annual period on an aggregate basis and the reported results for that annual period.

We believe that investors should be informed about all large errors when they are corrected. Even if a large error is determined to be not material because of qualitative factors, there should be appropriate disclosure about the error in the period in which the error is corrected.

We believe that the issuance by the FASB or the SEC, as appropriate, of guidance on how to correct and disclose errors in previously issued financial statements will provide to investors higher quality and more timely information (e.g., less delay occasioned by the need for restatement of prior period financial statements for errors that are not material and for errors that have no relevance to investors making current investment decisions) and reduce the burdens on companies related to the preparation of amended reports. Since our proposal would require prompt correction and full disclosure about all material errors, all large errors that are considered to be not material as well as many other types of errors, it would enhance transparency of accounting errors and help to eliminate the phenomenon of so-called ''stealth restatements''—when an error impacts past financial statements without disclosure of such error in current financial filings.

Developed Proposal 3.3: The FASB or the SEC, as appropriate, should issue guidance on disclosure during the period in which the restatement is being prepared, about the need for a restatement and about the restatement itself, to improve the adequacy of this disclosure based on the needs of investors:

Typically, the restatement process involves three primary reporting stages:

1. The initial notification to the SEC and investors that there is a material error and that the financial statements previously filed with the SEC can no longer be relied upon;

2. The ''dark period'' or the period between the initial notification to the SEC and the time restated financial statements are filed with the SEC; and

3. The filing of restated financial statements with the SEC.

We believe that a major effect on investors due to restatements is the lack of information when companies are silent during stage 2, or the ''dark period.'' This silence creates significant uncertainty regarding the size and nature of the effects on the company of the issues leading to the restatement. This uncertainty often results in decreases in the company's stock price. In addition, delays in filing restated financial statements may create default conditions in loan covenants; these delays may adversely affect the company's liquidity. We understand that, in the current legal environment, companies are often unwilling to provide disclosure of uncertain information. However, we believe that when companies are going through the restatement process, they should be encouraged to continue to provide any reasonably reliable financial information that they can, accompanied by appropriate explanations of ways in which the information could be affected by the restatement. Consequently, regulators should evaluate the company's disclosures during the ''dark period,'' taking into account the difficulties of generating reasonably reliable information before a restatement is completed.

We believe that the current disclosure surrounding a restatement is often not adequate to allow investors to evaluate the company's operations and the likelihood that such errors could occur in the future. Specifically, we believe that all companies that have a restatement should be required to disclose information related to: (1) The nature of the error, (2) the impact of the error, and (3) management's response to the error, to the extent known, during all three stages of the restatement process. Some suggestions of disclosures that would be made by companies include the following:

Nature of error:

- Description of the error;
- Periods affected and under review;

[45] We are focused on the principle that prior periods should not be restated for errors that are not material to those periods. Correction in the current period of errors that are not material to prior periods could be accomplished through an adjustment to equity or to current period income (which might potentially require an amendment to GAAP). We believe that there are merits in both approaches and that the FASB and the SEC, as appropriate, should carefully weigh both approaches before determining the actual approach to utilize.

• Material items in each of the financial statements subject to the error and pending restatement;

• For each financial statement line item, the amount of the error or range of potential error;

• Identity of business units/locations/segments/subsidiaries affected.

Impact of error:

• Updated analysis on trends affecting the business if the error impacted key trends;

• Loan covenant violations, ability to pay dividends, and other effects on liquidity or access to capital resources;

• Other areas, such as loss of material customers or suppliers.

Management Response

• Nature of the control weakness that led to the restatement and corrective actions, if any, taken by the company to prevent the error from occurring in the future;

• Actions taken in response to covenant violations, loss of access to capital markets, loss of customers, and other consequences of the restatement.

If there are material developments related to the restatement, companies should update this disclosure on a periodic basis during the restatement process, particularly when quarterly or annual reports are required to be filed, and provide full and complete disclosure within the filing with the SEC that includes the restated financial statements.

Developed Proposal 3.4: The FASB or the SEC, as appropriate, should develop and issue guidance on applying materiality to errors identified in prior interim periods and how to correct these errors. This guidance should reflect the following principles:

• Materiality in interim period financial statements must be assessed based on the perspective of the reasonable investor.

• When there is a material error in an interim period, the guidance on how to correct that error should be consistent with the principles outlined in developed proposal 3.2.

Based on prior restatement studies, approximately one-third of all restatements involved only interim periods. Authoritative accounting guidance on assessing materiality with respect to interim periods is currently limited to paragraph 29 of APB Opinion No. 28, *Interim Financial Reporting.*[46] Differences in interpretation of this paragraph have resulted in variations in practice that have increased the complexity of financial reporting. This increased complexity impacts preparers and auditors, who struggle with determining how to evaluate the materiality of an error to an interim period, and also impacts investors, who can be confused by the inconsistency between how companies evaluate and report errors. We believe that guidance as to how to evaluate errors related to interim periods would be beneficial to preparers, auditors and investors.

We have observed that a large part of the dialogue about interim materiality has focused on whether an interim period should be viewed as a discrete period or an integral part of an annual period. Consistent with the view expressed at the outset of this section, we believe that the interim materiality dialogue could be greatly simplified if that dialogue were refocused to address two sequential questions: (1) What principles should be considered in determining the materiality of an error in interim period financial statements? and (2) How should errors in previously issued interim financial statements be corrected? We believe that additional guidance on these questions, which are extensions of the basic principles outlined in developed proposals 3.1 and 3.2 above, would provide useful guidance in assessing and correcting interim period errors. We believe that while these principles would assist in developing guidance related to interim periods, additional work should also be performed to fully develop robust guidance regarding errors identified in interim periods.

We believe that the determination of whether an interim period error is material should be made based on the perspective of a reasonable investor, not whether an interim period is a discrete period, an integral part of an annual period, or some combination of both. An interim period is part of a larger mix of information available to a reasonable investor. As one example, a reasonable investor would use interim financial statements to assess the sustainability of a company's operations and cash flows. In this example, if an error in interim financial statements did not impact the sustainability of a company's operations and cash flows, the interim period error may very well not be material given the total mix of information available. Similarly, just as a large error in annual financial statements does not determine by itself whether an error is material, the size of an error in interim financial statements should also not be necessarily determinative as to whether an error in interim financial statements is material.

We believe that applying the principles set forth above would reduce restatements by providing a company the ability to correct in the current period immaterial errors in previously issued financial statements and as a practical matter obviate the need to debate whether the interim period is a discrete period, an integral part of an annual period, or some combination of both.

We also note that these principles will provide a mechanism, other than restatement, to correct through the current period a particular error that has often been at the center of the interim materiality debate—a newly discovered error that has accumulated over one or more annual or interim periods, but was not material to any of those prior periods.

III. Judgment

III.A. Background

Overview

Judgment is not new to the areas of accounting, auditing, or securities regulation—the criteria for making and evaluating judgment have been a topic of discussion for many years. The recent increased focus on judgment, however, comes from several different developments, including changes in the regulation of auditors and a focus on more ''principles-based'' standards—for example, FASB standards on fair value and IASB standards. Investors will benefit from more emphasis on ''principles-based'' standards, since ''rules-based'' standards (as discussed in chapters 1 and 2) may provide a method, such as through exceptions and bright-line tests, to avoid the accounting objectives underlying the standards. If properly implemented, ''principles-based'' standards should improve the information provided to investors while reducing the investor's concern about ''financial engineering'' by companies using the ''rules'' to avoid accounting for the substance of a transaction. While preparers appear supportive of a move to less prescriptive guidance, they have expressed concern regarding the perception that current practice by regulators in evaluating judgments does not provide an environment in which such judgments may be generally respected. This, in turn, can lead to repeated calls for more rules, so that the

[46] Paragraph 29 of APB Opinion No. 28, *Interim Financial Reporting*, states the following:

In determining materiality for the purpose of reporting the cumulative effect of an accounting change or correction of an error, amounts should be related to the estimated income for the full fiscal year and also to the effect on the trend of earnings. Changes that are material with respect to an interim period but not material with respect to the estimated income for the full fiscal year or to the trend of earnings should be separately disclosed in the interim period.

standards can be comfortably implemented.

Many regulators also appear to encourage a system in which preparers can use their judgment to determine the most appropriate accounting and disclosure for a particular transaction. Regulators assert that they do respect judgments, but may also express concerns that some companies may attempt to inappropriately defend certain errors as ''reasonable judgments.'' Identifying standard processes for making judgments and criteria for evaluating those judgments, after the fact, may provide an environment that promotes the use of judgment and encourages consistent evaluation practices among regulators.

Goals of Potential Guidance on Judgments

The following are several issues that any potential guidance related to judgments may help address:

a. Investors' lack of confidence in the use of judgment—Guidance on judgments may provide investors with greater comfort that there is an acceptable rigor that companies follow in exercising reasonable judgment.

b. Preparers' concern regarding whether reasonable judgments are respected—In the current environment, preparers may be afraid to exercise judgment for fear of having their judgments overruled, after the fact by regulators.

c. Lack of agreement in principle on the criteria for evaluating judgments—The criteria for evaluating reasonable judgments, including the appropriate role of hindsight in the evaluation, may not be clearly defined and thus may lead to increased uncertainty.

d. Concern over increased use of ''principles-based'' standards—Companies may be less comfortable with their ability to implement more ''principles-based'' standards if they are concerned about how reasonable judgments are reached and how they will be assessed.

Categories of Judgments That Are Made in Preparing Financial Statements

There are many categories of accounting and auditing judgments that are made in preparing financial statements, and any guidance should encompass all of these categories, if practicable. Some of the categories of accounting judgment are as follows:

1. Selection of accounting standard.

In many cases, the selection of the appropriate accounting standard under GAAP is not a highly complex judgment (e.g., leases would be accounted for using lease accounting standards and pensions would be accounted for using pension accounting standards). However, there are cases in which the selection of the appropriate accounting standard can be highly complex.

For example, the standards on accounting for derivatives contain a definition of a derivative and provide scope exceptions that limit the applicability of the standard to certain types of derivatives. To evaluate how to account for a contract that has at least some characteristics of a derivative, one would first have to determine if the contract met the definition of a derivative in the accounting standard and then determine if the contract would meet any of the scope exceptions that limited the applicability of the standard. Depending on the nature and terms of the contract, this could be a complex judgment to make, and one on which experienced accounting professionals can have legitimate differing, yet acceptable, opinions.

2. Implementation of an accounting standard.

After the correct accounting standard is identified, there are judgments to be made during its implementation.

Examples of implementation judgments include determining if a hedge is effective, if a lease is an operating or a capital lease, and what inputs and methodology should be utilized in a fair value calculation. Implementation judgments can be assisted by implementation guidance issued by standards-setters, regulators, and other bodies; however, this guidance could increase the complexity of selecting the correct accounting standard, as demonstrated by the guidance issued on accounting for derivatives.

Further, many accounting standards use wording such as ''substantially all'' or ''generally.'' The use of such qualifying language can increase the amount of judgment required to implement an accounting standard. In addition, some standards may have potentially conflicting statements.

3. Lack of applicable accounting standards.

There are some transactions that may not readily fit into a particular accounting standard. Dealing with these ''gray'' areas of GAAP is typically highly complex and requires a great deal of judgment and accounting expertise. In particular, many of these judgments use analogies from existing standards that require a careful consideration of the facts and circumstances involved in the judgment.

4. Financial Statement Presentation.

The appropriate method to present, classify and disclose the accounting for a transaction in a financial statement can be highly subjective and can require a great deal of judgment.

5. Estimating the actual amount to record.

Even when there is little debate as to which accounting standard to apply to a transaction, there can be significant judgments that need to be made in estimating the actual amount to record.

For example, opinions on the appropriate standard to account for loan losses or to measure impairments of assets typically do not differ. However, the assumptions and methodology used by management to actually determine the allowance for loan losses or to determine an impairment of an asset can be a highly judgmental area.

6. Evaluating the sufficiency of evidence.

Not only must one make a judgment about how to account for a transaction, the sufficiency of the evidence used to support the conclusion must be evaluated. In practice, this is typically one of the most subjective and difficult judgments to make.

Examples include determining if there is sufficient evidence to estimate sales returns or to support the collectability of a loan.

Levels of Judgment

There are many levels of judgment that occur related to accounting matters. Preparers must make initial judgments about uncertain accounting issues; the preparer's judgment may then be evaluated or challenged by auditors, investors, regulators, legal claimants, and even others, such as the media. Therefore, in developing potential guidance, differences in role and perspective between those who make a judgment and those who evaluate a judgment should be carefully considered. Guidance should not make those who evaluate a judgment re-perform the judgment according to the guidance. Instead, guidance should provide clarity to those who would make a judgment on factors that those who would evaluate the judgment would consider while making that evaluation.

Hindsight

The use of hindsight to evaluate a judgment where the relevant facts were not available at the time of the initial release of the financial statements (including interim financial statements) is not appropriate. Determining at what point the relevant facts were known to management, or should have been

known,[47] can be difficult, particularly for regulators who are often evaluating these circumstances after substantial time has passed. Therefore, the use of hindsight should only be used based on the facts reasonably available at the time the annual or interim financial statements were issued.

Form of Potential Guidance

We believe that there are many different ways that potential guidance on judgment could be provided. To be successful, however, we believe that guidance on judgment should not eliminate debate, nor be inflexible or mechanical in application. Rather, the guidance should encourage preparers to organize their analysis and focus preparers and others on areas to be addressed; thereby improving the quality of the judgment and likelihood that regulators will accept the judgment. Any guidance issued should be designed to stimulate a rigorous, thoughtful and deliberate process rather than a checklist-based approach for making and evaluating judgments.

One potential way to accomplish the goals we set forth earlier as well as to guard against the potential that such guidance would develop into a checklist-based approach is for the SEC to formally state its approach to evaluating judgments. As discussed earlier in this report, one of the major concerns surrounding the use of judgment is the possibility of a regulator ''second guessing'' the reasonableness of a judgment after the fact. We believe that a primary cause of this concern is a lack of clarity and transparency into the process the SEC uses to evaluate the reasonableness of judgments. The SEC has articulated its policies in the past with success. Examples of previous articulations of policy by the SEC include the ''Seaboard'' report (October 23, 2001) relating to the impact of a company's cooperation on a potential SEC enforcement case and the SEC's framework for assessing the appropriateness of corporate penalties (January 4, 2006). We believe that a statement of policy could implement the goals we have articulated and therefore recommend that the SEC and the PCAOB issue statements of policy describing how they evaluate the reasonableness of accounting and auditing judgments.

The Nature and Limitations of GAAP

Some have suggested that potential judgment guidance for the selection and implementation of GAAP be a requirement to reflect the economic substance of a transaction or be a standard of selecting the ''high road'' in accounting for a transaction. We agree that qualitative standards for GAAP such as these would be desirable and we encourage regulators and standards-setters to move financial reporting in this direction. However, such standards are not always present in financial reporting today and we cannot recommend the articulation of such standards in an SEC statement of policy without anticipating a fundamental long-term revision of GAAP—a change that would be beyond our purview and one that would not be doable in the near- or intermediate-term.

For example, there is general agreement that accounting should follow the substance and not just the form of a transaction or event. Many believe that this fundamental principle should be extended to require that all GAAP judgments should reflect economic substance. However, reasonable people disagree on what economic substance actually is, and many would conclude that significant parts of current GAAP do not require and do not purport to measure economic substance (e.g., accounting for leases, pensions, certain financial instruments and internally developed intangible assets are often cited as examples of items reported in accordance with GAAP that would not meet many reasonable definitions of economic substance).

Similarly, some would like financial reporting to be based on the ''high road''—a requirement to use the most preferable principle in all instances. Unfortunately, today a preparer is free to select from a variety of acceptable methods allowed by GAAP (e.g., costing inventory, measuring depreciation, and electing to apply hedge accounting are just some of the many varied methods allowed by GAAP) without any qualitative standard required in the selection process. In fact, a preferable method is required to be followed only when a change in accounting principle is made, and a less preferable alternative is fully acceptable absent such a change.

We believe that adopting a requirement that accounting judgments reflect economic substance or the ''high road'' would require a revolutionary change not achievable in the foreseeable future. Our suggestion that the SEC issue a statement of policy relating to its evaluation of judgments could and we believe would enhance adherence to GAAP, but it cannot be expected to correct inherent weaknesses in the standards to which it would be applied.

III.B. Developed Proposals

We have developed the following proposal:

Developed Proposal 3.5: The SEC should issue a statement of policy articulating how it evaluates the reasonableness of accounting judgments and include factors that it considers when making this evaluation. The PCAOB should also adopt a similar approach with respect to auditing judgments.

The statement of policy applicable to accounting-related judgments should address the choice and application of accounting principles, as well as estimates and evidence related to the application of an accounting principle. We believe that a statement of policy that is consistent with the principles outlined in this developed proposal to cover judgments made by auditors based on the application of PCAOB auditing standards would be very beneficial to auditors. Therefore, we propose that the PCAOB develop and articulate guidance related to how the PCAOB, including its inspections and enforcement divisions, would evaluate the reasonableness of judgments made based on PCAOB auditing standards. The PCAOB statement of policy should acknowledge that the PCAOB would look to the SEC's statement of policy to the extent the PCAOB would be evaluating the appropriateness of accounting judgments as part of an auditor's compliance with PCAOB auditing standards.

We believe that it would be useful if the SEC also set forth in the statement of policy factors that it looks to when evaluating the reasonableness of preparers' accounting judgments.

The Concept of Judgment in Accounting Matters

Judgment, with respect to accounting matters, should be exercised by a person or persons who have the appropriate level of knowledge, experience, and objectivity and form an opinion based on the relevant facts and circumstances within the context provided by applicable accounting standards. Judgments could differ between knowledgeable, experienced, and objective persons. Such differences between reasonable judgments do not, in themselves, suggest that one judgment is wrong and the other is correct. Therefore, those who evaluate judgments should evaluate the reasonableness of the judgment, and should not base their evaluation on whether the judgment is different from the opinion that would have been reached by the evaluator.

[47] We believe that those making a judgment should be expected to exercise due care in gathering all of the relevant facts prior to making the judgment.

We have listed below various factors that we believe preparers should consider when making accounting judgments. The SEC may want to take these factors into account in developing its statement of policy. We also believe that a suggestion by the SEC that preparers should carefully consider these factors when making accounting judgments would be beneficial in not only increasing the quality of judgments, but also in making sure that the SEC and preparers will be able to more efficiently resolve potential differences during the SEC's review of preparer's filings. The mere consideration by a preparer of these factors in a SEC statement of policy would not prevent a regulator from asking appropriate questions about the accounting judgments made by the preparer or asking companies to correct unreasonable judgments, however. In fact, there is no guarantee that the preparer's consideration of the SEC's suggested factors articulated in a statement of policy would result in a reasonable judgment being reached. Rather, the statement of policy should be designed to encourage preparers to organize their analysis and focus preparers and others on areas that would be the focus of the SEC's review, thereby improving the quality of the judgment and likelihood that regulators will accept the judgment. We encourage the SEC to seek to accept a range of alternative reasonable judgments when preparers make good faith attempts to reach a reasonable judgment. A preparer's failure to follow the SEC's suggested factors in its statement of policy, however, would not imply that the judgment is unreasonable.

We would expect that, in the evaluation of judgments made using the factors that are cited below, the focus would be on significant matters requiring judgment that could have a material effect on the financial statements taken as a whole. We recognize that the facts and circumstances of each judgment may indicate that certain factors are more important than others. These factors would have a greater influence in an evaluation of the reasonableness of a judgment made by a preparer.

Factors to Consider When Evaluating the Reasonableness of a Judgment

While we believe that the SEC should articulate the factors that it uses when evaluating the reasonableness of a judgment, we believe that the statement of policy would be even more useful to preparers if the SEC also made suggestions for ways in which accounting judgments could be made.

We believe that accounting judgments should be based on a critical and reasoned evaluation made in good faith and in a rigorous, thoughtful and deliberate manner. We believe that preparers should have appropriate controls in place to ensure adequate consideration of all relevant factors. Factors applicable to the making of an accounting judgment include the following:

1. The preparer's analysis of the transaction, including the substance and business purpose of the transaction;
2. The material facts reasonably available at the time that the financial statements are issued;
3. The preparer's review and analysis of relevant literature, including the relevant underlying principles;
4. The preparer's analysis of alternative views or estimates, including pros and cons for reasonable alternatives;
5. The preparer's rationale for the choice selected, including reasons for the alternative or estimate selected and linkage of the rationale to investors' information needs and the judgments of competent external parties;
6. Linkage of the alternative or estimate selected to the substance and business purpose of the transaction or issue being evaluated;
7. The level of input from people with an appropriate level of professional expertise;[48]
8. The preparer's consideration of known diversity in practice regarding the alternatives or estimates;[49]
9. The preparer's consistency of application of alternatives or estimates to similar transactions;
10. The appropriateness and reliability of the assumptions and data used;
11. The adequacy of the amount of time and effort spent to consider the judgment.

When considering these factors, it would be expected that the amount of documentation, disclosure, input from professional experts, and level of effort in making a judgment would vary based on the complexity, nature (routine versus non-routine) and materiality of a transaction or issue requiring judgment.

Material issues or transactions should be disclosed appropriately. We note that existing disclosure requirements should be sufficient to generate[50] transparent disclosure that enables an investor to understand the transaction and assumptions that were critical to the judgment. The SEC has provided in the past, and should continue to consider providing, additional guidance on existing disclosure requirements to encourage more transparent disclosure. In addition, when evaluating the reasonableness of a judgment, regulators should take into account the disclosure relevant to the judgment.

Documentation—The alternatives considered and the conclusions reached should be documented contemporaneously. The lack of contemporaneous documentation may not mean that a judgment was incorrect, but would complicate an explanation of the nature and propriety of a judgment made at the time of the release of the financial statements.

Exhibit D

SEC Advisory Committee on Improvements to Financial Reporting

Delivering Financial Information Subcommittee Update

May 2, 2008 Full Committee Meeting

I. Introduction

The SEC's Advisory Committee on Improvements to Financial Reporting (Committee) issued a progress report (Progress Report) on February 14, 2008.[51] In chapter 4 of the Progress Report, the Committee discussed its work-to-date in the area of delivering financial information including its developed proposals relating to XBRL tagging of financial information and improved use of corporate Web sites and its future considerations relating to disclosure of key performance indicators, improved quarterly press release disclosures and timing, and the inclusion of executive summaries in public company periodic reports.

Since the issuance of the Progress Report, the delivering financial information subcommittee (Subcommittee IV) has deliberated further the areas of improved use of

[48] In many cases, input from professional experts would include consultation with a preparer's independent auditors or other competent external parties, such as valuation specialists, actuaries or counsel.

[49] If there is not diversity in practice, it would be significantly harder to select a different alternative.

[50] Existing disclosure requirements would include the guidance on critical accounting estimates in the Commissions Release No. 33–8350 ''Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, the Commissions Release No. 33–8040 ''Cautionary Advice Regarding Disclosure About Critical Accounting Policies'' and Accounting Principles Board Opinion No. 22 ''Disclosure of Accounting Policies''. We also encourage the SEC to continue to remind preparers of ways to improve the transparency of disclosure, such as through statements like the Sample Letter sent to Public Companies on MD&A Disclosure Regarding the Application of SFAS 157 (Fair Value Measurements) issued by the Division of Corporation Finance in March 2008.

[51] Refer to Progress Report at *http://www.sec.gov/rules/other/2008/33–8896.pdf*.

corporate Web sites, disclosure of key performance indicators, improved quarterly press release disclosures and timing and inclusion of executive summaries. This report represents Subcommittee IV's latest thinking, including its consideration of input received through comment letters and received orally at the March 14, 2008 Committee meeting in San Francisco and subsequent Subcommittee meeting with industry participants. Subject to further public comment, Subcommittee IV will recommend the following preliminary hypotheses to the full Committee for its consideration in developing the final report, which it expects to issue in July 2008.

II. XBRL

In the Progress Report, the Committee issued a developed proposal regarding XBRL (developed proposal 4.1). Refer to the Progress Report for additional discussion of this developed proposal. At the Committee meeting on March 14, 2008 held in San Francisco, the Committee received oral and written input from market participants regarding the XBRL developed proposal. The Subcommittee understands the SEC has scheduled an open meeting on May 14, 2008 to consider whether to propose amendments to provide for corporate financial statement information to be filed with the SEC in interactive data format, and a near- and long-term schedule therefore. Subcommittee IV proposes no revisions at this time to the developed proposal.

III. Use of Corporate Web Sites

In the Progress Report, the Committee issued a developed proposal regarding the use of corporate Web sites and the development of uniform best practices regarding corporate Web site use by industry participants (developed proposal 4.2). Refer to the Progress Report for additional discussion of this developed proposal. The Committee heard additional input from industry participants, including newswire services, reporting companies, investors, and securities lawyers regarding the developed proposal as part of the comments received on the Progress Report. The Subcommittee heard from companies and investors about the value of corporate Web site disclosures as an additional, though not exclusive, means of providing information to the market in a timely manner available to all persons. Subcommittee IV proposes no significant revisions at this time to the developed proposals regarding corporate Web sites and industry developed best practice guidelines.

IV. Disclosures of KPIs and Other Metrics To Enhance Business Reporting

Preliminary Hypothesis 1

The SEC should encourage private sector initiatives targeted at best practice development of company use of Key Performance Indicators (KPIs) in their business reports. The SEC should encourage private sector dialogue, involving preparers, investors, and other interested industry participants, such as consortia that have long supported KPI-like concepts, to generate understandable, consistent, relevant and comparable KPIs on an industry-specific and relevant activity basis. The SEC also should encourage companies to provide, explain, and consistently disclose period-to-period company-specific KPIs. The SEC should consider reiterating and expanding its interpretive guidance regarding disclosures of KPIs in MD&A and other company disclosures.

The Committee should further acknowledge the useful work of those consortia that endeavor to go beyond the limited scope of the Committee's recommendation to provide an overall structure which provides a linking of financial and KPI indicators into a seamless whole.

Background

As the Committee noted in the Progress Report, enhanced business reporting and key performance indicators (KPIs) are disclosures about the aspects of a company's business that provide significant insight into the sources of its value. The Enhanced Business Reporting Consortium,[52] has stated that the value drivers for a business ''can be measured numerically through KPIs or may be qualitative factors such as business opportunities, risks, strategies and plans—all of which permit assessment of the quality, sustainability and variability of its cash flows and earnings.'' KPIs include supplemental non-GAAP financial reporting disclosures that proponents have stated can improve disclosures by public companies. Such KPIs also may include non-financial measures. KPIs are leading indicators of financial results and intangible assets that are not necessarily encompassed on a company's balance sheet and can provide more transparency and understanding about the company to investors. Proponents of the use of KPIs note that they are important because they inform judgments about a company's future cash flows—and form the basis for a company's stock price. Managers and boards of directors of companies use KPIs to monitor performance of companies and of management. Market participants and the SEC have identified KPIs as important supplements to GAAP-defined financial measures.

The Committee understands that investment professionals concur that investors are very interested in non-financial information as a way to better understand the businesses they invest in. They recognize that financial reports provide an accounting of past events and a current view of the financial condition of the company. The financials are viewed as an end-of-process result delivered as a combination of market conditions and company business strategies, processes and execution. The financials are, by their nature, not necessarily forward-looking indicators. Of interest to many investors from a business reporting standpoint is information regarding the fundamental drivers of the business and metrics used to give evidence as to how the business is being managed in the environment it finds itself in. Financial reporting captures some aspects of this but not all and, in fact, financial statements are not currently designed to provide a broader picture of the company and its operations.

From a corporate preparer standpoint, management uses KPIs as key metrics with which to direct the company as part of the strategic planning process both in terms of goal setting and as a way to provide analysis and feedback. In that regard the degree to which companies are comfortable sharing these metrics with shareholders, communication would be greatly enhanced. By its very nature such communication would increase the fundamental transparency of the business. Numerous prior studies have shown that greater transparency on the part of corporations reduces the company's cost of capital and no doubt improves market efficiency.

Recognizing this, the SEC encourages extensive discussion of the condition of the business in the MD&A. The SEC, in its 2003 MD&A Interpretive Release, stated ''[o]ne of the principal objectives of MD&A is to give readers a view of the company through the eyes of management by providing both a short- and long-term analysis of the business. To do this, companies should 'identify

[52] The Enhanced Business Reporting Consortium was founded by the AICPA, Grant Thornton LLP, Microsoft Corporation, and PricewaterhouseCoopers in 2005 upon the recommendation of the AICPA Special Committee on Enhanced Business Reporting. The EBRC is an independent, market-driven non-profit collaboration focused on improving the quality, integrity and transparency of information used for decision-making in a cost-effective, time efficient manner.

and address those key variables and other qualitative and quantitative factors which are peculiar to and necessary for an understanding and evaluation of the individual company'.'' In this regard, the SEC noted the importance of disclosures of key performance measures—''when preparing MD&A, companies should consider whether disclosure of all key variables and other factors that management uses to manage the business would be material to investors, and therefore required. These key variables and other factors may be non-financial, and companies should consider whether that non-financial information should be disclosed.'' The SEC went on to state that ''[i]ndustry-specific measures can also be important for analysis, although common standards for the measures also are important. Some industries commonly use non-financial data, such as industry metrics and value drivers. Where a company discloses such information, and there is no commonly accepted method of calculating a particular non-financial metric, it should provide an explanation of its calculation to promote comparability across companies within the industry. Finally, companies may use non-financial performance measures that are company-specific.'' [53]

This discussion is intended to give information about the business in a way that is consistent with the manner in which the business is run.

Discussion

The Subcommittee's hypothesis extends beyond a narrow definition of financial reporting to business reporting more generally. The Subcommittee has been evaluating whether public companies should increase their voluntary disclosure of financial and non-financial performance measures or indicators, such as KPIs. The Subcommittee has examined the current practices of public companies and notes that many companies are already disclosing some company-specific KPIs in their periodic reports filed with the SEC or in other public statements, but these company-specific measures may not necessarily be consistently reported by companies from period-to-period, are not necessarily well-defined, and may not be commonly used by other companies in the same industry so that they lend themselves to comparisons between and among companies. Therefore, as part of its review of KPI disclosure, the Subcommittee has evaluated the kinds of KPIs that should be made available, in what format, and whether they should be consistently defined over time. The Subcommittee has found that various groups, within and outside industries, are working on developing industry-specific and activity-specific KPIs in order to improve comparability of companies on an industry basis.

In developing its preliminary hypothesis on KPIs and other possible metrics to enhance business reporting, the Subcommittee consulted with industry members and others who have been working on this subject. As a result of these discussions and its evaluation of other materials, the Subcommittee preliminarily believes that further exploration of the use of KPIs and other metrics by public companies would be constructive.

Accordingly, for KPI reporting to be most effective and improve user understanding, the Subcommittee is considering that the full Committee recommend that companies should consider the following to improve KPI disclosures.[54]

- *Understandability*—The Subcommittee believes that a given KPI term, such as ''same store sales,'' would be most useful in evaluating the relevant industry or activity if it had a standard agreed definition in the industry. For that reason, as part of its preliminary hypothesis, the Subcommittee notes that the SEC should explore ways to encourage private initiatives in various industries for the development of standard KPI definitions. It is presumed that there would be some terms that would be macro in nature that companies from all industries would make use of and thus would be activity-based, but it is assumed that many KPI terms would be industry-specific. Once a term has been defined by industry, the SEC and other global regulators should work with industry to support the use of such term in periodic and other company reports, with such modified or additional disclosures as the SEC and other global regulators deem necessary or appropriate. Companies should be encouraged to use such industry-defined terms and to disclose any differences in their use of terms from any industry-defined and accepted definition. Companies would still have the freedom to use whatever terms they wished in describing their businesses but would be expected to make clear any differences between their definitions and those that have been industry defined.
- *Consistency*—Whether or not a company uses an industry-defined term for its KPI disclosures, the KPI that is used should be reported consistently from period-to-period. Any changes in the definition of a KPI should be disclosed, along with the reasons for the change. KPIs should be reported not just for the current period but for prior periods as well so that investors can assess the company's development from period-to-period or year-to-year.
- *Relevancy*—KPI that are disclosed should be important to an understanding and tracking of the business or business segments for which they are used and should align with how reporting companies run their business.
- *Presentability*—When companies disclose KPIs in their reports and other releases, they should make clear to ordinary investors that the information is intended to provide information about the business of the company that is separate from and supplemental to the financial statements. This could either be done in a separate KPI section in MD&A or in subsections of parts of the MD&A, such as the general business discussion or the discussion by business segment. Segment reporting of KPIs, given the logical connection to business line activities, could be very useful. The inclusion of tabular presentations showing current and prior periods should be seriously considered.
- *Comparability*—Encouraging companies to use industry-defined KPI's would enable investors to compare companies within and across industries and would also be quite useful at the industry segment level. Once industry-defined KPIs are available, the Subcommittee would hope that investor interest would encourage companies to use commonly defined KPI terms.

The Subcommittee has heard that some companies may be hesitant about increased disclosure of KPIs because of concern that disclosure of these metrics may compromise competitive information.[55] Neither the Subcommittee nor investors want companies to give away the ''crown jewels.'' The Subcommittee has also heard questions about the validity of many of such competitive harm claims, particularly where information is widely known within a particular

[53] SEC, *Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations,* Securities Act Release No. 33–8350 (December 19, 2003) (2003 MD&A Interpretive Release).

[54] The Subcommittee notes that the SEC has provided guidance as to some of these matters as well in its 2003 MD&A Interpretive Release as discussed above. The SEC noted that ''[t]he focus on key performance indicators can be enhanced not only through the language and content of the discussion, but also through a format that will enhance the understanding of the discussion and analysis.''

[55] The Subcommittee also heard a question as to the liability treatment of KPIs.

industry. The Subcommittee has heard that there is already so much information about companies that disclosure of unique competitive information would be rare. Nevertheless, the Subcommittee preliminarily believes that if a particular KPI could require the disclosure of competitively important information, the affected company could decline to disclose it.

In an ideal disclosure system, non-financial and financial indicators and elements would be presented within a cohesive framework that combines KPIs and other indicators with GAAP data and text discussion in order to create a complete picture of a company. At this time, the Subcommittee believes that having the Committee propose to mandate or suggest such an organized structure is outside the scope of what the Subcommittee is evaluating, might be premature and inappropriate for a regulator or standard setter, possibly being too prescriptive.

Rather, the Subcommittee's preliminary hypothesis believes that the SEC should encourage an industry driven initiative with significant investor involvement to develop best practices that companies could follow in developing and disclosing KPIs. Just as financial reporting standards and the recently developed XBRL taxonomy may improve business reporting by creating standardized language, the Subcommittee believes the development of a KPI dictionary, developed on an industry basis but also allowing for company-specific definitions, also could provide valuable information to investors.

Thus, the Subcommittee has developed a preliminary hypothesis that is based on a number of industry-driven initiatives, with significant investor involvement, to develop best practices and common definitions for KPIs that companies could follow in disclosing KPIs. The hypothesis suggests that companies, investors, and business reporting consortiums should work together to develop industry-wide and activity-specific KPIs that conform to uniform or standard definitions, as well as company-specific KPIs. These KPIs should then be disclosed in a company's periodic reports, as well as other disclosure formats such as earnings releases. The hypothesis suggests that the KPIs:

- Be clearly and consistently defined to allow investors understanding of the meanings of the KPIs;
- Be disclosed, as relevant, on a company and/or segment basis; and
- Permit cross-company and cross-industry comparisons.

The Subcommittee does not believe that the mandatory reporting of KPIs is desirable at this time. Instead, the Subcommittee believes that the Committee should consider encouraging the SEC to promote the development of commonly recognized and defined KPIs by industry groups.

Integration With Other Proposals

The Subcommittee preliminarily believes that the formalization of KPI disclosures through commonly recognized definitions, will enhance the benefits that will come from other proposals from the Committee. For example, disclosing KPIs on company Web sites would allow investors and other users of the reported information to gain an improved understanding of the prospects for a company and could lead to better capital market pricing.

V. Improved Quarterly Press Release Disclosures and Timing

Preliminary Hypothesis 2

Industry groups, including the National Investor Relations Institute, FEI, and the CFA Institute should update their best practices for earnings releases. Such updated best practices guidance should cover, among other matters, the type of information that should be provided in earnings releases and the need for investors to receive information that is consistent from quarter to quarter, with an explanation of any changes in disclosures from quarter to quarter. Further, the best practices guidance should consider recommending that companies include in their earnings releases the income statement, balance sheet and cash flow tables, locate GAAP reconciliations in close proximity to any non-GAAP measures presented, and provide more industry and company specific key performance indicators.

The SEC should consider reinforcing its view that disclosures in connection with earnings calls posted on company Web sites should be maintained and available on such sites for at least 12 months.

Background

As noted in the Progress Report, the quarterly earnings release, often the first corporate communication about the result of the quarter just ended, is viewed as an important corporate communication. This communication often receives more attention than the formal Form 10–Q submission which often occurs a week or two later.

The quarterly earnings release is not currently required to contain mandated information other than that required by the application of Regulation G to the presentation of non-GAAP measures and the antifraud provisions of the federal securities laws. Industry groups have previously coordinated in developing best practices for reporting companies to follow in preparing their earnings releases. In addition, under SEC rules, companies must furnish earnings releases to the Commission on a Form 8–K. Investors and other market participants have expressed concern about the matters relating to earnings releases, including consistency of information provided in such releases, the timing of such releases in relation to the filing of the applicable periodic report, and the inclusion of earnings guidance in such earnings releases.

Discussion

The Subcommittee has been examining a number of issues relating to the earnings release, including with regard to its consistency, understandability, timeliness, and the continued public availability of earnings conference calls. The Subcommittee had an opportunity to discuss the quarterly earnings release and these related matters with investor and company representatives. In addition, the Subcommittee considered the consistent provision of income statement, balance sheet and cash flow tables in the quarterly earnings release as well as the positioning and prominence of GAAP and non-GAAP figures, GAAP reconciliation, the consistent placement of topics, and clear communication of any changes to accounting methods or key assumptions. The Subcommittee viewed the goal for the earnings release to be a consistent, reliable communication form that all investors can easily navigate.

The Subcommittee also briefly discussed the advisability of requiring the issuance of the earnings releases on the same day that the periodic report (e.g., Form 10–Q) is filed, in contrast to the current practice in which the earnings release often is issued before the periodic report is filed. The Subcommittee heard from company and investor representatives in this regard and took note of the comments that the SEC received in connection with a prior request for comment to tie the filing of the quarterly report to the issuance of an earnings release. The Subcommittee understood that the practices of companies in this regard may differ depending on the size of the company and the company's own disclosure practices. For example, the Subcommittee understands that some large companies issue their earnings release at the same time as the filing of

their quarterly reports. The Subcommittee also heard that smaller companies tended to wait to issue their earnings releases so that their news would not be eclipsed by news of larger and more well followed companies. While investors noted an interest in having the earnings release issued at the same time as the Form 10–Q is filed to avoid duplication of effort in analyzing the company's disclosures, representatives of companies and others expressed concern about the effect of delays in disclosing material non-public information about the quarter or year end. Investors also expressed concern regarding the trading of company stock by executives after the issuance of the earnings release but before the filing of the Form 10–Q and questioned whether executives could be prohibited from engaging in trading until after the Form 10–Q was filed.

The Subcommittee determined not to include a preliminary hypothesis that would change current market practice regarding the issuance of earnings releases but would suggest that, instead, the SEC monitor company practices in regard to the timing of the earnings release in relation to the filing of the relevant periodic report with the SEC.

The Subcommittee also heard concerns that companies were not keeping their earnings calls and related information posted on their Web sites for more than one quarter after the call, thus making quarterly comparisons difficult. The Subcommittee noted that the SEC had suggested that companies keep their Web site disclosures regarding GAAP reconciliations for non-GAAP measures presented on earnings calls available on their Web sites for at least a 12-month period and the Subcommittee's preliminary hypothesis would suggest that the SEC reiterate this guidance.[56]

The Subcommittee briefly discussed the practices of some companies in providing earnings guidance or public projections of next quarter's earnings by company officials, since some believe that this practice is an important underlying source of reporting complexity and other accounting problems. The Subcommittee also discussed the provision of annual guidance that may be updated quarterly. The Subcommittee does not intend to continue its evaluation of quarterly earnings guidance or to suggest any preliminary hypothesis regarding the provision of quarterly earnings guidance at this time because it notes that many others are evaluating the issues arising from the provision of quarterly earnings guidance.

VI. Use of Executive Summaries in Exchange Act Periodic Reports

Preliminary Hypothesis 3

The SEC should mandate the inclusion of an executive summary in the forepart of a reporting company's filed annual and quarterly reports. The executive summary should provide summary information, in plain English, in a narrative and perhaps tabular format of the most important information about a reporting company's business, financial condition, and operations. As with the MD&A, the executive summary should be required to use a layered approach that would present information in a manner that emphasizes the most important information about the reporting company and include cross-references to the location of the fuller discussion in the annual report. The requirement for the executive summary should build on the company's MD&A overview and essentially be principles-based, other than a limited number of required disclosure items such as:

- A summary of a company's current financial statements;
- A digest of the company's GAAP and non-GAAP KPIs (to the extent disclosed in the company's 10–Q or 10–K);
- A summary of key aspects of company performance;
- A summary of business outlook;
- A brief description of the company's business, sales and marketing; and
- Page number references to more detailed information contained in the document (which, if the report is provided electronically, could be hyperlinks).

Background

Reporting companies are not currently required to include any type of summary in their periodic reports, although a summary of the company and the securities it is offering is a line-item disclosure in Securities Act registration statements. Companies, therefore, are familiar with the concept of summarizing the important aspects of their business and operations at the time they are raising capital. The Subcommittee has heard that retail investors find it difficult at times to navigate through a company's periodic reports, including its Form 10–K annual report. The Subcommittee has been evaluating the use of an executive summary in the forepart of a company's annual and quarterly Exchange Act reports to facilitate the ready delivery of important information to investors by providing them a roadmap of the disclosures contained in such reports.

Discussion

The Subcommittee has been exploring a requirement to include an executive summary in reporting company annual and quarterly Exchange Act reports (Forms 10–K and 10–Q). The Subcommittee has met with investor and company representatives as well as securities counsel. The Subcommittee understands that a summary report prepared on a stand-alone basis would not necessarily provide investors with information they need in a desired format and that investors would not use such a summary. However, the Subcommittee understands that an executive summary included in the forepart of an Exchange Act periodic report may provide investors, particularly retail investors, with an important roadmap to the company's disclosures located in the body of such a report.[57] The executive summary in the Exchange Act periodic report would provide summary information, in plain English, in a narrative and perhaps tabular format of the most important information about a reporting company's business, financial condition, and operations. As with the MD&A, the executive summary would use a layered approach that would present information in a manner that emphasizes the most important information about the reporting company and include cross-references to the location of the fuller discussion in the annual report.

As noted in the Progress Report and as contemplated in the Subcommittee's preliminary hypothesis, the goal of the executive summary would be to help investors fundamentally understand a company's businesses and activities through a relatively short, plain English presentation. An executive summary in a periodic report may be most useful if it includes high-level summaries across a broad range of key components of the annual or quarterly report, rather than detailed discussion of a limited number of variables. The executive summary approach may be an efficient way to provide all investors, including retail investors, with a concise overview of a company, its business, and its financial condition. For the more sophisticated investor, an executive summary may be

[56] See SEC *Conditions for Use of Non-GAAP Measures*, Exchange Act Release No. 34–47226 (Jan. 22, 2003).

[57] Such reports generally are posted on company Web sites as well so that the executive summaries would be electronically available with hyperlinks to the more detailed information in the relevant report.

helpful in presenting the company's unique story which the sophisticated investor could consider as it engages in a more detailed analysis of the company, its business and financial condition.

The executive summary in a periodic report should be brief, and it might fruitfully build on the overview that the SEC has identified should be in the forepart of the MD&A disclosure. The MD&A overview is expected to ''include the most important matters on which a company's executives focus in evaluating the financial condition and operating performance and provide context.'' [58] The executive summary should build on the MD&A overview disclosure and include the following:

1. A summary of a company's current financial statements;
2. A digest of the company's GAAP and non-GAAP KPIs (to the extent disclosed in the company's 10–Q or 10–K);
3. A summary of key aspects of company performance;
4. A summary of business outlook;
5. A brief description of the company's business, sales and marketing;
6. Page number references to more detailed information contained in the document (which, if the report is provided electronically, could be hyperlinks).

The Subcommittee's preliminary hypothesis provides that the executive summary should be required to be included in the forepart of a reporting company's annual or quarterly report filed with the SEC or, if a reporting company files its annual report on an integrated basis (the glossy annual report is provided as a wraparound to the filed annual report), the executive summary instead could be included in the forepart of the glossy annual report. If the executive summary was included in the glossy annual report, it would not be considered filed with the SEC. The Subcommittee understands that the inclusion of a summary in the body of the periodic report should not give rise to additional liability implications.

VII. Continued Need for Improvements in the MD&A and Other Public Company Financial Disclosures

The Committee noted in chapter 4 of the Progress Report that while investors and other market participants believe that while there has been some improvement in the MD&A disclosures since publication of the SEC's interpretive release in 2003, significant improvement is still needed. The Subcommittee evaluated the MD&A and other public company disclosures in the context of its preliminary hypotheses regarding disclosures of key performance indicators, earnings releases, and use of executive summaries in periodic reports.

[58] See 2003 MD&A Interpretive Release above.

[FR Doc. E8–11276 Filed 5–21–08; 8:45 am]

BILLING CODE 8010–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11249 and #11250]

Oklahoma Disaster #OK–00020

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of Oklahoma (FEMA–1756–DR), dated 05/14/2008.

Incident: Severe Storms, Tornadoes, and Flooding

Incident Period: 05/10/2008 and continuing.

EFFECTIVE DATE: 05/14/2008.

Physical Loan Application Deadline Date: 07/14/2008.

Economic Injury (EIDL) Loan Application Deadline Date: 02/16/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 05/14/2008, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans): Ottawa.

Contiguous Counties (Economic Injury Loans Only):

Oklahoma: Craig, Delaware.
Kansas: Cherokee.
Missouri: McDonald, Newton.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	5.375
Homeowners Without Credit Available Elsewhere	2.687
Businesses With Credit Available Elsewhere	8.000
Other (Including Non-Profit Organizations) With Credit Available Elsewhere:	5.250
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere:	4.000

The number assigned to this disaster for physical damage is 11249B and for economic injury is 112500.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. E8–11466 Filed 5–21–08; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11199]

Missouri Disaster Number MO–00024

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Missouri (FEMA–1749–DR), dated 03/19/2008.

Incident: Severe Storms and Flooding.

Incident Period: 03/17/2008 through 05/09/2008.

EFFECTIVE DATE: 05/09/2008.

Physical Loan Application Deadline Date: 05/19/2008.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Missouri, dated 03/19/2008, is hereby amended to establish the incident period for this disaster as beginning 03/17/2008 and continuing through 05/09/2008.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

James E. Rivera,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. E8–11475 Filed 5–21–08; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11203 and #11204]

Missouri Disaster Number MO–00025

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Missouri (FEMA–1749–DR), dated 03/27/2008.

Incident: Severe Storms and Flooding.

Incident Period: 03/17/2008 and continuing through 05/09/2008.

EFFECTIVE DATE: 05/09/2008.

Physical Loan Application Deadline Date: 05/27/2008.

EIDL Loan Application Deadline Date: 12/23/2008.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of Missouri, dated 03/27/2008 is hereby amended to establish the incident period for this disaster as beginning 03/17/2008 and continuing through 05/09/2008.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. E8–11482 Filed 5–21–08; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages that will require clearance by the Office of Management and Budget (OMB) in compliance with Public Law (Pub. L.) 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. The information collection package in this notice is for a revision to an OMB-approved information collection.

SSA is soliciting comments on the accuracy of the Agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and ways to minimize the burden on respondents, including the use of automated collection techniques or other forms of information technology. Submit written comments and recommendations on the information collection to the SSA Reports Clearance Officer. Mail, fax or e-mail the information to the address and fax number listed below:

(OMB): Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, E-mail address: *OIRA_Submission@omb.eop.gov*.

(SSA): Social Security Administration, DCBFM, Attn: Reports Clearance Officer, 1333 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–965–6400, E-mail address: *OPLM.RCO@ssa.gov*.

We are submitting the information collection below to OMB for clearance. Your comments on the information collection will be most useful if you send them to OMB and SSA within 30 days from the date of this publication. You can obtain a copy of the OMB clearance package by calling the SSA Reports Clearance Officer at 410–965–0454, or by writing to *OPLM.RCO@ssa.gov*.

Social Security Benefits Application (Internet, Retirement Survivor & Disability)—20 CFR 404.310–.311, 404.315–.322, 404.330–.333, 404.601–.603, 404.1501–.1512, Subpart D, Subpart G & Subpart P—0960–0618. Members of the public seeking Social Security benefits must first file an application for the desired type of payment. The Internet Social Security Benefits Application (ISBA) is an online system that allows members of the public to apply electronically for Retirement Insurance Benefits, Disability Insurance Benefits, and Spouse's Insurance Benefits. This information collection includes: (1) ISBA; (2) paper forms (Forms SSA–1, SSA–2, and SSA–16) for these various benefits; and (3) Modernized Claims System for these benefits, which allows SSA field office employees to enter information in an application system during interviews with applicants in a direct input process. For each part of this information collection, we ask applicants only those questions that are relevant to the specific type of benefit they are seeking. This information collection request (ICR) is for changes we are making to the ISBA application, including: (1) the ability for third parties to complete applications in ISBA and (2) redesign changes that will make the application less time-consuming. The respondents are applicants for Retirement, Disability, or Spouse's Insurance Benefits or their third-party representatives.

Type of Request: Revision to an OMB-approved information collection.

ISBA Burden Information:

Form type	Number of respondents	Frequency of response	Average burden per response (minutes)	Total burden (hours)
ISBA 3rd Party	28,118	1	15	7,030
ISBA Applicant after 3rd Party Completion	28,118	1	5	2,343
First Party ISBA	541,851	1	15	135,463
Totals	598,087			144,836

Paper Forms/Accompanying MCS Screens Burden Information:

Form SSA–1:

Collection method	Number of respondents	Frequency of response	Average burden per response (minutes)	Total burden (hours)
MCS	172,200	1	11	31,750
MCS/Signature Proxy	1,549,800	1	10	258,300
Paper	21,000	1	11	3,850
Totals	1,743,000			293,900

Form SSA–2:

Collection method	Number of respondents	Frequency of response	Average burden per response (minutes)	Total burden (hours)
MCS	36,860	1	15	9,215
MCS/Signature Proxy	331,740	1	14	77,406
Paper	3,800	1	15	950
Totals	372,400			87,571

Form SSA–16:

Collection method	Number of respondents	Frequency of response	Average burden per response (minutes)	Total burden (hours)
MCS	218,657	1	20	72,886
MCS/Signature Proxy	1,967,913	1	19	623,172
Paper	24,161	1	20	8,054
Totals	2,210,732			704,112

Dated: May 19, 2008.

Elizabeth A. Davidson,

Reports Clearance Officer, Social Security Administration.

[FR Doc. E8–11542 Filed 5–21–08; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 6233]

Culturally Significant Objects Imported for Exhibition Determinations: ''Women Impressionists: Berthe Morisot, Mary Cassatt, Eva Gonzales, Marie Bracquemond''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition ''Women Impressionists: Berthe Morisot, Mary Cassatt, Eva Gonzales, Marie Bracquemond'', imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Fine Arts Museums of San Francisco, de Young Legion of Honor, San Francisco, California, from on or about June 21, 2008, until on or about September 21, 2008, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Richard Lahne, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/453–8058). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: May 14, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E8–11533 Filed 5–21–08; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. FHWA–2008–0067]

Agency Information Collection Activities: Notice of Request for Renewal of a Previously Approved Information Collection

AGENCY: Office of the Secretary (OST), DOT.

ACTION: Notice and request for comments.

SUMMARY: The OST invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for renewal of a previously approved information collection that is summarized below under **SUPPLEMENTARY INFORMATION**. We are required to publish this notice in the

Federal Register by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by July 21, 2008.

ADDRESSES: You may submit comments identified by DOT DMS Docket Number FHWA–2008–0067 by any of the following methods:

Web Site: http://dms.dot.gov. Follow the instructions for submitting comments on the DOT electronic docket site.

Fax: 1–202–493–2251.

Mail: Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590.

Hand Delivery: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Jon Obenberger, 202–366–2221, Office of Infrastructure, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Utility Adjustments, Agreements, Eligibility Statements and Accommodation Policies.

OMB Control #: 2125–0519.

Background: Federal laws dealing with the relocation and accommodation of utility facilities associated with the right-of-way of highway facilities are contained in the United States Code (U.S.C.) 23, Sections 123 and 109(I)(1). Regulations dealing with the utility facility accommodation and relocation are based upon the laws contained in 23 U.S.C. and are found in the Code of Federal Regulations (CFR), Title 23, Chapter I, Subchapter G, Part 645, subparts A and B.

The FHWA requires (23 CFR 645 subpart A—Utility Relocations, Adjustments, and Reimbursement) developing and recording costs for utility adjustments, as the basis for reimbursing State Departments of Transportation (SDOTs) and local agency transportation departments, when they have paid the costs of utility facilities relocations that were required by the construction of Federal-aid highway projects. The FHWA requires the utility companies to document the costs or expenses for adjusting their facilities. These utility companies must have a system for recording labor, materials, supplies and equipment costs incurred when undertaking adjustments to accommodate the highway projects. This record of costs forms the basis for payment by the SDOT or local transportation department to the utility company. In turn the FHWA reimburses the SDOT or local transportation department for its payment to the utility company. The utility company is required to maintain these records of costs for 3 years after final payment is received.

The SDOT and/or local agency transportation departments are responsible for maintaining the highway rights-of-way, including the control of its use by the utility companies. In managing the use of the highway rights-of-way, the SDOT and/or local agency transportation department is required (23 CFR 645.205 and 23 CFR 645.213) to document the terms under which utility facilities are allowed to cross or otherwise occupy the highway rights-of-way, in the form of utility use and occupancy agreements (formerly OMB Control #: 2125–0522) with each utility company. This documentation, consisting of a use and occupancy agreement (permit), must be in writing and must be maintained in the SDOT and/or local agency transportation department.

Each SDOT is required (23 CFR 615.215) to submit to the FHWA a utility adjustment eligibility statement (formerly OMB Control #: 2125–0515) that establishes the SDOT's legal authority and policies it employs for accommodating utilities within highway right-of-ways or obligation to pay for utility adjustments. FHWA has previously reviewed and approved these eligibility statements for each State DOT. The statements are used as a basis for Federal-aid reimbursement in utility relocation costs under the provisions of 23 U.S.C. 123. Updated statements may be submitted for review at the State's discretion where circumstances have modified (for example, a change in State statute) the extent to which utility adjustments are eligible for reimbursement by the State or those instances where a local SDOT's legal basis for payment of utility adjustments differs from that of the State.

Each SDOT's is also required (23 CFR 645.215) to develop and submit to FHWA their utility accommodation policies (formerly OMB Control #: 2125–0514) that will be used to regulate and manage the utility facilities within the rights-of-way of Federal-aid highway projects. The agencies' utility accommodation policies need to address the basis for utility facilities to use and occupy highway right-of-ways; the State's authority to regulate such use; and the policies and/or procedures employed for managing and accommodating utilities within the right-of-ways of Federal-aid highway projects. Upon FHWA's approval of the policy statement, the SDOT may take any action required in accordance with the approved policy statement without a case-by-case review by the FHWA. In addition, the utility accommodation policy statements that have been approved previously by the FHWA are periodically reviewed by the SDOT's to determine if updating is necessary to reflect policy changes.

Respondents: 52 SDOT's, including the District of Columbia and Puerto Rico, local agency transportation departments, and utility companies.

Frequency: Developing and recording costs and expenses for utility adjustments are submitted as they occur during the year (annually) by utility companies to SDOTs or local agency transportation departments. The SDOT's and local agency transportation departments are each involved in an average of 15 utility use and occupancy agreements (or permits) per year for an annual frequency of 69,000. SDOT's are allowed to submit their eligibility statement for utility adjustments and their utility accommodation policies when warranted by changes or updates occur, or at the SDOT's discretion. It is estimated 10 SDOT's will update either their eligibility statement for utility agreements or utility accommodation policies per year.

Estimated Average Annual Burden per Response: The estimated average amount of time required to develop and record the costs for each utility adjustment is 8 hours. The estimated amount of time required by the SDOT's and local agency transportation departments to process each utility use and occupancy agreement (permit) is 8 hours. The estimated amount of time for each update to the SDOT's eligibility statement for utility adjustments has an average burden of 18 hours. The estimated amount of time for each update and submittal of a SDOT's utility accommodation policy has an average burden of 280 hours.

Estimated Total Annual Burden Hours: The annual burden associated with developing and recording the costs for adjusting utility facilities is 72,000 hours based on an estimate of 9,000 adjustments that utility companies

perform annually that may be eligible for Federal-aid highway funding allowing SDOT's or local agency transportation departments to request reimbursement from FHWA. The annual burden associated with preparing, submitting and approving utility use and occupancy agreements (permits) is 552,000 burden-hours. The annual burden associated with developing and approving updates to SDOT's eligibility statement for utility adjustments is 90 hours. The annual burden associated with developing and approving updates to SDOT's utility accommodation policies is 1,400 hours. The accumulated burden for the combined information collection is 625,490.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued On: May 15, 2008.

Judith Kane,

Team Leader, Management Programs and Analysis Division.

[FR Doc. E8–11438 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Fourth Meeting, RTCA Special Committee 216: Aeronautical System Security

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 216, Aeronautical Systems Security.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 216: Aeronautical Systems Security.

DATES: The meeting will be held on June 10–12, 2008, from 9 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at RTCA, Inc. 1828 L Street, NW., Suite 805, Washington, DC, 20036.

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC, 20036–5133; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 216 meeting. The agenda will include:

- June 10–12:
- Opening Session (Welcome, Introductory and Administrative Remarks, Agenda Overview);
- Subgroup reports;
- EUROCAE WG–72 Report;
- Other Industry activities related to Security—Reports;
- Presentation—Test and accreditation of commercially derived military Aircraft;
- Evaluation of status, progress, and direction based on subgroup recommendations and Terms of Reference;
- Continued development of SC–216 work products;
- Closing Session (Other Business, Assignment/Review of Future Work, Establish Agenda, Date and Place of Next Meeting, Closing Remarks, Adjourn).

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on May 12, 2008.

Francisco Estrada C.,

RTCA Advisory Committee.

[FR Doc. E8–11270 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA Special Committee 218/Future ADS–B/TCAS Relationships

AGENCY: Federal Aviation Administration (FAA), DOT

ACTION: Notice of RTCA Special Committee 218/Future ADS–B/TCAS Relationships

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 218/Future ADS–B/TCAS Relationships

DATES: The meeting will be held June 17–18, 2008, from 9 a.m.–5 p.m.

ADDRESSES: The meeting will be held at RTCA, Inc., 1828 L Street, NW., Suite 805, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: (1) RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (P.L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 218/Future ADS–B/TCAS Relationships meeting.

- June 17–18:
- Open Plenary (Welcome, Introductions, Administrative Remarks, Agenda Review);
- RTCA Functional Overview;
- Industry Activities Related to ADS–B/TCAS—Review;
- Committee Scope—Terms of Reference:
- Presentation, Discussion, Recommendations;
- European I EUROCAE Review;
- Organization of Work, Assign Tasks and Workgroup;
- Presentations, Discussions, Recommendations;
- Assignment of Responsibilities;
- Consider/Review Liaison with Other Active Committees;
- Closing Session (Next Meeting Dates, Location and Agenda for Next meeting, Other Business).

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on May 12, 2008.

Francisco Estrada C.,

RTCA Advisory Committee.

[FR Doc. E8–11272 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Fourth Meeting, Special Committee 214: Standards for Air Traffic Data Communication Services Joint With EUROCAE Working Group 78 (WG–78)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 214, Standards for Air Traffic Data Communication Services Joint with EUROCAE Working Group 78 (WG–78).

SUMMARY: The FAA is issuing this notice to advise the public of a first meeting of RTCA Special Committee 214, Standards for Air Traffic Data Communication Services Joint with EUROCAE Working Group 78 (WG–78).

DATES: The meeting will be held June 16–20, 2008 from 10 a.m.–4 p.m.

ADDRESS: The meeting will be held at EUROCAE, 102 rue Etienne Dolet, 92240 MALAKOFF, Phone: 33/1 40 92 79 30, Fax: 33/1 46 55 62 65.

FOR FURTHER INFORMATION CONTACT: David Bowen, e-mail: *david.bowen@skynet.be;* Local contact: Samira Bezza, e-mail: *eurocae@eurocae.net.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 214 meeting. The agenda will include:

- June 16:
- Welcome, Review Status and Needs (aka Tutorials), Approval of Agenda;
- SC–214 work so far and the SC–214/WG–78 Work Plan:
- Review of the work of the Subgroups so far: SG–1, SG–2 and SG–3;
- Introduction to the Environment Definitions produced by SG–1;
- Introduction to the new OSA methodology;
- Introduction to the OPA methodology;
- Introduction to the Interop methodology.
- June 17:
- Welcome and Approval of the Agenda for Days 2–5;
- Report of Last SC–214 meeting including Approval of Summary;
- Election of EUROCAE WG–78 Chairman and Subgroup co-chairs;
- Subgroup Reports and Action Item Review:
- SG–1, SG–2 and SG–3 reports;
- Review/Approve of OSA and OPA methodologies.
- June 18–19:
- Subgroup Reports;
- Review/Approve the OSEDs for all services;
- Review/Approve the D–OTIS, ACL, ACM, DLIC and DCL OSAs in the new Environments;
- Review Committee Plan—Master Schedule—Terms of Reference;
- Closing Session (Next Meeting Dates, Location and Agenda for Next meeting).

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on May 12, 2008.

Francisco Estrada C.,

RTCA Advisory Committee.

[FR Doc. E8–11268 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Transport Airplane Wheels and Wheel and Brake Assemblies

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of availability and request for public comment.

SUMMARY: This notice announces the availability of, and requests comment on proposed Technical Standard Order (TSO) C–135a, Transport Airplane Wheels and Wheel and Brake Assemblies. This proposed TSO tells persons seeking a TSO authorization or letter of design approval what minimum performance standards (MPS) their Transport Airplane Wheels and Wheel and Brake Assemblies must meet to be identified with the appropriate TSO marking.

DATES: Comments must be received on or before June 23, 2008.

ADDRESSES: Send all comments on this proposed TSO to: Federal Aviation Administration (FAA), Aircraft Certification Service, Aircraft Engineering Division, Technical Programs and Continued Airworthiness Branch (AIR–120), Room 815, 800 Independence Avenue, SW., Washington DC 20591. ATTN: Mr. George Soteropoulos. Or, you may deliver comments to: Federal Aviation Administration, Room 815, 800 Independence Avenue, SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: Mr. George Soteropoulos, AIR–120, Room 815, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591. Telephone: (202) 267–9796, fax: (202) 267–5340, e-mail: *george.soteropoulos@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

You are invited to comment on the proposed TSO by submitting written data, views, or arguments to the above address. Comments received may be examined, both before and after the closing date, in room 815 at the above address, weekdays except federal holidays, between 8:30 a.m. and 4:30 p.m. The Director, Aircraft Certification Service, will consider all comments received on or before the closing date before issuing the final TSO.

Background

TSO–C 135 is being revised to remove an installation criterion that is not appropriate at the article level. (Appendix 1 Para. 3.2.2.2., the last sentence.) The revision also adds Appendix 2 to the proposed TSO–C135a's MPS for transport airplane wheel and brake assemblies with electrically actuated brakes. The aforementioned MPS defines the standards for wheel and brake assemblies to be used on airplanes certified under 14 CFR part 25. These standards were defined by the FAA, adopted in SAE Aerospace Standard (AS) 5663, Minimum Performance Requirements for Transport Airplane Wheel and Brake Assemblies Using Electric Power Actuation dated January 2007. Note that compliance with this specification is not considered approval for installation on any transport airplane.

How To Obtain Copies

You can view or download the proposed TSO from its online location at: *http://www.airweb.faa.gov/rgl.* At this Web page, select ''Technical Standard Orders.'' At the TSO page, select ''Proposed TSOs.'' For a paper copy, contact the person listed in **FOR FURTHER INFORMATION CONTACT** paragraph.

Issued in Washington, DC, on May 13, 2008.

David W. Hempe,

Manager, Aircraft Engineering Division, Aircraft Certification Service.

[FR Doc. E8–11267 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice To Rescind Five Notices of Intent to Prepare Environmental Impact Statements in Virginia

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice to rescind Notices of Intent to Prepare Environmental Impact Statements.

SUMMARY: The Federal Highway Administration (FHWA) is issuing this notice to advise the public that FHWA is rescinding the Notice of Intent to prepare an Environmental Impact Statement for the following five proposals: (1) Outer Connector in Stafford and Spotsylvania Counties; (2)

I–77/I–81 Improvement Project in Wythe County; (3) Interstate 66 Multimodal Transportation and Environmental Study in Fairfax and Prince William Counties; (4) Route 29 South Bypass Improvement Project near Lynchburg; and (5) Spotsylvania Parkway in Spotsylvania County.

FOR FURTHER INFORMATION CONTACT: Ken Myers, Planning and Environmental Program Manager, Federal Highway Administration, 400 North 8th Street, Suite 750, Richmond, Virginia 23219–4825. Telephone: (804) 775–3353.

SUPPLEMENTARY INFORMATION: The FHWA is rescinding the Notice of Intent to prepare an Environmental Impact Statement for the following five proposals: (1) Outer Connector in Stafford and Spotsylvania Counties; (2) I–77/I–81 Improvement Project in Wythe County; (3) Interstate 66 Multimodal Transportation and Environmental Study in Fairfax and Prince William Counties; (4) Route 29 South Bypass Improvement Project near Lynchburg; and (5) Spotsylvania Parkway in Spotsylvania County. The corresponding Notice of Intent publication dates for each of the EISs are as follows: (1) June 1, 1995; (2) May 10, 2001; (3) January 11, 2002; (4) March 4, 2002; and (5) November 15, 2002.

(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 proposed action.)

Authority: 23 U.S.C. 315; 49 CFR 1.48.

Issued on: May 12, 2008.

Kenneth Myers,

Planning and Environmental Program Manager.

[FR Doc. E8–11452 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for a waiver of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

Long Island Railroad Company

(Waiver Petition Docket Number FRA–2008–0045)

The Long Island Railroad Company (LIRR) seeks a permanent waiver of compliance from a certain provision of the Use of Locomotive Horns at Highway-Rail Grade Crossings, 49 CFR Part 222. LIRR is seeking a waiver to permit trains to sound one short blast of the train horn when departing from 24 specific train stations, which are located no more than 50 feet from a public highway-rail grade crossing. Specifically, LIRR is seeking a waiver from the provisions of 49 CFR Part 222.21. The waiver petition is supported by the ten public authorities that are responsible for the roadways near the 24 train stations listed in the petition.

LIRR states that the modification to the final rule 49 CFR 222.21 on August 17, 2006, by the addition of 49 CFR 222.21(d), which provides that under certain conditions trains stopped in the vicinity of public highway-rail grade crossings would be able to sound their horn less than 15 seconds, still requires the railroad to blow its horn in required sequence (two longs, one short and two longs) until the lead locomotive blocks the crossing from all approaches.

LIRR states that its previous practice at these 24 train stations were to sound a short blast as the train departed the station and approached the nearby highway-rail grade crossing. LIRR states that a review of internal and FRA records for the past 10 years show no incidents occurring when trains departed from any of these stations. The approximate distance between the edge of the road to the station platform varies between 8 to 50 feet. All of the crossings are equipped with gates, flashing lights and bells. LIRR requests to return to its prior policy of sounding one short blast of its train horn when departing from the 24 train stations. It believes, based upon the lack of any incidents when trains departed from the stations under its previous practice, that the safety of those traversing the crossings, as well as LIRR's customers and employees, will not be adversely affected. It has received numerous complaints about the additional train horn noise since 49 CFR Part 222 went into effect.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.*, Waiver Petition Docket Number FRA–2008–0045) and may be submitted by any of the following methods:

1. *Web site: http://www.regulations.gov*. Follow the online instructions for submitting comments.
2. *Fax:* 202–493–2251.
3. *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
4. *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov*.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Issued in Washington, DC on May 16, 2008.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E8–11457 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2000–7257; Notice No. 47]

Railroad Safety Advisory Committee (RSAC); Working Group Activity Update

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Announcement of Railroad Safety Advisory Committee working group activities.

SUMMARY: FRA is updating its announcement of RSAC's Working Group activities to reflect its current status.

FOR FURTHER INFORMATION CONTACT: Larry Woolverton, RSAC Coordinator, FRA, 1200 New Jersey Avenue, SE., Mailstop 25, Washington, DC 20590, (202) 493–6212, or Grady Cothen, Deputy Associate Administrator for Safety, FRA, 1200 New Jersey Avenue, SE., Mailstop 25, Washington, DC 20590, (202) 493–6302.

SUPPLEMENTARY INFORMATION: This notice serves to update FRA's last announcement of working group activities and status reports as of February 1, 2008, (73 FR 6257). The 34th full RSAC Committee meeting was held February 20, 2008, and the 35th meeting is scheduled for June 11, 2008, at the National Housing Center in Washington, DC.

Since its first meeting in April of 1996, the RSAC has accepted 25 tasks. The status for each of the tasks is provided below.

Open Tasks

Task 96–4—Tourist and Historic Railroads. Reviewing the appropriateness of the agency's current policy regarding the applicability of existing and proposed regulations to tourist, excursion, scenic, and historic railroads. This task was accepted on April 2, 1996, and a working group was established. The working group monitored the steam locomotive regulation task. Planned future activities involve the review of other regulations for possible adaptation to the safety needs of tourist and historic railroads. Contact: Grady Cothen, Jr., (202) 493–6302.

Task 03–01—Passenger Safety. This task includes updating and enhancing the regulations pertaining to passenger safety, based on research and experience. This task was accepted on May 20, 2003, and a working group was established. Prior to embarking on substantive discussions of a specific task, the working group set forth in writing a specific description of the task. The working group reports planned activities to the full Committee at each scheduled full RSAC meeting, including milestones for completion of projects and progress toward completion. At the first meeting held September 9–10, 2003, a consolidated list of issues was completed. At the second meeting held November 6–7, 2003, four task groups were established: Emergency preparedness, mechanical, crashworthiness, and track/vehicle interaction. The task groups met and reported on activities for working group consideration at the third meeting held May 11–12, 2004, and a fourth meeting was held October 26–27, 2004. The working group met on March 21–22, 2006, and again on September 12–13, 2006, at which time the group agreed to establish a task force on general passenger safety. The full Passenger Safety Working Group met on April 17–18, 2007, and again on December 11–12, 2007. The next meeting is scheduled for June 18, 2008. Contact: Charles Bielitz, (202) 493–6314.

(Emergency Preparedness Task Force) At the working group meeting of March 9–10, 2005, the working group received and approved the consensus report of the Emergency Preparedness Task Force related to emergency communication, emergency egress, and rescue access. These recommendations were presented to, and approved by, the full RSAC on May 18, 2005. The working group met on September 7–8, 2005, and additional supplementary recommendations were presented to, and accepted by, the full RSAC on October 11, 2005. The Notice of Proposed Rulemaking (NPRM) was published on August 24, 2006, and was open for comments until October 23, 2006. The working group agreed upon recommendations for resolution of final comments during the April 17–18, 2007, meeting. The recommendations were presented to, and approved by, the full RSAC on June 26, 2007. The final rule regarding emergency communication, emergency egress, and rescue access was published on February 1, 2008 (73 FR 6370). The task force met on October 17–18, 2007, and the group reached consensus on draft rule text for a followup NPRM on passenger train emergency systems. The task force presented the draft rule text to the Passenger Safety Working Group on December 11–12, 2007, and the consensus draft rule text was presented and approved by a full RSAC vote during the February 20, 2008, meeting. The next meeting is scheduled for May 13–14, 2008. Contact: Brenda Moscoso, (202) 493–6282.

(Mechanical Task Force) (Completed) Initial recommendations on mechanical issues (revisions to Title 49 Code of Federal Regulations (CFR) part 238) were approved by the full Committee on January 26, 2005. At the working group meeting of September 7–8, 2005, the task force presented additional perfecting amendments and the full RSAC approved them on October 11, 2005. An NPRM was published in the **Federal Register** on December 8, 2005, (70 FR 73070). Public comments were due by February 17, 2006. The final rule was published in the **Federal Register** on October 19, 2006, (71 FR 61835) effective December 18, 2006.

(Crashworthiness Task Force) Among its efforts, the Crashworthiness Task Force provided consensus recommendations on static-end strength that were adopted by the working group on September 7–8, 2005. The full Committee accepted the recommendations on October 11, 2005. The Front-End Strength of Cab Cars and Multiple-Unit Locomotives NPRM was published in the **Federal Register** on August 1, 2007 (72 FR 42016), with comments due by October 1, 2007. A number of comments were entered into the docket and FRA is considering each of them in drafting a final rule. To demonstrate the means of determining compliance with the crashworthiness requirements of the rule, FRA scheduled deformation tests as prescribed in the NPRM. A dynamic impact test per the performance standard was conducted on April 16, 2008. Additionally, two quasi-static tests are planned for May 22, 2008 and June 25, 2008. The objectives of the tests are to show alternative means for demonstrating compliance with dynamic performance and quasi-static strength-based standard outlined in the NPRM. Contact: Gary Fairbanks, (202) 493–6322.

(Vehicle/Track Interaction Task Force) The task force is developing proposed revisions to 49 CFR Parts 213 and 238 principally regarding high-speed passenger service. The task force met on October 9–11, 2007, and again on November 19–20, 2007, in Washington, DC and presented the final task force report and final recommendations and proposed rule text for approval by the Passenger Safety Working Group at the December 11–12, 2007, meeting. The final report and the proposed rule text were approved by the working group and were presented to, and approved by, full RSAC vote during the February 20, 2008, meeting. The group last met on February 27–28, 2008, and FRA is currently drafting an NPRM. No additional task force meetings are currently scheduled. Contact: John Mardente, (202) 493–1335.

(General Passenger Safety Task Force) At the working group meeting on April 17–18, 2007, the task force presented a progress report to the working group. The task force met on July 18–19, 2007, and afterward it reported proposed reporting cause codes for injuries involving the platform gap that were approved by the working group by mail ballot in September 2007. The full

RSAC approved the recommendations for changes to 49 CFR Part 225 accident/incident cause codes on October 25, 2007. The task force continues work on passenger train door securement, ''second train in station,'' trespasser incidents, and system safety based solutions by developing a regulatory approach to system safety. The General Passenger Safety Task Force presented draft guidance material for management of the gap that was considered and approved by the working group during the December 11–12, 2007, meeting and was presented and approved by full RSAC vote during the February 20, 2008, meeting. The group met last on April 23–24, 2008. Contact: Dan Knote, (631) 567–1596.

Task 05–01—Review of Roadway Worker Protection Issues. This task was accepted on January 26, 2005, to review 49 CFR Part 214, Subpart C, Roadway Worker Protection, and related sections of Subpart A; recommend consideration of specific actions to advance the on-track safety of railroad employees and contractors engaged in maintenance-of-way activities throughout the general system of railroad transportation, including clarification of existing requirements. A working group was established and reported to the RSAC any specific actions identified as appropriate. The first meeting of the working group was held on April 12–14, 2005. The group drafted and accepted regulatory language for various revisions, clarifications, and additions to 32 separate items in 19 sections of the rule. However, two parties raised technical concerns regarding the draft language concerning electronic display of track authorities. The working group reported recommendations to the full Committee at the June 26, 2007, meeting. FRA, through the NPRM process, is to address this issue along with eight additional items on which the working group was unable to reach a consensus. Comments were received and were considered during the drafting of the NPRM. In early 2008, the external working group members were solicited to review the consensus text for errata review. A draft NPRM is currently under review for legal sufficiency by the Office of Safety staff and legal counsel, and is expected to be published in late 2008. Contact: Christopher Schulte, (610) 521–8201.

Task 05–02—Reduce Human Factor-Caused Train Accident/Incidents. This task was accepted on May 18, 2005, to reduce the number of human factor-caused train accidents/incidents and related employee injuries. The Railroad Operating Rules Working Group was formed and the group extensively reviewed the issues presented. The final working group meeting devoted to developing a proposed rule was held February 8–9, 2006. The working group was not able to deliver a consensus regulatory proposal, but did recommend that it be used to review comments on FRA's NPRM, which was published in the **Federal Register** on October 12, 2006, (FR 71 60372) with public comments due by December 11, 2006. Two reviews were held, one February 8–9, 2007, and the other April 4–5, 2007. Consensus was reached on four items and those items were presented and accepted by the full RSAC Committee at the June 26, 2007, meeting. A final rule was published in the **Federal Register** on February 13, 2008 (73 FR 8442) with an effective date of April 14, 2008. The most recent working group meetings were held September 27–28, 2007, and January 17–18, 2008. The next meeting is scheduled for May 21–22, 2008. Contact: Douglas Taylor, (202) 493–6255.

Task 06–01—Locomotive Safety Standards. This task was accepted on February 22, 2006, to review 49 CFR Part 229, Railroad Locomotive Safety Standards, and revise as appropriate. A working group was established with the mandate to report any planned activity to the full Committee at each scheduled full RSAC meeting, to include milestones for completion of projects and progress toward completion. The first working group meeting was held May 8–10, 2006. Working group meetings were held on August 8–9, 2006; September 25–26, 2006; October 30–31, 2006; January 9–10, 2007; and the working group presented recommendations regarding revisions to requirements for locomotive sanders to the full RSAC on September 21, 2006. The NPRM regarding Sanders was published in the **Federal Register** on March 6, 2007 (72 FR 9904). Comments received were discussed by the working group for clarification, and FRA published a final rule on October 19, 2007 (72 FR 59216). The working group is continuing the review of 49 CFR Part 229 with a view to proposing further revisions to update the standards. The working group met on November 27–28, 2007, and February 5–6, 2008. The next meeting is scheduled for May 20–21, 2008, and a followup meeting is scheduled for August 5–6, 2008. Contact: George Scerbo, (202) 493–6249.

Task 06–02—Track Safety Standards and Continuous Welded Rail. Section 9005 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub.L. No. 109–59, ''SAFETEA–LU''), the 2005 Surface Transportation Authorization Act, requires FRA to issue requirements for inspection of joint bars in continuous welded rail (CWR) to detect cracks that could affect the integrity of the track structure. (49 U.S.C. 20142(e)). FRA published an interim final rule (IFR) establishing new requirements for inspections on November 2, 2005 (70 FR 66288). On October 11, 2005, FRA offered the RSAC a task to review comments on this IFR, but the conditions could not be established under which the Committee could have undertaken this with a view toward consensus. Comments on the IFR were received through December 19, 2005, and FRA reviewed the comments. On February 22, 2006, the RSAC accepted this task to review and revise the CWR related to provisions of the Track Safety Standards, with particular emphasis on reduction of derailments and consequent injuries and damage caused by defective conditions, including joint failures, in track using CWR. A working group was established. The working group will report any planned activity to the full Committee at each scheduled full RSAC meeting, including milestones for completion of projects and progress toward completion. The first working group meeting was held April 3–4, 2006, at which time the working group reviewed comments on the IFR. The second working group meeting was held April 26–28, 2006. The working group also met May 24–25, 2006, and July 19–20, 2006. The working group reported consensus recommendations for the final rule that were accepted by the full RSAC Committee by mail ballot on August 11, 2006. The final rule was published in the **Federal Register** on October 11, 2006, (71 FR 59677). The working group is continuing its review of 49 CFR Section 213.119 with a view to proposing further revisions to update the standards. The working group met January 30–31, 2007; April 10–11, 2007; June 27–28, 2007; August 15–16, 2007; October 23–24, 2007; and January, 8–9, 2008. The working group reported consensus recommendations for revisions to 49 CFR Section 213.119 regulations to the full RSAC Committee on February 20, 2008, and the recommendations were accepted. The next meeting is scheduled for September 16–17, 2008. Contact: Ken Rusk, (202) 493–6236.

Task 06–03—Medical Standards for Safety-Critical Personnel. This task was accepted on September 21, 2006, to enhance the safety of persons in the railroad operating environment and the public by establishing standards and

procedures for determining the medical fitness for duty of personnel engaged in safety-critical functions. A working group has been established and will report any planned activity to the full Committee at each scheduled full RSAC meeting, including milestones for completion of projects and progress toward completion. The first working group meeting was held December 12–13, 2006. The working group met on February 20–21, 2007; July 24–25, 2007; August 29–30, 2007; October 31–November 1, 2007; December 4–5, 2007; February 13–14, 2008; March 26–27, 2008; and April 22–23, 2008. A task force of physicians was established in May 2007 to work on specific medical exam-related issues. The task force of physicians has had meetings or conference calls on July 24, 2007; August 20, 2007; October 15, 2007; and October 31, 2007, and is scheduled to meet again on June 23–24, 2008. Contact: Alan Misiaszek, (202) 493–6002.

Task 07–01—Track Safety Standards. This task was accepted on February 22, 2007, to consider specific improvements to the Track Safety Standards (TSS) or other responsive actions, supplementing work already underway on CWR specifically: review controls applied to reuse of rail in CWR ''plug rail,'' review the issue of cracks emanating from bond wire attachments, consider improvements in the TSS related to fastening of rail to concrete ties, and ensure a common understanding within the regulated community concerning requirements for internal rail flaw inspections. These tasks were assigned to the Track Safety Standards Working Group. The working group will report any planned activity to the full Committee at each scheduled full RSAC meeting, including milestones for completion of projects and progress toward completion. The first working group meeting was held on June 27–28, 2007, and the group met again on August 15–16, 2007, and October 23–24, 2007. Two task forces were created under the working group; the Concrete Ties Task Force and the Rail Integrity Task Force. The Concrete Ties Task Force met on November 26–27, 2007; February 13–14, 2008; and April 16–17, 2008, and the next meeting is scheduled for July 9–10, 2008. The Rail Integrity Task Force met on November 28–29, 2007; February 12–13, 2008; and April 15–16, 2008, and the next meeting is scheduled for July 8–9, 2008. Contact: Ken Rusk, (202) 493–6236.

Task 08–01—Report on the Nation's Railroad Bridges. This task was accepted on February 20, 2008, to report to the Federal Railroad Administrator on the current state of railroad bridge safety management, update the findings and conclusions of the 1993 Summary Report of the FRA Railroad Bridge Safety Survey, and include recommendations for further action with a target date of November 3, 2008. The working group first met on April 24–25, 2008 and the next meeting is scheduled for June 12–13, 2008.

Completed Tasks

Task 96–1—(Completed) Revising the Freight Power Brake Regulations.

Task 96–2—(Completed) Reviewing and recommending revisions to the TSS (49 CFR part 213).

Task 96–3—(Completed) Reviewing and recommending revisions to the Radio Standards and Procedures (found under 49 CFR part 220).

Task 96–5—(Completed) Reviewing and recommending revisions to Steam Locomotive Inspection Standards (49 CFR part 230).

Task 96–6—(Completed) Reviewing and recommending revisions to miscellaneous aspects of the regulations addressing Locomotive Engineer Certification (49 CFR part 240).

Task 96–7—(Completed) Developing Roadway Maintenance Machines (On-Track Equipment) Safety Standards.

Task 96–8—(Completed) This planning task evaluated the need for action responsive to recommendations contained in a report to Congress, titled, ''Locomotive Crashworthiness & Working Conditions.''

Task 97–1—(Completed) Developing crashworthiness specifications (49 CFR part 229) to promote the integrity of the locomotive cab in accidents resulting from collisions.

Task 97–2—(Completed) Evaluating the extent to which environmental, sanitary, and other working conditions in locomotive cabs affect the crew's health and the safe operation of locomotives, proposing standards where appropriate.

Task 97–3—(Completed) Developing event recorder data survivability standards.

Task 97–4 and *Task 97–5*—(Completed) Defining positive train control functionalities, describing available technologies, evaluating costs and benefits of potential systems, and considering implementation opportunities and challenges, including demonstration and deployment.

Task 97–6—(Completed) Revising various regulations to address the safety implications of processor-based signal and train control technologies, including communications-based operating systems.

Task 97–7—(Completed) Determining damages qualifying an event as a reportable train accident.

Task 00–1—(Completed-task withdrawn) Determining the need to amend regulations protecting persons who work on, under, or between rolling equipment and persons applying, removing, or inspecting rear-end marking devices (Blue Signal Protection).

Task 01–1—(Completed) Developing conformity of FRA's regulations for accident/incident reporting (49 CFR Part 225) to revised regulations of the Occupational Safety and Health Administration, U.S. Department of Labor, and to make appropriate revisions to the FRA Guide for Preparing Accident/Incident Reports (Reporting Guide).

Please refer to the notice published in the **Federal Register** on March 11, 1996, (61 FR 9740) for more information about the RSAC.

Issued in Washington, DC on May 15, 2008.

Michael J. Logue,

Associate Administrator for Safety Compliance and Program Implementation.

[FR Doc. E8–11532 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA–2008–0024]

Notice of Proposed Buy America Waiver for the National Fuel Cell Bus Technology Development Program

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of proposed Buy America waiver and request for comment.

SUMMARY: The Federal Transit Administration (FTA) proposes to waive its Buy America requirements for projects funded under the National Fuel Cell Bus Technology Development Program (Fuel Cell Bus Program). This Notice sets forth FTA's justification and seeks comment thereon. The purpose of the Fuel Cell Bus Program is to facilitate the development of commercially viable fuel cell bus technology and related infrastructure.

DATES: Comments must be received by May 29, 2008. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Please submit your comments by only one of the following means, identifying your submissions by docket number FTA–2008–0024. All electronic submissions must be made to

the U.S. Government electronic site at *http://www.regulations.gov*. Commenters should follow the instructions below for mailed and hand-delivered comments.

(1) *Web site: http://www.regulations.gov*. Follow the instructions for submitting comments on the U.S. Government electronic docket site;

(2) *Fax:* (202) 493–2251;

(3) *Mail:* U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Docket Operations, M–30, Room W12–140, Washington, DC 20590–0001.

(4) *Hand Delivery:* Room W12–140 on the first floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must make reference to the ''Federal Transit Administration'' and include docket number FTA–2008–0024. Due to security procedures in effect since October 2001, mail received through the U.S. Postal Service may be subject to delays. Parties making submissions responsive to this notice should consider using an express mail firm to ensure the prompt filing of any submissions not filed electronically or by hand. Note that all submissions received, including any personal information therein, will be posted without change or alteration to *http://www.regulations.gov*. For more information, you may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or visit *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: For program questions please contact Christina Gikakis at (202) 366–2637 or *christina.gikakis@dot.gov*. For legal questions please contact Jayme L. Blakesley at (202) 366–0304 or *jayme.blakesley@dot.gov*.

SUPPLEMENTARY INFORMATION: This Notice sets forth the Federal Transit Administration's (FTA) justification for proposing to waive its Buy America requirements for projects funded under the National Fuel Cell Bus Technology Development Program (Fuel Cell Bus Program) and seeks comment thereon.

The National Fuel Cell Bus Technology Development Program

Section 3046 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, instructed FTA ''to establish a national fuel cell bus technology program [Fuel Cell Bus Program] to facilitate the development of commercially viable fuel cell bus technology and related infrastructure.''

By notice dated April 14, 2006, FTA solicited applications to the Fuel Cell Bus Program and restated the statutory criteria for evaluating applications. These criteria included the ability of the project ''to contribute significantly to furthering fuel cell technology as it relates to transit bus operations, including hydrogen production, energy storage, fuel cell technologies, vehicle systems integration, and power electronics technology,'' and to advance ''different fuel cell technologies, including hydrogen-fueled and methanol-powered liquid-fueled fuel cell technologies, that may be viable for public transportation systems.'' 71 FR 19612 (April 14, 2006).

FTA selected three consortiums to participate in the Fuel Cell Bus Program: The Center for Transportation and the Environment in Atlanta, the Northeast Advanced Vehicle Consortium in Boston, and Westart/CALSTART in Pasadena. These consortia will develop fourteen projects. Of these, eight are development and demonstration projects, two are component technology development, and four support analysis, outreach and coordination.

The Fuel Cell Bus Program seeks to develop commercially-viable fuel cell buses by demonstrating that buses powered by fuel cell technology can achieve several technical targets, including a four to six year (20,000 to 30,000 hour) fuel cell durability, cost of less than five times that of an equivalent diesel, greater than 90% reliability, twice the fuel efficiency of a comparable bus, emissions below the 2010 Environmental Protection Agency standards and vehicle performance comparable to a diesel bus.

Public Interest Waiver

The purpose of this notice is to seek public comment on whether FTA should waive its Buy America requirements for all projects funded under the Fuel Cell Bus Program.

With certain exceptions, FTA's ''Buy America'' requirements prevent FTA from obligating an amount that may be appropriated to carry out its program for a project unless ''the steel, iron, and manufactured goods used in the project are produced in the United States. 49 U.S.C. 5323(j)(1). One such exception is if applying the Buy America requirements ''would be inconsistent with the public interest.'' 49 U.S.C. 5323(j)(2)(A). After considering all appropriate factors on a case-by-case basis, 49 CFR 661.7(b), if FTA determines that the conditions exist to grant a public interest waiver, FTA will issue a detailed written statement justifying why the waiver is in the public interest, and will publish this justification in the **Federal Register**, providing the public with a reasonable time for notice and comment of not more than seven calendar days. 49 CFR 661.7(b).

Because the U.S. market for fuel cell bus technology and related infrastructure is not fully developed, participants in the Fuel Cell Bus Program have inquired whether FTA could waive its Buy America requirements. According to one participant, ''[a] successful Fuel Cell transit bus must meet and be consistent with the public transit market's ability to incorporate and afford such technology on a mass scale. * * * At this stage of technology development more engineering data is necessary to accurately specify a fuel cell for a competitive bid. [Requiring participants to comply with FTA's Buy America requirements] would significantly delay the development effort, would be extremely expensive, and would result in a huge set back to the overall development of Fuel Cell technology. [Allowing participants to use all available technology, regardless of origin,] is the fastest, soundest method to perfect the technology, assure future competition, and hasten the advent of fuel cell buses in transit.''

In order to develop commercially viable fuel cell buses, FTA's Fuel Cell Bus Program must examine all current technologies. But at this time, because fuel cell technologies for transit are still in the developmental and technical validation phase, it is impossible to determine which configurations are most likely to reach commercialization. As development continues, the industry will require objective demonstrations and evaluations of different bus propulsion systems. Permitting participants to use foreign and domestic suppliers will allow FTA to evaluate which technologies are closest to successful deployment. If certain technologies are omitted from the program because they are of foreign origin, it will severely affect FTA's ability to fully analyze fuel cell bus technology.

FTA believes that a limited waiver of its Buy America requirements for manufactured products and rolling stock procured through its Fuel Cell Bus Program is necessary because of the technical difficulties and increased costs associated with new technology.

There are several benefits to waiving FTA's Buy America requirements on a

program-wide basis. FTA selected projects to include all significant technologies within a centrally-managed program. By granting a waiver for the entire program, FTA can decrease the start-up time for individual projects. Otherwise, each project would have to apply for waivers on a case-by-case basis. This is impractical in a research setting. Research projects often encounter unexpected problems that require changes to the scope of work. The continued development of Fuel Cell technology will result in more choices for FTA grantees and better, more environmentally friendly, buses for the riding public. Successful demonstrations through the Fuel Cell Bus Program will increase awareness of fuel cell technology and foster a domestic industry by identifying and mitigating barriers and uncertainties in the market. A limited waiver to support research and development would increase and improve domestic technical expertise. Moreover, a fully-inclusive public interest waiver will allow Fuel Cell Bus Program participants to collaborate to achieve the program goals in an appropriate timeframe. By reducing risk and expanding expertise, the Fuel Cell Bus Program will improve the availability of capital for a self-sustaining domestic fuel cell industry.

For the foregoing reasons, FTA proposes to waive its Buy America requirements for all projects funded through its Fuel Cell Bus Program. Quick and successful deployment of fuel cell bus technology and infrastructure is in the public interest. Fuel cell technology will benefit the environment by lessening carbon emissions, decreasing the use of petroleum and other fossil fuels. Allowing foreign technologies will allow the project teams to focus on commercial viability instead of having to make fundamental advances independent of existing technology. Ultimately, this will lead to increased domestic demand for fuel cell bus technology and infrastructure, resulting in a sustainable U.S. market.

FTA seeks comment from all interested parties. Please submit comments by May 29, 2008. Late-filed comments will be considered to the extent practicable.

Issued this 15th day of May, 2008.

Severn E.S. Miller,

Chief Counsel.

[FR Doc. E8–11403 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Availability of Fiscal Year 2008 Clean Fuels Grant Program Funds: Solicitation of Project Proposals

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice.

SUMMARY: The U.S. Department of Transportation (DOT) Federal Transit Administration (FTA) announces the availability of funds in Fiscal Year (FY) 2008 for the Discretionary Clean Fuels Grant Program, authorized by the Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy For Users (SAFETEA–LU). The Clean Fuels Grant Program makes funds available to assist non-attainment or maintenance areas in achieving or maintaining the National Ambient Air Quality Standards for ozone or carbon monoxide (CO). Additionally, the program supports emerging clean fuel and advanced propulsion technologies for transit buses and markets for those technologies. The authorizing legislation allows for the Secretary of Transportation to make awards under this program at her discretion in non-attainment or maintenance areas for ozone or CO.

In FY 2008, $49,000,000 was available for the discretionary Clean Fuels Grant program; $20,247,000 of the available funding was earmarked to specific projects authorized in SAFETEA–LU. The $28,753,000 of Clean Fuels Grant program funding that was unallocated in FY 2008 remains available for discretionary award.

This announcement is available on the Internet on the FTA Web site at: *http://www.fta.dot.gov.* FTA will announce final selections on the Web site and in the **Federal Register**. A synopsis of this announcement will be posted in the FIND module of the government-wide electronic grants Web site at *http://www.grants.gov.* Proposals may be submitted to FTA electronically at *cfnofa@dot.gov* or through the GRANTS.GOV ''APPLY'' function. Those who apply via e-mail at *cfnofa@dot.gov* should receive a confirmation e-mail within 2 business days.

DATES: Complete proposals for the Clean Fuels Grant Program must be submitted by July 21, 2008. The proposals must be submitted electronically through the GRANTS.GOV Web site or via e-mail at *cfnofa@dot.gov.* Anyone intending to apply electronically through GRANTS.GOV should initiate the process of registering on the GRANTS.GOV site immediately to ensure completion of registration before the deadline for submission. FTA will announce grant selections in the **Federal Register** when the selection process is complete.

ADDRESSES: Supplemental information that cannot be submitted electronically may be submitted to the appropriate Regional Office (See Appendix A).

FOR FURTHER INFORMATION CONTACT: Contact the appropriate FTA Regional Office for general program information (Appendix A). For application-specific information and issues, contact Kimberly Sledge, Office of Transit Programs, (202) 366–2053, E-mail: *kimberly.sledge@dot.gov* or Henrika Buchanan-Smith, (202) 366–4020, E-mail: *henrika.buchanan-smith@dot.gov.* A TDD is available at 1–800–877–8339 (TDD/FIRS).

SUPPLEMENTARY INFORMATION

Table of Contents

I. Funding Opportunity Description
II. Award Information
III. Eligibility Information
IV. Application and Submission Information
V. Application Review, Selection, and Notification
VI. Award Administration
Appendix A FTA Regional Offices

I. Funding Opportunity Description

A. Authority

The program is authorized under Section 5308(b) of SAFETEA–LU, Pub. L 109–59, August 10, 2005.

''The Secretary shall make grants in accordance with this section to recipients to finance eligible projects.''

B. Background

The program was first established as the Clean Fuels Formula Grant Program in Section 3008 of the Transportation Equity Act for the 21st Century, Pub. L. 105–178, June 9, 1998. The program was developed to assist non-attainment or maintenance areas in achieving or maintaining the National Ambient Air Quality Standards for ozone and CO. Additionally, the program supported emerging clean fuel and advanced propulsion technologies for transit buses and markets for those technologies. Although the program was authorized as a formula grant program, Congress did not allocate funds to the program. SAFETEA–LU changed the Clean Fuels Program from a formula based grant program to a discretionary grant program. However, the program retained its initial purpose.

II. Award Information

In FY 2008, $28,753,000 in Clean Fuels Program funds are available to fund capital projects in areas that are maintenance or non-attainment for ozone or CO. These funds are available at up to 90 percent of the net incremental of the clean fuels component.

III. Eligibility Information

A. Eligible Applicants

Eligible applicants under this program are designated recipients, which are entities designated to receive Federal urbanized formula funds under 49 U.S.C. 5307. Areas with multiple transit operators but one designated recipient should submit a consolidated proposal.

B. Eligible Expenses

SAFETEA–LU grants authority to the Secretary to make grants under this section to assist recipients to finance eligible projects such as the following;

(1) Purchasing or leasing clean fuel buses, including buses that employ a lightweight composite primary structure and vans for use in revenue service. The purchase or lease of non-revenue vehicles is not an eligible project. A definition of ''clean fuel'' vehicles can be found in the Clean Fuel Grant Program Regulation at 49 CFR 624.3.

(2) Constructing or leasing clean fuel bus facilities or electrical recharging facilities and related equipment. Facilities and related equipment for clean diesel buses are not eligible.

(3) Projects relating to clean fuel, biodiesel, hybrid electric, or zero emissions technology buses that exhibit equivalent or superior emissions reductions to existing clean fuel or hybrid electric technologies.

Funds made available under this program cannot be used to fund operating expenses or preventive maintenance. Funds made available under this program cannot be used to reimburse projects that have incurred prior eligible expenses without a Letter of No Prejudice (LONP) issued by FTA for the project before the costs are incurred.

C. Cost Sharing or Matching

Costs will be shared at the following ratio: 90 percent FTA/10 percent local contribution for net incremental cost of the clean fuels component or 83 percent FTA/17 percent local contribution for the total project cost when purchasing vehicles. The Federal share for biodiesel buses is 90 percent/10 percent local share of the total project cost. FTA will not approve deferred local share under this program.

IV. Application and Submission Information

A. Proposal Submission Process

Project proposals may be submitted electronically through *http://www.grants.gov* or by e-mail electronically at *cfnofa@dot.gov.* Mail and fax submissions will not be accepted except for supplemental information that cannot be sent electronically.

Applicants can only apply for funds appropriated for the 2008 fiscal year. However, an applicant may propose a project that would expend money over multiple years. The project, however, should be ready to implement and should be completed in a reasonable period of time. In sum, the period of performance of the award is separate from the year of funds of the award.

B. Application Content

(1) Applicant Information

This addresses basic identifying information, including:

i. Applicant name,

ii. Contact information (including contact name, address, fax and phone number,

iii. Description of services provided by the agency, including areas served, and

iv. Existing fleet, facility and employee information, and

v. A description of your technical, legal, and financial capacity to implement the proposed project.

(2) Project Information

Every proposal must:

i. Describe the project to be funded and include with the proposal any necessary supporting documentation. Example: Information on the age of the current fleet, Metropolitan Planning Organization (MPO) concurrence letters, population forecasts, ridership information.

ii. Address each of the evaluation criteria separately.

iii. Describe why the project is important to the area and how the project addresses local priorities.

iv. Provide a line item budget for the project.

v. Provide the Federal amount requested for each purpose for which funds are sought.

vi. Document matching funds, including amount and source of the match.

vii. Provide project time-line, including significant milestones such as date or contract for purchase of vehicle(s), actual or expected delivery date of vehicles and contract award and completion of facility improvements.

C. Funding Restrictions

Only proposals from eligible recipients for eligible activities will be considered for funding (see Section III). Due to funding limitations, applicants that are selected for funding may receive less than the amount requested.

D. Other Submission Requirements

Applicants should submit 3 copies of any supplemental information that cannot be submitted electronically to the appropriate regional office. Supplemental information submitted in hardcopy must be postmarked by July 21, 2008.

V. Application Review Information

A. Project Evaluation Criteria

Projects will be evaluated according to the following criteria:

(1) Demonstrated Need

i. Project represents a one-time or periodic need that cannot reasonably be funded from formula allocations or State and/or local revenues.

ii. Project or applicant did not receive funding in a SAFETEA–LU earmark.

iii. The project will have a positive impact on air quality.

iv. The project is consistent with the applicant's bus fleet management plan.

v. The project is a transportation control measure in an approved State Implementation Plan.

(2) Planning and Prioritization at Local/Regional Level

i. Project is consistent with the transit priorities identified in the long range plan and/or contingency/illustrative projects. The project could not be included in the financially constrained Transportation Improvement Plan (TIP)/Statewide Transportation Program (STIP) due to lack of funding (if selected, project must be on TIP before grant award).

ii. Local support is demonstrated by availability of local match for this and/or related projects and letters of support.

iii. In an area with more than one transit operator, the application demonstrates coordination with and support of other transit operators, or other related projects within the applicant's MPO or the geographic region within which the proposed project will operate.

(3) The Project Is Ready To Implement

i. Any required environmental work has been initiated for construction projects requiring an Environmental Assessment (EA).

ii. Implementation plans are ready, including initial design of facilities projects.

iii. TIP/STIP can be amended (evidenced by MPO/State endorsement).

vi. Project can be obligated and implemented quickly, if selected.

(4) The applicant demonstrates the benefits of the proposed project in reducing transportation related pollutants.

(5) The proposed project supports emerging clean fuels technologies or advanced technologies for transit buses.

(6) The applicant demonstrates the technical, legal, and financial capacity to carry out the project. This criterion refers to implementation of the particular project proposed.

i. The applicant has the technical capacity to administer the project.

ii. The acquisition is consistent with the bus fleet management plan.

iii. There are no outstanding legal, technical, or financial issues with the grantee that would make this a high risk project.

iv. Source of local match is identified and is available for prompt project implementation if selected (no deferred local share will be allowed).

B. Review and Selection Process

Proposals will first be screened and ranked by the appropriate FTA regional office (see Appendix A). After evaluating the projects based on the established criteria, the headquarters review team will provide a recommendation to the FTA Administrator. The Administrator will determine the final selection and amount of funding for each project.

FTA will publish the list of all selected projects and funding levels in the **Federal Register**. Regional offices will also notify successful applicants of their success and the amount of funding awarded to the project.

VI. Award Administration Information

A. Award Notices

FTA will screen all proposals to determine whether all required eligibility elements, as described in III ''Eligibility Information'' are present. Once proposals have been reviewed and projects have been selected, FTA will award funds to the lead project sponsor to implement the project. These grants will be administered and managed by the FTA regional offices in accordance with the federal requirements of the Section 5308 program. FTA will award funding to successful applicants through a grant in FTA's TEAM grant management system.

B. Administrative and National Policy Requirements

1. Grant Requirements

If selected, applicants will apply for a grant through TEAM and adhere to the customary FTA grant requirements of the Section 5308 Clean Fuels Grant program, including those of the current version of FTA C 9300 and the Master Agreement. Discretionary grants greater than $500,000 will go through Congressional Notification and release process. Technical assistance regarding these requirements is available from each FTA regional office.

The Applicant must submit the Certifications and Assurances prior to receiving a grant. The Applicant assures that it will comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal administrative requirements in carrying out any project supported by the FTA grant. The Applicant acknowledges that it is under a continuing obligation to comply with the terms and conditions of the grant agreement issued for its project with FTA. The Applicant understands that Federal laws, regulations, policies, and administrative practices might be modified from time to time and affect the implementation of the project. The Applicant agrees that the most recent Federal requirements will apply to the project, unless FTA issues a written determination otherwise.

2. Planning

Applicants are encouraged to notify the appropriate State DOT and MPO in areas likely to be served by the project funds made available under this program. Incorporation of funded projects in the long range plans and transportation improvement programs of States and metropolitan areas is required of all funded projects.

3. Reporting

Post-award reporting requirements for grantees who purchase or lease hybrid electric, battery electric and fuel cell vehicles include semiannual submission of the following for the first three years of the useful life of the vehicle (this report should be attached in TEAM):

i. Vehicle miles traveled;

ii. Fuel/energy costs;

iii. Vehicle fuel/energy consumption and oil consumption;

iv. Number of road calls or breakdowns resulting from clean fuel and advanced propulsion technology systems; and

v. Maintenance costs associated with the clean fuels or advanced propulsion system.

Note: Recipients of financial assistance under 49 U.S.C. 5308 that purchase or lease compressed natural gas (CNG), liquefied natural gas (LNG), and liquefied petroleum gas (LPG) vehicles may report the information described above, but this reporting is voluntary. Recipients of financial assistance under 49 U.S.C. 5308 that purchase or lease clean diesel vehicles are not required to report information beyond FTA grant reporting requirements for capital projects.

VII. Agency Contact(s)

Contact the appropriate FTA Regional Office (see Appendix A) for application-specific information and issues. For general program information, contact Kimberly Sledge, Office of Transit Programs, (202) 366–2053, e-mail: *kimberly.sledge@dot.gov.* A TDD is available at 1–800–877–8339 (TDD/FIRS).

Issued in Washington, DC, this 14th day of May, 2008.

James S. Simpson,

Administrator.

Appendix A

Richard H. Doyle, Regional Administrator, Region 1–Boston, Kendall Square, 55 Broadway, Suite 920, Cambridge, MA 02142–1093, Tel. 617–494–2055, States served: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont

Brigid Hynes-Cherin, Regional Administrator, Region 2–New York, One Bowling Green, Room 429, New York, NY 10004–1415, Tel. 212–668–2170, States served: New Jersey, New York

Letitia Thompson, Regional Administrator, Region 3–Philadelphia, 1760 Market Street, Suite 500, Philadelphia, PA 19103–4124, Tel. 215–656–7100, States served: Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and District of Columbia

Yvette Taylor, Regional Administrator, Region 4–Atlanta, 230 Peachtree Street, NW., Suite 800, Atlanta, GA 30303, Tel. 404–865–5600, States served: Alabama, Florida, Georgia, Kentucky, Mississippi Islands

Marisol Simon, Regional Administrator, Region 5–Chicago, 200 West Adams Street, Suite 320, Chicago, IL 60606, Tel. 312–353–2789, States served: Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin

Robert C. Patrick, Regional Administrator, Region 6–Ft. Worth, 819 Taylor Street, Room 8A36, Ft. Worth, TX 76102, Tel. 817–978–0550, States served: Arkansas, Louisiana, Oklahoma, New Mexico and Texas

Mokhtee Ahmad, Regional Administrator, Region 7–Kansas City, MO, 901 Locust Street, Room 404, Kansas City, MO 64106, Tel. 816–329–3920, States served: Iowa, Kansas, Missouri, and Nebraska

Terry Rosapep, Regional Administrator, Region 8–Denver, 12300 West Dakota Ave., Suite 310, Lakewood, CO 80228–2583, Tel. 720–963–3300, States served: Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming

Leslie T. Rogers, Regional Administrator, Region 9–San Francisco, 201 Mission Street, Room 1650, San Francisco, CA 94105–1926, Tel. 415–744–3133, States served: American Samoa, Arizona, California, Guam, Hawaii, Nevada, and the Northern Mariana Islands

Rick Krochalis, Regional Administrator, Region 10–Seattle, Jackson Federal Building, 915 Second Avenue, Suite 3142, Seattle, WA 98174–1002, Tel. 206–220–7954. States served: Alaska, Idaho, Oregon, and Washington

[FR Doc. E8–11224 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket ID PHMSA–2007–0056]

Pipeline Safety: Agency Information Collection Activities: Notice of Request for Extension of Currently Approved Information Collection

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: This notice invites public comments about PHMSA's intention to request the Office of Management and Budget's (OMB) approval for renewal of four existing information collections. These information collections are described below.

DATES: Submit comments on or before July 21, 2008.

ADDRESSES: Comments should reference Docket No. PHMSA–RSPA–2004–19854 and may be submitted in the following ways:

- *E-Gov Web Site: http://www.regulations.gov*. This site allows the public to enter comments on any **Federal Register** notice issued by any agency.
- *Fax:* 1–202–493–2251.
- *Mail:* DOT Docket Operations Facility (M–30), U.S. Department of Transportation, West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* DOT Docket Operations Facility, U.S. Department of Transportation, West Building, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: In the E-Gov Web site: *http://www.regulations.gov*, under ''Search Documents'' select ''Pipeline and Hazardous Materials Safety Administration.'' Next, select ''Notices,'' and then click ''Submit.'' Select this notice by clicking on the docket number listed above. Submit your comment by clicking the yellow bubble in the right column then following the instructions.

Identify docket ID PHMSA–2007–0056 at the beginning of your comments. For comments by mail, please provide two copies. To receive PHMSA's confirmation receipt, include a self-addressed stamped postcard. Internet users may access all comments at *http://www.regulations.gov*, by following the steps above.

Note: PHMSA will post all comments without changes or edits to *http://www.regulations.gov* including any personal information provided.

Privacy Act Statement

Anyone can search the electronic form of all comments received in response to any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). DOT's complete Privacy Act Statement was published in the **Federal Register** on April 11, 2000 (65 FR 19477).

FOR FURTHER INFORMATION CONTACT: Barbara Betsock, U.S. Department of Transportation, Office of Pipeline Safety (PHP–30), Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue, SE., East Building, 2nd Floor, Washington, DC 20590–0001, Telephone (202) 366–4595.

SUPPLEMENTARY INFORMATION: Section 1320.8(d), Title 5, Code of Federal Regulations requires PHMSA to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies information collection requests that PHMSA will be submitting to OMB for renewal and extension. These information collections are contained in the pipeline safety regulations, 49 CFR parts 190–199. PHMSA has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on changes in proposed or final rules published since the information collections were last approved. The following information is provided for each information collection: (1) Title of the information collection; (2) OMB control number; (3) abstract of the information collection activity; (4) description of affected public; (5) estimate of total annual reporting and recordkeeping burden; and (6) frequency of collection. PHMSA will request a three-year term of approval for each information collection activity.

PHMSA requests comments on the following information collections:

1. *Title: Pipeline Safety:* Excess Flow Valves—Customer Notification.

OMB Control Number: 2137–0593.

Type of Request: Renewal of a currently approved information collection.

Abstract: Pipeline operators are required to provide notifications about excess flow valves to service line customers as described in 49 CFR 192.383. Upon request, an operator must make documentation of compliance available to PHMSA or the appropriate State regulatory agency.

Estimated number of respondents: 900,000.

Estimated annual burden hours: 18,000 hours.

Frequency of collection: On occasion.

2. *Title: Pipeline Safety:* Customer-Owned Service Lines.

OMB Control Number: 2137–0594.

Type of Request: Renewal of a currently approved information collection.

Abstract: Operators of gas service lines who do not maintain certain buried piping of their customers must provide notification about maintenance to those customers (49 CFR 192.16). Upon request, an operator must make documentation of compliance available to PHMSA or the appropriate State regulatory agency.

Estimated number of respondents: 550,000.

Estimated annual burden hours: 9,167 hours.

Frequency of collection: On occasion.

3. *Title: Pipeline Safety:* Qualification of Pipeline Safety, Training.

OMB Control Number: 2137–0600.

Type of Request: Renewal of a currently approved information collection.

Abstract: Pipeline operators are required to have continuing programs for qualifying and training personnel performing safety-sensitive functions on pipelines. (49 CFR part 192, subpart N and 49 CFR part 195, subpart G. Operators must maintain records, make

reports, and provide information to PHMSA and State pipeline safety agencies concerning these programs. The information aids Federal and State pipeline safety inspectors in conducting compliance inspections and investigating incidents.

Estimated number of respondents: 22,300.

Estimated annual burden hours: 466,667 hours.

Frequency of collection: On occasion.

4. *Title:* Pipeline Safety Report of Abandoned Underwater Pipelines.

OMB Control Number: 2137–0601.

Type of Request: Renewal of a currently approved information collection.

Abstract: Pipeline operators are required to report certain information about abandoned underwater pipelines to PHMSA. The information aids Federal and State pipeline safety inspectors in conducting compliance inspections and investigating incidents.

Estimated number of respondents: 10.

Estimated annual burden hours: 60 hours.

Frequency of collection: On occasion.

Issued in Washington, DC on May 19, 2008.

Barbara Betsock,

Acting Director of Regulations.

[FR Doc. E8–11540 Filed 5–21–08; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Application for Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of Applications for Special Permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR Part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. Each mode of transportation for which a particular special permit is requested is indicated by a number in the ''Nature of Application'' portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before June 23, 2008.

Address Comments to: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue, SE., Washington, DC or at *http://dms.dot.gov*.

This notice of receipt of applications for special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on May 12, 2008.

Delmer F. Billings,

Director, Office of Hazardous Materials, Special Permits and Approvals.

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permits thereof
		NEW SPECIAL PERMITS		
14689–N		Trinity Industries, Inc., Dallas, TX	49 CFR 178.337–3(g).	To authorize the manufacture, marking, sale and use of certain MC 331 cargo tank motor vehicles that have baffle support clips welded to the inside of the cargo tank wall. (mode 1).
14690–N		Thermo MF Physics, Colorado Springs, CO.	49 CFR 173.304a	To authorize the transportation in commerce of Sulfur hexafluoride, Division 2.2 in non-DOT specification cylinders. (modes 1, 3, 4, 5).
14691–N		FedEx Express, Memphis, TN	49 CFR 172.202; 172.203(c), (k), (m); 172.301; 172.400; 172.302(c).	To authorize the return shipment by motor vehicle of hazardous materials that have been accepted, transported, and subsequently determined to be non-compliant with the Hazardous Materials Regulation's shipping paper, marking or labeling requirements. (mode 1).
14692–N		Airgas, Inc., Radnor, PA	49 CFR 180.209	To authorize the transportation in commerce of certain DOT–3A, 3AA, 3AX, 3AAX and 3T specification cylinders that are requalified every ten years. (modes 1, 2, 3).
14697–N		Air Products and Chemicals, Inc., Allentown, PA.	49 CFR 171.23(a)	To authorize the one-time, one-way transportation in commerce of six non-DOT specification cylinders containing Acetylene, dissolved. (modes 1, 4).
14699–N		Lawrence Livermore National Laboratory, Livermore, CA.	49 CFR 173.212 and 173.241.	To authorize the one-time, one-way transportation in commerce of encapsulated Lithium hydride, fused solid in a non-DOT specification packaging. (mode 1).

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permits thereof
14700–N		Pentair Water Treatment Company, Chardon, OH.	49 CFR 173.302a and 173.306(g).	To authorize the transportation in commerce of non-DOT specification cylinders under the exception provided for water pump system tanks in 49 CFR 173.306(g). (mode 1).
14704–N		Worldpac, Inc., Newark, CA	49 CFR 173.159(e)	To authorize the transportation in commerce of lead acid batteries under the exception provided in 49 CFR 173.159(e) with other hazardous materials classed as ORM–D on the same motor vehicle. (mode 1).
14705N		packgen Corporation, Auburn, ME	49 CFR 178.812	To authorize the transportation in commerce of certain IBCs that have not been tested under § 178.812 Top Lift Test requirements. (mode 1).

[FR Doc. E8–11229 Filed 5–21–08; 8:45 am]
BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Applications for Modification of Special Permit

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of Applications for Modification of Special Permit.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR part 107, subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. This notice is abbreviated to expedite docketing and public notice. Because the sections affected, modes of transportation, and the nature of application have been shown in earlier **Federal Register** publications, they are not repeated here. Request of modifications of special permits (e.g. to provide for additional hazardous materials, packaging design changes, additional modes of transportation, etc.) are described in footnotes to the application number. Application numbers with the suffix ''M'' denote a modification request. These applications have been separated from the new application for special permits to facilitate processing.

DATES: Comments must be received on or before June 6, 2008.

Address Comments to: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue, SE., Washington, DC or at *http://dms.dot.gov*.

This notice of receipt of applications for modification of special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on May 12, 2008.

Delmer F. Billings,

Director, Office of Hazardous Materials, Special Permits and Approvals.

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permit thereof
MODIFICATION SPECIAL PERMITS				
7951–M	.....	Ball Aerosol & Specialty Container, Inc., Elgin, IL.	49 CFR 173.306(b)(1); 178.33; 175.3.	To modify the special permit to authorize an increase in rim vent release pressure from 210 psig to 235 psig.
12574–M	RSPA–00–8318	Weldship Corporation, Bethlehem, PA.	49 CFR 172.302(c)(2), (3), (4), (5); Subpart F of Part 180.	To modify the special permit to authorize the transportation in commerce of additional Division 2.2 gases.
13280–M	RSPA–03–16152 ...	Ovonic Hydrogen Systems, L.L.C., Rochester Hills, MI.	49 CFR 173.301(a)(1), (d) and (f).	To modify the special permit to authorize cargo aircraft and cargo vessel as approved transportation.
13487–M	RSPA–04–17293 ...	University of Colorado, Denver, Aurora, CO.	49 CFR 173.197	To modify the special permit to authorize the transportation of a Category A infectious substance in alternative packaging.
14298–M	PHMSA–06–23589	Air Products and Chemicals, Inc., Allentown, PA.	49 CFR 180.209(a) and (b).	To modify the special permit to authorize DOT specification cylinders mounted on a trailer frame.
14509–M	PHMSA–07–28225	Pacific Consolidated Industries, LLC, Riverside, CA.	49 CFR 173.302(a)(1), 173.304a(a)(1), 175.3.	To modify the special permit to authorize the transportation in commerce of additional Division 2.2 gases.

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permit thereof
14574–M	PHMSA–07–29127	KMG Electronic Chemicals (Former Grantee: Air Products), Houston, TX.	49 CFR 180.407(c), (e) and (f).	To modify the special permit to authorize teflon as an approved tank lining.
14631–M	PHMSA–08–0009 ..	iSi Automotive GmbH, Austria.	49 CFR 173.301, 173.302a and 173.305.	To modify the special permit to authorize the transportation in commerce of a Division 2.2 gas.

[FR Doc. E8–11226 Filed 5–21–08; 8:45 am]

BILLING CODE 4909–60–M

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designations of Entities Pursuant to Executive Order 13405

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the names of three newly-designated entities whose property and interests in property are blocked pursuant to Executive Order 13405 of June 16, 2006, ''Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus.''

DATES: The designation by the Director of OFAC of the three entities identified in this notice, pursuant to Executive Orders 13405, is effective May 15, 2008.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Avenue, NW., (Treasury Annex), Washington, DC 20220, Tel.: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

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

Background

On June 16, 2006, the President issued Executive Order 13405 (the ''Order'') pursuant to, *inter alia*, the International Emergency Economic Powers Act (50 U.S.C. 1701–06). In the Order, the President declared a national emergency to address political repression, electoral fraud, and public corruption in Belarus. The Order imposes economic sanctions on persons responsible for actions or policies that undermine democratic processes or institutions in Belarus. The President identified ten individuals as subject to the economic sanctions in the Annex to the Order.

Section 1 of the Order blocks, with certain exceptions, all property, and interests in property, that are in, or hereafter come within, the United States or the possession or control of United States persons for persons listed in the Annex and those persons determined by the Secretary of the Treasury, after consultation with the Secretary of State, to satisfy any of the criteria set forth in subparagraphs (a)(ii)(A) through (a)(ii)(E) of Section 1.

On May 15, 2008, the Director of OFAC, in consultation with the Secretary of State, designated, pursuant to one or more of the criteria set forth in Section 1, subparagraphs (a)(ii)(A) through (a)(ii)(E) of the Order, the following three entities, whose names have been added to the list of Specially Designated Nationals and whose property and interests in property are blocked, pursuant to Executive Order 13405:

1. LAKOKRASKA OAO (a.k.a. LAKOKRASKA OPEN JOINT–STOCK COMPANY), 71 Ignatova Street, Grodnenskaya Region, Lida 231300, Belarus; ul. Ignatova, 71, Grodnenskaya oblast, Lida 231300, Belarus [BELARUS].

2. POLOTSK STEKLOVOLOKNO OAO (a.k.a. POLOTSK PRODUCTION ASSOCIATION STEKLOVOLOKNO; a.k.a. POLOTSKOE STEKLOVOLOKNO OAO; a.k.a. POLOTSK–STEKLOVOLOKNO; a.k.a. POLOTSK–STEKLOVOLOKNO JSC; a.k.a. POLOTSK–STEKLOVOLOKNO JSC SD STEKLOKOMPOZIT; a.k.a. POLOTSK–STEKLOVOLOKNO OPEN JOINT–STOCK COMPANY; a.k.a. POLOTZK STEKLOVOLOKNO OAO; a.k.a. STEKLOVOLOKNO), ul. Stroitelnaya, Polotsk, 211412, Belarus; Industrial Zone Ksty, Vitebsk Region, Polotsk 21140, Belarus; Ksty Industrial Zone, 211400 Vitebskaya oblast, Polotsk, Belarus; Promuzel Ksty, Polotsk 211400, Belarus [BELARUS].

3. BELARUSIAN OIL TRADE HOUSE (a.k.a. BELARUSIAN OIL TRADING HOUSE; a.k.a. BELARUSIAN OIL TRADING HOUSE REPUBLICAN SUBSIDIARY UNITARY ENTERPRISE; a.k.a. BELARUSIAN OIL TRADING HOUSE REPUBLICAN UNITARY SUBSIDIARY; a.k.a. BOTH; a.k.a. UE BELARUSIAN OIL TRADE HOUSE), Dzerzhinsky Avenue, 73, Minsk 220116, Belarus; Prospect Dzerzhinskogo, 73, Minsk 220116, Belarus; 73 Derzhinskiy Ave., Minsk 220116, Belarus; Business Registration Document # UNP 101119568 (Belarus) [BELARUS].

Dated: May 15, 2008.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. E8–11472 Filed 5–21–08; 8:45 am]

BILLING CODE 4811–42–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Proposed Agency Information Collection Activities; Comment Request—Interagency Bank Merger Act Application

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 July 21, 2008.

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 Patricia D. Goings, (202) 906–5668, 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 Bank Merger Act Application.

OMB Number: 1550–0016.

Form Numbers: N/A.

Regulation requirement: 12 CFR Parts 546, 552 and 563.

Description: The Office of Thrift Supervision, Comptroller of the Currency, Federal Deposit Insurance Corporation, and Board of Governors of the Federal Reserve System each use the Interagency Bank Merger Act Application form to collect information for bank merger proposals that require prior approval under the Bank Merger Act. Prior approval is required for every merger transaction involving affiliated or nonaffiliated institutions and must be sought from the regulatory agency of the depository institution that would survive the proposed transaction. A merger transaction may include a merger, consolidation, assumption of deposit liabilities, or certain asset transfers between or among two or more institutions. The information collected by the remaining notifications and forms assist the regulatory agency in fulfilling their statutory responsibilities as supervisors. The regulatory agency uses the information to evaluate the controlling owners, senior officers, and directors of the insured depository institutions subject to their oversight.

Type of Review: Revision of a currently approved collection.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 17.

Estimated Number of Responses: 17.

Estimated Time per Respondent: 30 hours.

Estimated Frequency of Response: Other: As requested.

Estimated Total Burden: 510 hours.

Clearance Officer: Ira L. Mills, (202) 906–6531, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Dated: April 4, 2008.

Deborah Dakin,

Senior Deputy Chief Counsel, Regulations and Legislation Division.

[FR Doc. E8–11446 Filed 5–21–08; 8:45 am]

BILLING CODE 6720–01–P

Federal Register

Thursday,
May 22, 2008

Part II

Department of Veterans Affairs

38 CFR Parts 1, 14, 19 and 20

Accreditation of Agents and Attorneys; Agent and Attorney Fees; Final Rule

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 1, 14, 19 and 20

RIN 2900–AM62

Accreditation of Agents and Attorneys; Agent and Attorney Fees

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its regulations governing the representation of claimants for veterans benefits in order to implement provisions of the Veterans Benefits, Health Care, and Information Technology Act of 2006, and to reorganize and clarify existing regulations. As amended, the regulations establish the procedures and rules necessary for VA to facilitate the paid representation of claimants by accredited agents and attorneys after a Notice of Disagreement has been filed with respect to a case. The purpose of these regulations is to fulfill Congress' direction that agents and attorneys may be paid for services rendered after a Notice of Disagreement is filed with respect to a decision by an agency of original jurisdiction while ensuring that claimants for veterans benefits have responsible, qualified representation.

DATES: *Effective Date:* The final rule is effective June 23, 2008. See **SUPPLEMENTARY INFORMATION** for initial compliance dates.

Applicability Dates: Some amendments in this final rule are for prospective application only. For more information concerning the dates of applicability, see the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Michael G. Daugherty, Staff Attorney, Office of the General Counsel (022G2), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7699. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** on May 7, 2007 (72 FR 25930), VA proposed to amend its regulations governing the representation of claimants for veterans benefits, accreditation of individuals who may provide representation, and limitations on fees charged for representation. The public comment period ended on June 6, 2007. VA received 44 comments from interested individuals and organizations, including agents, attorneys, law firms, pro bono groups, and veterans service organizations (VSO). The comments generally concerned VA's proposed attorney accreditation requirements and the centralization of attorney accreditation and disciplinary proceedings in the Office of the General Counsel (OGC). The comments are discussed below. Based on the rationale described in this document and in the notice of the proposed rulemaking, VA adopts the proposed rule as revised in this document.

Section 14.627—Definitions

Noting some confusion in the comments concerning accreditation of individuals and when those individuals would be considered to be providing representation in a proceeding before the Department for purposes of charging fees, we modified the definitions in 38 CFR 14.627(a) and (n) to clarify that ''accreditation'' means authority to assist claimants in the preparation, presentation, and prosecution of claims for VA benefits, and that ''representation'' means the acts associated with representing a claimant in a proceeding before the Department pursuant to a properly executed and filed VA Form 21–22 (appointment of service organization) or VA Form 21–22a (appointment of individual).

In § 14.627(d), we amend the definition of ''attorney'' to mean a member in good standing of a State bar who has met the requirements prescribed in 38 CFR 14.629(b) for practice before VA. One commenter opined that changing the definition of ''attorney'' as proposed in § 14.627(d) was unnecessary. Another commenter, without taking a position on the appropriateness of the proposed definition, suggested VA address the question of whether the Agency Practice Act, 5 U.S.C. 500(b), prohibits VA from regulating attorney practice before the Department. We discuss VA's authority to regulate attorney practice before VA below under § 14.629.

We disagree that a change in the definition of ''attorney'' is unnecessary. Prior to the enactment of Public Law 109–461, VA accredited attorneys for practice before the Department based solely upon being a member in good standing of a State bar. However, Public Law 109–461 amended 38 U.S.C. 5904(a) and directed VA to prescribe, in regulations, qualifications and standards of conduct for practice before the Department. As discussed in greater detail below, the final rule does not require attorneys to submit to a character and fitness evaluation or pass a written exam to be accredited. Nonetheless, attorneys must apply for accreditation, certify their standing annually, and complete continuing legal education (CLE) requirements established by VA. Because these are requirements beyond bar membership we retain the definition of ''attorney'' as proposed.

Four commenters suggested that VA amend the definition of ''claim'' in § 14.627(g). One commenter suggested that we place the definition in 38 CFR part 3.

We agree that clarification is necessary concerning when a fee is payable for representation, especially in circumstances where more than one representative, agent, or attorney is involved. A number of commenters requested that we reconcile the definition of ''claim'' in § 14.627(g) with case law, including *Carpenter* v. *Nicholson*, 452 F.3d 1379 (Fed. Cir. 2006). Because the definition of ''claim'' in § 14.627(g) is identical to the prior definition we will retain it as proposed but will address commenters' concerns and reconcile the case law in § 14.636(c), the section pertaining to the circumstances under which fees may be charged.

One commenter recommended that the definition of ''service'' under § 14.627(o) include a proof of receipt component. We disagree. The commenter makes this suggestion based upon the alleged failure of VA to properly deliver correspondence related to benefit claims. However, requiring proof of service under part 14 does not address the commenter's concerns about benefit claims. Under part 14, claimants and attorneys are required to ''serve'' documents related to claimants' or the General Counsel's motions for review of fee agreements. Such service is not related to the manner in which VA mails or proves mailing of documents related to claims. Furthermore, we modeled our proposed service rules after the rules of practice and procedure generally followed by litigants, practitioners and courts, such as Rule 5(b) of the Federal Rules of Civil Procedure and Rule 25(c) of the Federal Rules of Appellate Procedure, both of which provide that service by mail is complete on mailing.

Section 14.629—Requirements for Accreditation of Representatives, Agents, and Attorneys

In 38 CFR 14.629, we proposed to continue administering VA's accreditation program in OGC and to clarify that the Assistant General Counsel has primary responsibility for the program. We received numerous comments regarding the requirements for accreditation. Several commenters suggested that it was a conflict of interest and a violation of due process

for OGC to administer the accreditation program because the General Counsel is the Secretary's legal advisor and represents the Secretary in benefits matters that are appealed to the U.S. Court of Appeals for Veterans Claims. These commenters asserted that OGC *might* use the accreditation program to screen out opposing counsel or to retaliate against parties in benefits litigation.

We agree that individuals seeking accreditation have the right to a timely decision based solely on the merits of their application by an impartial and unbiased decision maker. However, the argument that VA's accreditation program, as clarified by the amendments in 38 CFR 14.629, creates a conflict of interest and violates due process is not supported in law or in fact.

The VA General Counsel or his designee may lawfully determine whether an applicant satisfies the requirements for accreditation. In 38 U.S.C. 5904, Congress granted the Secretary of Veterans Affairs the authority to accredit agents and attorneys for practice before VA. *See also* 38 U.S.C. 5901 (''[N]o individual may act as an agent or attorney in the preparation, presentation, or prosecution of any claim under laws administered by the Secretary unless such individual has been recognized for such purposes by the Secretary.''). Congress has also authorized the Secretary to delegate authority to act and to render decisions under the laws administered by VA as he deems necessary. *See* 38 U.S.C. 512. The Secretary, then the Administrator of Veterans Affairs, first delegated the authority for the accreditation program to the General Counsel in 1954 in a new 38 CFR part 14.19 FR 5556, Aug. 31, 1954. The United States Supreme Court has held that such delegations, involving the combination of functions in a single decision maker, do not violate due process. *See Withrow* v. *Larkin*, 421 U.S. 35 (1975). Further, general allegations of conflict are not sufficient to rebut the strong presumption ''that public officers perform their duties correctly, fairly, in good faith, and in accordance with law and governing regulations.'' *Haley* v. *Department of the Treasury*, 977 F.2d 553, 558 (Fed. Cir. 1992) (quoting *Parsons* v. *United States*, 670 F.2d 164, 166 (Ct. Cl. 1982)), *cert. denied*, 508 U.S. 950 (1993). *See also Assoc. of Nat'l Advertisers* v. *FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979) (agency decision-maker ''should be disqualified [for a conflict of interest] only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding'').

In a case in which a corporation regulated by a Federal agency asserted that an agency decision maker participating in an investigation of a regulatory violation had prejudged its claim resulting in a violation of procedural due process, the U.S. Court of Appeals for the Federal Circuit held that the corporation could prevail on its claim ''only if it can establish that the decision maker is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.' '' *NEC Corp.* v. *United States*, 151 F.3d 1361, 1373 (1998) (quoting *United States* v. *Morgan*, 313 U.S. 409, 421 (1941)). *See also Hortonville Joint Sch. Dist. No. 1* v. *Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976). ''This standard is met when the challenger demonstrates, for example, that the decision maker's mind is 'irrevocably closed' on a disputed issue.'' *NEC Corp.*, 151 F.3d at 1373 (other citations omitted).

The commenters have not alleged any facts indicating an actual conflict of interest in OGC's administration of the accreditation program. The comments also suggest a misunderstanding of VA's organizational structure and the scope of VA's authority under 38 U.S.C. Chapter 59. Claims for VA benefits are adjudicated by agencies of original jurisdiction within one of the Department's administrations (Veterans Benefits Administration, Veterans Health Administration, or National Cemetery Administration) and those decisions are generally subject to review by the Board of Veterans' Appeals (Board), which makes the final agency decision on benefit claims. Although the Board is obligated by law to follow precedent opinions of the General Counsel, the Chairman of the Board is appointed by the President and is directly responsible to the Secretary, not the General Counsel. 38 U.S.C. 7101(a), 7104(c). Staff attorneys assist Board members in rendering decisions on benefit claims, but these attorneys are employees of the Board, not OGC. Also, VA's authority is to regulate agents' and attorneys' practice before the agencies of original jurisdiction and the Board, not practice before Federal appellate courts. *See* 38 U.S.C. 5904 (authorizing suspension or exclusion from ''practice before the Department''). Although OGC attorneys represent the Department before the Court of Appeals for Veterans Claims, they are not involved in the adjudication of claims before VA's agencies of original jurisdiction or the Board, the two forums in the Department where the accreditation provisions in 38 CFR part 14 are applicable. Under its limited accreditation authority, OGC cannot control or otherwise limit attorney admission to practice before the courts. In our view, continuing administration of the accreditation program in OGC is necessary to avoid conflicts that might arise from involvement of VA officers with claim adjudication responsibility and to ensure that only individuals with the appropriate legal expertise are involved in accreditation determinations.

We received four comments regarding the process for appealing an adverse initial accreditation decision of the Assistant General Counsel to the General Counsel. One commenter stated that although a final decision of the General Counsel may not be appealable within VA, ''it is clearly appealable under the Administrative Procedure Act [(APA)] and the Department should revise proposed § 14.629 to so state.'' We agree. A decision to deny accreditation under 38 U.S.C. 5904(a) is based solely upon a determination of whether an applicant has satisfied the requirements prescribed in regulations for accreditation. VA did not propose to deny judicial review of these decisions, only to clarify that review is in the U.S. District Court under the Administrative Procedure Act (5 U.S.C. 701–706) rather than in the administrative review system that Congress designed for adjudicating veterans benefit claims.

Although the Court of Appeals for the Federal Circuit held in *Bates* v. *Nicholson*, 398 F.3d 1355 (Fed. Cir. 2005), that section 5904 is a law that affects the provision of veterans benefits for purposes of the Board's jurisdiction, the court did not address the distinction between decisions denying accreditation under section 5904(a) and decisions cancelling accreditation under section 5904(b). Whereas a decision to cancel or suspend accreditation may indirectly affect the provision of benefits because it may result in withdrawal of representation and delay in adjudication, a decision to deny accreditation has no affect on pending adjudications. An unsuccessful accreditation applicant has had no lawful contact with VA's benefits system as a representative, agent, or attorney. Moreover, we do not interpret section 5904(a) as expressing congressional intent to extend VA's informal and nonadversarial adjudication process to individuals seeking admission to practice before VA. As such, an initial decision to deny accreditation to practice before VA under 38 CFR 14.629 is separate and

distinct from a decision to suspend or cancel accreditation under 38 CFR 14.633, which may be appealed to the Board under *Bates*. We will amend the introduction to § 14.629 to clarify that the General Counsel's decision denying accreditation is a final agency action for purposes of 5 U.S.C. 702.

Another commenter recommended that VA adopt a procedure for appeal of initial accreditation decisions similar to that provided in 38 CFR 14.633 for suspension or cancellation of accreditation because a denial of accreditation would impact a VSO representative's ability to remain employed. We disagree and will not make any changes based on this comment.

A service organization representative may not represent claimants before VA without VA accreditation under § 14.629(a); therefore, any employment by a VSO of an individual for purposes of providing representation before VA must be conditional. Procedural due process requires that an individual receive notice and an opportunity to respond before being deprived of a protected property or liberty interest. *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 542 (1985). However, an applicant does not have a protected liberty or property interest sufficient to warrant notice and opportunity for a hearing prior to VA making a decision on an accreditation application. *See White* v. *Office of Pers. Mgmt.*, 787 F.2d 660, 663–64 (D.C. Cir. 1986) (''before the right to a hearing attaches, a deprivation greater than the denial of a particular job application must be involved'').

To the extent the commenter suggests that a decision of the General Counsel to deny accreditation warrants some procedural due process, the process provided in the introduction to § 14.629 provides both notice and an opportunity to respond adequate to the nature of the interest involved. In the event the Assistant General Counsel denies an application for accreditation, the Assistant General Counsel will notify the applicant of the reasons for disapproval and provide the applicant with an opportunity to submit additional information. If the Assistant General Counsel continues to deny the application, the applicant may appeal the decision, in writing, to the General Counsel for a final decision. For the reasons discussed above, the appropriate forum for review of the General Counsel's decision denying initial accreditation is the U.S. District Court under the provisions of the APA.

One commenter expressed concern with the provision in the introduction to § 14.629 restricting the General Counsel's review of a determination to deny accreditation to the evidence of record before the Assistant General Counsel at the time the decision was made. The commenter suggested that this requirement would deny the appellant's right to due process because the rationale underlying the decision may not be apparent until the applicant receives notice of the decision.

It is not our intent to prevent individuals from submitting additional evidence necessary to satisfy the accreditation requirements or to limit the General Counsel's review of a decision denying accreditation to the initial application for accreditation. Under the introduction to § 14.629, the Assistant General Counsel will notify the unsuccessful applicant of the decision and provide the applicant an opportunity to submit additional information for the purpose of correcting any deficiencies or omissions. If, after receiving and considering the additional information, the Assistant General Counsel continues the denial of accreditation and the applicant appeals the decision to the General Counsel, the record forwarded to the General Counsel for review will include the additional information submitted by the applicant in response to the initial denial. Timely decisions on accreditation are important to both applicants and the Department; consequently, this provision is designed to encourage applicants to provide information in a timely manner to facilitate final resolution of the matter by the General Counsel.

We received many comments regarding the proposed requirement in § 14.629(b) that attorneys achieve a score of 75 percent or higher on a written examination as a condition of accreditation. We received eight comments in favor of testing, and 27 comments opposed to testing.

Among those commenters generally favoring testing, four stated that testing alone was insufficient to ensure continued competency to represent veterans before VA and recommended that VA require some form of CLE to ensure continued competency. Three commenters, while acknowledging the value of testing as a means to ensure competency, expressed concern that such a requirement would discourage pro bono representation of indigent veterans. Similarly, the two most prevalent reasons provided for opposition to testing was that CLE was necessary to maintain competency and that testing would discourage pro bono representation of indigent claimants. The majority of the remaining comments expressing opposition to testing as a requirement for attorney accreditation fell into one of four general categories: (1) The proposed rule failed to consider other alternatives to testing; (2) testing is contrary to Congressional intent; (3) testing is contrary to 5 U.S.C. 500, the Agency Practice Act; and (4) a testing requirement is redundant because attorneys have already demonstrated competency by passing a bar examination.

In drafting the accreditation provisions in the proposed rule, VA was required to reconcile the competing interests reflected in section 101 of Public Law 109–461. In section 5904(c), Congress directed that veterans were to be provided the option of retaining paid representation earlier in the administrative appeals process, after a Notice of Disagreement was filed with respect to a case. However, in section 5904(a), Congress introduced a new requirement that VA establish in regulations qualifications for practice before VA to ensure that agents and attorneys have specialized training or experience where VA had previously only required membership in good standing with a State bar as a requirement for attorney accreditation. Sections 5904(a) and (c) require VA to develop a program of agent and attorney accreditation that ensures competent representation while facilitating choice of representation.

In section 5904(a)(2), Congress gave VA the choice of prescribing in regulations a requirement that, as a condition of accreditation as an agent or attorney, an individual must have either a specific level of experience or specialized training. In drafting the proposed rule, we considered alternative means including practical experience through which applicants for accreditation could demonstrate either experience or training and concluded that testing provided balance between ensuring competence and providing choice of representation. After weighing all the options and considering the comments, we decided, with respect to attorneys, that a law degree, bar membership in good standing, and CLE in veterans benefits law and procedure is the best method to fulfill congressional intent as expressed in section 101 of Public Law 109–461. Although VA has authority under section 5904(a)(2) to ensure attorney competence through testing, we considered the formal education and testing already required of licensed attorneys, the potential chilling effect of further testing on pro bono representation of indigent veterans, and the absence of complaints concerning

attorney competence in representation before the Department under former law, and concluded that completion of CLE requirements is a better choice for veterans, their attorneys, and VA. Accordingly, we will take a measured approach in regulating the practice of attorneys before the Department and will amend the rule to remove the testing requirement and instead require the completion of State-bar-approved CLE credits to maintain accreditation. We will evaluate this method of ensuring competent attorney representation and may revisit the issue of testing at a later date.

After drafting the proposed rule, we learned that several State bar associations have offered, currently offer, or will offer CLE courses in veterans benefits law and procedure, some of which are available in formats capable of supporting distance learning for persons outside the jurisdiction. Other organizations offer veterans benefits law and procedure training that has been approved for CLE credit by some States. Accordingly, we will amend § 14.629(b) to provide that an initial 3 hours of State-bar-approved CLE in veterans benefits law and procedure is required for agents and attorneys. Additionally, to maintain accreditation, agents and attorneys would be required to periodically complete 3 hours of State-bar-approved CLE in veterans benefits law and procedure. VA will review available training as necessary to ensure sufficiency. Agents and attorneys applying for accreditation must satisfy the initial CLE requirement during the first year of accreditation and must satisfy the follow-on CLE requirement every 2 years thereafter. Upon completion of the initial and follow-on CLE requirements, agents and attorneys must certify in writing to OGC that they have completed qualifying CLE, such certification to include the date and time of the CLE and identification of the CLE provider. VA intends that agents and attorneys will include information concerning their compliance with the CLE requirements in the annual certification required by § 14.629(b)(4).

Even though we will not require testing for accreditation of attorneys under § 14.629(b), the question remains whether *any* additional requirements for attorney accreditation, such as the CLE requirement, are contrary to the Agency Practice Act, 5 U.S.C. 500, as some commenters asserted. Until Congress enacted Public Law 109–461, VA's attorney accreditation requirements were limited to those prescribed in the Agency Practice Act, bar membership in good standing and a written declaration of representation. However, in amended section 5904(a), Congress expressly directed VA to prescribe in regulations additional requirements for practice before the Department. In amending section 5904(a), Congress is presumed to have been aware of the Agency Practice Act, and, as a result, section 5904(a) as implemented by VA in § 14.629(b) should not be read as being in conflict with that act or the intent of Congress. *See* 2A Norman J. Singer, *Statutes & Statutory Construction* § 45.12 (6th ed. 2000) (In construing legislation, we must presume that Congress was aware of existing law and the rules of statutory construction.).

One commenter noted that, in amending 38 U.S.C. chapter 59, Congress did not remove provisions regarding the Agency Practice Act from 38 U.S.C. 5901. Section 5901 provides, ''[e]xcept as provided by section 500 of title 5, no individual may act as an agent or attorney in the preparation, presentation, or prosecution of any claim under laws administered by the Secretary unless such individual has been recognized for such purposes by the Secretary.'' The commenter went on to suggest that because Congress did not amend section 5901, it did not authorize VA to exceed the requirements in 5 U.S.C. 500, specifically bar membership in good standing and a written declaration of representation.

Congress did not remove the reference to 5 U.S.C. 500 in section 5901; however, to give effect to the commenter's suggestion would be to ignore Congress' amendment to section 5904(a) requiring VA to establish as a condition of accreditation a specific level of experience or specialized training, either of which goes beyond section 500's requirements for attorney practice before Federal agencies. The commenter incorrectly reads section 5901 in isolation from section 5904 and does not account for an applicable rule of construction. The provisions of chapter 59 must be read as a whole to give effect to amended section 5904. *See Splane* v. *West*, 216 F.3d 1058, 1068 (Fed. Cir. 2000) (''We must construe a statute, if at all possible, to give effect and meaning to all its terms.'') (citing *Lowe* v. *Securities & Exch. Comm'n*, 472 U.S. 181, 207–08 n.53 (1985)); *see also Gonzales* v. *Oregon*, 546 U.S. 243, 273 (2006) (statutes ''should not be read as a series of unrelated and isolated provisions'') (citation omitted); *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) (''It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'').

As discussed above, 5 U.S.C. 500 is a statute of general applicability, enacted in 1965 and binding on nearly all Federal agencies. In 1969, Congress amended former 38 U.S.C. 3401, now section 5901, to incorporate a reference to section 500. Public Law 91–21, § 12(a), 83 Stat. 34 (1969). Section 5904 is applicable only to VA and was amended in 2006. *See Food and Drug Admin.* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). (''The meaning of one statute may be affected by other acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.''); *see also Pioneer Hi-Bred Int'l, Inc.* v. *J.E.M. AG Supply, Inc.*, 200 F.3d 1374, 1376–77 (Fed. Cir. 2000) (It is a basic principle of statutory construction that ''a general statute must give way to a specific one.''). Because provisions incorporating section 500 were added to section 5901 over 37 years before the last amendment to section 5904(a), and because Congress expressly directed VA in section 5904(a) to establish attorney accreditation requirements that exceed those in section 500, a reasonable harmonization of sections 5901 and 5904 is that the reference to section 500 in section 5901 is for the purpose of establishing attorney practice requirements for VA to the extent Congress has not specifically provided otherwise in chapter 59.

One commenter stated that the proposed testing requirement for attorney accreditation was inconsistent with the requirement in section 5904(a)(2) that VA prescribe in regulations qualifications and standards of conduct consistent with the American Bar Association's Model Rules of Professional Conduct (Model Rules). The commenter noted that the comment to Model Rule 1.1 states, ''a lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar.'' Although we have decided to remove testing as a requirement for attorney accreditation, we do not agree that VA's authority to prescribe qualifications standards for agents and attorneys is limited by the comment to Model Rule 1.1.

The comment fails to distinguish between the general provision in section 5904(a)(2) and subsequent specific provisions modifying the general provision. In section 5904(a)(2), Congress directed VA to prescribe in regulations qualifications for accreditation consistent with the Model Rules. In section 5904(a)(2)(B), Congress further directed VA to establish as a condition of accreditation, a

requirement that an individual must have ''such level of experience or specialized training as the Secretary shall specify.'' Section 5904(a)(2)(B), as a specific provision, must be given effect as against the general provision provided in section 5902(a)(2). Thus, to the extent testing, or CLE, or any or any other accreditation requirement related to level of experience or specialized training may be inconsistent with the comment to Model Rule 1.1, it is consistent with the specific provision in section 5904(a)(2)(B).

Several commenters stated that testing of attorneys would be unnecessary and redundant because attorneys, as a condition of licensing, have already established a minimum level of competency by completing formal legal training and passing a State bar examination. One commenter questioned why VA would require the same testing for attorneys as is required for agents who have not completed similar legal education or passed a State-bar administered examination. To the extent the comments are limited to the proposed testing requirement, VA agrees that it is appropriate at this time to limit the regulation of attorney practice before the Department to membership in good standing with a State bar and subsequent completion of CLE requirements.

Although Congress did not distinguish between agents and attorneys in amending chapter 59 and directing VA to establish standards of conduct and qualifications as conditions for accreditation, formal legal education and State bar membership requirements for attorneys clearly distinguish them from agents. As discussed above, Congress intended that the legislation would increase standards for all individuals who provide paid representation before VA. Consequently, to ensure that claimants receive the same level of competence regardless of whether they are represented by an agent or an attorney, VA will continue to test agents as a condition of initial accreditation to verify their competence to represent claimants and will require both agents and attorneys to complete veterans benefits law and procedure CLE as a condition of maintaining accreditation. We will amend the final rule to incorporate these changes.

One commenter remarked that VA should consider a system for accreditation similar to that used by the Social Security Administration in its pilot program. The commenter suggested that VA should accept bar membership in good standing as sufficient for attorney accreditation and should test non-attorney representatives and require that they possess liability insurance as a condition of accreditation. VA's representation regulations, like those of Social Security, are limited by the authorizing statutes unique to each agency. As discussed earlier, the statute governing VA's accreditation of agents and attorneys requires a specific level of experience or specialized training in addition to membership in good standing in a State bar, as qualification requirements for accreditation. The pilot program to which the commenter refers is authorized by a specific statutory directive to the Commissioner of Social Security enacted in section 303 of Public Law 108–203. Clearly, if Congress had wanted VA to adopt a pilot program similar to that used by the Social Security Administration, it could have enacted similar authorizing legislation. Because VA's authority to regulate representation is limited to that provided in chapter 59, we will make no changes to the final rule based on the comment.

We received two comments stating that it is not necessary to evaluate the character of attorneys who are members in good standing of a State bar because they have already met the State's character and fitness requirements. VA agrees that a State bar's comprehensive character and fitness determination, which is a prerequisite to licensure, is generally sufficient for practice before VA. To fairly recognize the comprehensive nature of a State bar character and fitness evaluation, VA will generally accept an attorney's certification of membership in good standing with a State bar under § 14.629(c)(1)(B) as satisfactory proof of fitness to practice. Absent information to the contrary, VA will presume an attorney's continued fitness to practice upon the receipt of a completed VA Form 21a and self-certification of membership in good standing in those jurisdictions in which he or she is licensed under § 14.629(b). Accordingly, we will amend the final rule to reflect these changes.

Additionally, in regard to character and fitness, VA finds it necessary to differentiate between agents and attorneys. Because agents have not completed a background investigation comparable in scope to a State bar character and fitness evaluation, VA will conduct an expanded inquiry consisting of additional personal history questions on the VA Form 21a to provide a more complete basis for the Department's determination of good character and reputation. VA's experience with agent applications supports this decision, as several applications have omitted mention of circumstances that required further inquiry before we had enough information necessary to make a decision regarding accreditation. Agents, unlike representatives, work without the oversight and monitoring required of recognized organizations under § 14.628(d)(1). Additionally, without such an expanded inquiry, OGC simply cannot verify that an agent is who he or she claims to be.

One commenter requested that we clarify whether § 14.629(b)(4) permits self-certification of the State bars, courts, and agencies before which an attorney is authorized to practice. The commenter also asked us to clarify whether certification is an annual requirement.

Pursuant to 38 U.S.C. 5904(a)(3), VA must prescribe regulations requiring that ''each agent or attorney * * * provide annually * * * information about any court, bar, or Federal or State agency * * * to which such agent or attorney is admitted to practice or otherwise authorized to appear * * * and a certification *by such agent or attorney*'' that they are in good standing. We interpret the phrase ''by such agent or attorney'' to mean that self-certification is appropriate. Requiring certified statements from every bar, court, or agency to which an agent or attorney is admitted might be onerous, and some agencies and courts might not routinely provide such certification. We believe self-certification is sufficient, provided that the certification advises VA of any change in status. VA may verify such information as necessary, and false certification of good standing would be grounds for initiating disciplinary proceedings under 38 CFR 14.633. Concerning the requirements for periodic recertification, the plain language of section 5904(a)(3) is clear that Congress intended to require annual re-certification. We will amend § 14.629(b)(4) to clarify these certification requirements. Finally, we amended the regulation to clarify that an agent or attorney must notify VA within 30 days of any change in status in any jurisdiction in which he or she is admitted to practice. This is necessary because 38 U.S.C. 5904(a)(4) prohibits VA from recognizing an agent or attorney who has been suspended or disbarred and VA may not otherwise become aware of the suspension or disbarment until many months after the fact.

One commenter expressed concern that § 14.629(b)(5), which provides that VA will not accredit an agent or attorney ''if the individual has been suspended by any court, bar, or Federal

or State agency in which the individual was previously admitted and not subsequently reinstated,'' is overbroad in that lack of reinstatement in one jurisdiction following suspension and reinstatement in another jurisdiction may simply reflect an attorney's decision not to practice in a given jurisdiction. The commenter recommended that VA should accredit individuals as long as they are licensed to practice in one state.

The plain language of section 5904(a)(4) prohibits VA from recognizing an individual as an agent or attorney if such individual has been suspended or disbarred by any court, bar, or Federal or State agency to which the individual was previously admitted to practice and has not been subsequently reinstated. The statute contemplates a situation in which an attorney has not been reinstated after suspension or disbarment because he or she has been deemed ineligible for reinstatement by the admitting authority. The situation described by the commenter presents a slightly different situation in that suspension in one jurisdiction may be purely derivative of the action taken by another jurisdiction. The suspended attorney has subsequently demonstrated fitness to practice in one jurisdiction and has been reinstated in that jurisdiction, and the attorney voluntarily chooses not to seek reinstatement in the other jurisdiction. We do not interpret section 5904(a)(4) as precluding accreditation in these derivative suspension or disbarment situations. Accordingly, we will amend the rule to distinguish between an independent suspension or disbarment proceeding and a derivative disbarment proceeding for purposes of VA accreditation. In a situation where an attorney is suspended or disbarred in jurisdiction B solely based upon suspension or disbarment in jurisdiction A and the attorney is reinstated in jurisdiction A, the General Counsel may accredit such individual based on an evaluation of the particular facts and circumstances of the situation. However, in situations where an attorney is suspended or disbarred in jurisdictions A and B, and neither action is derivative of the other, reinstatement in both jurisdictions is a prerequisite to VA accreditation.

One commenter objected to VA asking an agent or attorney seeking accreditation for information relevant to whether the applicant has any physical limitation that would interfere with the completion of the written accreditation exam without further explanation of the purpose and relevancy of this information. This is not a new requirement as it applies to agents. Prior § 14.629(b)(viii) required individuals to submit relevant information concerning physical limitations as part of the application process for claims agents. VA uses this information to determine whether appropriate accommodations are necessary for administering the accreditation exam to individuals with disabilities who seek accreditation as a claims agent.

We proposed to revise § 14.629(c)(3) to clarify the nature of consent required by the claimant to permit a legal intern, law student, or paralegal to assist an attorney in representing the claimant. Several commenters expressed concern that requiring a claimant to provide written consent specifically identifying the names of the legal interns, law students, or paralegals assisting in the case would be overly burdensome. One commenter objected to the provision claiming it violated equal protection because the requirement does not apply to a VSO's support staff. A final commenter recommended that we exempt accredited legal interns, law students, and paralegals from this requirement.

We disagree that requiring a claimant to specifically identify any legal intern, law student, or paralegal assisting in the claim is overly burdensome. The purpose of this requirement is to ensure that a claimant affirmatively acknowledges that a specific individual will be working in a representative capacity on his or her claim and will have access to the claimant's private information. Section 14.629(c)(3) authorizes legal interns, law students, or paralegals to assist in the preparation, presentation, or prosecution of a claim under a duly appointed attorney. This authority allows legal interns, law students, and paralegals, under the direct supervision of an attorney, to directly engage claimants, review files, and appear on a claimant's behalf at any hearing. Current law, 38 U.S.C. 5701(a), makes files, records, reports, and other papers related to a claim confidential and privileged except when disclosure is authorized. Section 5701(b)(1) authorizes disclosure to a ''duly authorized agent or representative of a claimant.'' Given that legal interns, law students, and paralegals are authorized to represent a claimant in a limited capacity when supervised by an accredited attorney, we believe it is appropriate to require the claimant to identify by name any legal intern, law student, or paralegal authorized to represent the claimant.

We note that Rule 606 of the Board's Rules of Practice, 38 CFR 20.606, requires written consent by a claimant specifically identifying, by name, any legal intern, law student, or paralegal assisting in their claim. Thus, § 14.629(c)(3) merely applies current rules for practice before the Board to practice before VA's agencies of original jurisdiction. For the foregoing reason, we also decline to exempt any legal intern, law student, or paralegal, who is separately accredited by VA, from this requirement.

We also disagree that requiring a claimant to specifically identify a legal intern, law student, or paralegal assisting an accredited attorney violates the Due Process Clause of the Fifth Amendment, and in particular its equal protection component. The comment is based upon the commenter's mistaken belief that VSO support personnel may assist in the representation of a claimant without the claimant's consent and are thus similarly situated but treated differently. Under § 14.629(c)(3), legal interns, law students, and certified paralegals may assist in the preparation, presentation, and prosecution of a claim under the direct supervision of an attorney of record, provided that the attorney obtains the claimant's consent on a VA Form 21–22a. These individuals are deemed qualified to represent claimants under an attorney's supervision as a result of their specialized legal training. VSO support personnel, unlike legal interns, law students, and paralegals assisting accredited attorneys, are not authorized to assist in preparing, presenting, and prosecuting claims. Accordingly, the commenter's equal protection concern, that we require claimants' consent for legal interns, law students, or paralegals assisting accredited attorneys in providing representation but do not require claimants' consent for VSO administrative personnel assisting accredited VSO representatives, is unfounded.

One commenter opposed to testing stated that the quality of the examination would be dependent on the competency of VA Regional Counsel administering the examination and would introduce inconsistency in accreditation. Another commenter expressed concern about the format of the examination, the manner in which it would be developed, and the manner in which it would be graded. Although we have amended the rule to remove the testing requirement for attorneys, we will address these comments to the extent that they can be construed as relating to the testing of agents.

The role of Regional Counsel is limited to administering the examination to prospective agents. To ensure nationwide access to the

examination, it will be offered at the Regional Counsel of jurisdiction upon receipt of a complete application at the VA Central Office. To ensure uniformity, the Regional Counsel will administer the examination according to OGC's standard procedures. To ensure objectivity, the examination will be offered in a multiple-choice format and be graded by OGC personnel at VA's Central Office.

The sole purpose of VA's accreditation examination is to objectively determine whether an agent has the qualifications necessary to provide competent representation before the Department. To that end, VA's accreditation examination has been developed to fairly assess the minimum level of competence required for practice before the Department. Examination questions have been centrally developed by OGC's subject matter experts before incorporating them into the examination.

We received one comment regarding the term ''agency of original jurisdiction'' as it is used in § 14.629. The introduction to § 14.629 provides that upon a determination that an individual meets the requirements for accreditation in paragraph (a) or (b) of this section, VA will provide notification of accreditation authorizing the preparation, presentation, and prosecution of claims before ''an agency of original jurisdiction and the Board of Veterans' Appeals.'' One commenter, a VSO, expressed concern that language in the introduction to § 14.629 was not sufficiently broad to authorize practice before the Veterans Benefits Administration's Appeals Management Center and Resource Centers where claims may be forwarded for disposition. The commenter misunderstands VA's intent.

In drafting the introduction to § 14.629, VA's intent was to clarify that representation of claimants, and the rules governing such representation, were not limited to claims before the Board. VA's current policy is that authorization to provide representation on a claim decided by an agency of original jurisdiction includes the inherent authority to provide representation before other VA facilities to which the claim may be forwarded for disposition, including, but not limited to the Appeals Management Center and Resource Centers. We will amend the final rule for greater clarification.

Section 14.630—Authorization for a Particular Claim

A number of commenters recommended revising § 14.630 to authorize any individual to represent an unlimited number of claimants. These commenters seemed to interpret § 14.630 as a pro bono attorney representation provision. Two commenters recommended that we amend § 14.630 to authorize any unaccredited individual to represent an unlimited number of individuals so long as a fee is not charged. We will not make any changes to the rule based on these comments.

VA has long interpreted 38 U.S.C. 5903, the statutory authority for § 14.630, as a provision under which ''any individual'' may represent a claimant on a one-time-only basis on a ''particular claim'' for benefits. The individual must generally seek accreditation under 38 U.S.C. 5902 (service organization representatives) or 5904 (agents and attorneys) to provide representation for a claimant on any other claim. VA does not have authority under section 5903 to permit individuals to represent an unlimited number of claimants without VA accreditation as the commenters suggest. *See* 38 U.S.C. 5901 (''no individual may act as an agent or attorney in the preparation, presentation, or prosecution of any claim * * * unless such individual has been recognized for such purposes by the Secretary'') and 5903 (authorizing VA to permit representation on a ''particular claim'' only). We addressed the issue of attorney representation of claimants on a pro bono basis above regarding § 14.629.

Section 14.630(a) requires a person authorized to provide representation on one claim to file a VA Form 21–22a ''with the agency of original jurisdiction where the claim is presented.'' One commenter requested that we clarify the filing requirement because the case may be pending at a Resource Center, the Appeals Management Center, or the Board when the claimant seeks representation. The commenter recommended that the form be filed with the VA facility in possession of the claim.

We decline to change § 14.630(a) to require a claimant to file a representation form with the VA facility in possession of the claim. When a claimant files a claim with their local VA regional office they presumably know where they filed the claim and may have established contacts with VA personnel. We recognize that there will be instances in which the claim has been temporarily moved to another VA facility. However, it will be easier for the claimant if he or she files the representation form with the agency of original jurisdiction where the claim was presented. We understand that slight delay may result because of processing and forwarding. This section in no way prohibits a claimant from also forwarding a copy of the form to the VA facility that is handling the claim. A final situation may arise where a claimant moves from the jurisdiction of one regional office to the jurisdiction of another regional office. In that instance, the claim and case file will be transferred to the new regional office of jurisdiction, and the claimant should treat the new regional office as the ''agency of original jurisdiction where the claim is presented.''

Section 14.631—Powers of Attorney; Disclosure of Claimant Information

We received five comments regarding proposed § 14.631. One commenter expressed concern that under § 14.629(b), claimants currently represented by attorneys would have their representation revoked on the effective date of the new regulations unless and until a VA Form 21–22a is completed by the claimant. The commenter, while recognizing VA had good reasons to have a standardized consent form, stated that requiring the form to allow representation is a different matter because the claimants have a contract, on file with VA, indicating appointment of an attorney as their representative. The commenter recommended that we amend the rule to eliminate the requirement that a VA Form 21–22a be submitted as a requirement for representation, particularly for claimants represented by attorneys as of the effective date of the rule. We will not make any changes to the rule based on this comment.

Section 14.631(a) requires that claimants use a standard form, VA Form 21–22a, to appoint individuals providing representation on a particular claim under § 14.630, representatives, agents, and attorneys, and to authorize the disclosure of claimant information. We have authority under the amendments to 38 U.S.C. Chapter 59 in Public Law 109–461 to regulate agent and attorney practice before the Department, and we interpret this authority as permitting us to exceed the limitations in 5 U.S.C. 500 by, among other things, requiring the use of a standard form to indicate appointment. *See* 38 U.S.C. 5904(a)(2) (''[t]he Secretary shall prescribe in regulations * * * qualifications and standards of conduct for individuals recognized under this section''). We also interpret current law as requiring a claimant's written authorization before VA can release information protected by the Privacy Act, and 38 U.S.C. 5701 and

7332, and we have determined that VA Form 21–22a is legally sufficient to authorize release of such information. This is reflected in VA's current policy of releasing claimant information to attorneys only upon receipt of a VA Form 21–22a signed by the represented claimant.

We understand the need to ensure continuity of representation, and it is not our intent to revoke representation on the effective date of this rule if we do not have a VA Form 21–22a signed by the agent or attorney on file. Rather, the requirement pertains to claimants' designation of agents and attorneys occurring on or after the effective date of this rule. Accordingly, for all representation before the Department initiated *on or after* the effective date of this regulation, June 23, 2008, VA will not recognize the designation of an agent or attorney for purposes of representation or disclose claimant information to the agent or attorney without a properly executed VA Form 21–22a on file. As to representation initiated before the effective date of the regulation, because Federal law prohibits release of claimant information without claimants' written authorization, VA will not disclose such information to a claimant's attorney unless the claimant has authorized the disclosure on a Form 21–22a.

We also disagree with the suggestion that VA should accept non-standard authorizations for the release of claimant information and will not make any changes based upon the comment. VA has previously accepted non-standard authorizations for the release of claimant information from attorneys, but found many of these to be legally insufficient requiring additional review and communication with attorneys delaying both the processing of the claim and the release of information to attorneys.

One commenter approved of the requirement in § 14.631(a) that a person providing representation under § 14.630, or an accredited representative, agent, or attorney must sign the VA Form 21–22a to indicate acceptance of appointment for purposes of representation. The commenter stated that this provision would help to ensure that claimants contact VSOs in a timely manner if they need assistance.

We received a comment concerning the circumstances under which an attorney may terminate representation. The commenter requested that we add language similar to that provided in Model Rule 1.6 requiring an attorney to withdraw from representation when ''representation will result in a 'violation of the rules of professional conduct or other law.' '' We note that under State bar rules attorneys will generally have duties in addition to those prescribed by VA and that these rules typically contain the Model Rule 1.6 provision. Section 14.632(d) prohibits attorneys, in representing claimants before VA, from violating the rules of professional conduct of the jurisdictions in which they are licensed to practice law. Accordingly, we do not agree that it is necessary to add the model language and will not make any changes to the rule based on the comment.

One commenter disagreed with the requirements in § 14.632(c) to notify the agency of original jurisdiction of withdrawal from representation and to surrender of documents provided by VA in the course of the representation. Concerning the requirement to notify the agency of original jurisdiction in the event of withdrawal from representation, the commenter stated, among other things, that the provision does not account for the fact that the claim or appeal could be at a facility other than the agency of original jurisdiction. The commenter's experience also indicates that the agency of original jurisdiction ''does not notify other VA facilities or update the necessary databases in a timely manner.'' The commenter suggested that VA amend the final rule to require the individual or organization desiring to withdraw from representation to notify the VA facility in possession of the claim or appeal in addition to the agency of original jurisdiction and the claimant. VA agrees that additional notification upon withdrawal from representation would be helpful. Accordingly, we will amend the final rule to incorporate the suggestion.

Concerning the requirement for surrender of documents provided by VA upon withdrawal of representation, the commenter expressed support for the requirement in the proposed rule and suggested that it be extended to all documentation belonging to the claimant. The commenter also suggested that VA provide guidelines for situations in which an individual providing representation under § 14.630, representative, agent, or attorney loses contact with a clamant, and how long the documentation should be maintained for the protection of the claimant and the representative. Another commenter suggested it might not be appropriate to require that individuals withdrawing from representation return all documents to the claimant because several provisions in 38 CFR part 1 proscribe disclosing information to claimants if it would affect their physical or mental health. We agree that VA's withdrawal provisions should not conflict with other provisions intended to protect claimants from harmful information. Accordingly, we will amend § 14.630 to provide that upon withdrawal from representation, all documents provided by VA must be returned to the agency of original jurisdiction or pursuant to the claimant's request, provided to the organization or individual taking over the representation. *See* Model Rules of Prof'l Conduct R. 1.16(d) (steps to take upon termination of representation). However, we do not agree with the commenter's suggestion that we expand the rule to require individuals to provide all documents, including those obtained from the claimant and other sources, to the agency of original jurisdiction. We intend that individuals providing representation will maintain or dispose of these documents according to State law.

Two commenters stated that § 14.631(c) and (d) fails to ''address VA's role once a power of attorney has been withdrawn or revoked.'' The commenters suggested that the final rule should address whether VA intends to provide timely notice to all concerned parties in such situations and, if so, describe how VA would provide such notice. Commenters further stated that without timely notice by VA, claimants may be confused as to who represents them on a particular claim and seek advice from a party who is no longer their representative.

When a power of attorney is withdrawn or revoked, VA's role is to ensure that that communications regarding an affected claim or claims are provided only to the appropriate representative of record. It is the responsibility of the claimant and the organization, individual providing representation on a particular claim under § 14.630, representative, agent, or attorney to ensure that the claimant fully understands the scope of representation, particularly when an agent or attorney is providing limited representation on a particular claim under § 14.631(f)(2). Moreover, a claimant and his or her organization, individual providing representation on a particular claim under § 14.630, representative, agent, or attorney are in a better position than VA to understand who represents whom on a given claim. Therefore, VA will not provide additional notification of withdrawal or revocation to claimants or representatives. Additionally, the rule is not intended to preclude withdrawal from representation until a claimant obtains alternative representation. After

an organization, individual providing representation on a particular claim under § 14.630, representative, agent, or attorney complies with § 14.631(c), in part by providing time for the claimant to obtain alternative representation or proceed pro se, the organization or individual may withdraw from representation.

The commenters also expressed concern about § 14.631(f)(1) and (f)(2), under which agents and attorneys may limit the scope of their representation to a particular claim. They suggested that the final rule address VA's provision of timely notice to all individuals that a new power of attorney is limited to a particular claim and that the new power of attorney does not pertain to the veteran's other claims. VA disagrees with the premise that the responsibility for notifying claimants and other interested parties of arrangements to provide limited representation rests with VA and will not make any changes based on the comments. In enacting the amendments to 38 U.S.C. chapter 59, Congress provided claimants for VA benefits choice in representation. It is the claimant who designates the source and scope of representation on VA Form 21–22a and enters into fee agreements, not VA. Moreover, § 14.631 clearly identifies the effect of withdrawal from representation and the effect of a revocation of a power of attorney, a concept that organizations and accredited individuals are obligated to follow.

Under § 14.631(f)(1), receipt of a new power of attorney by VA, without limitation, revokes existing powers of attorney. Generally, there can be only one power of attorney. As a result, the organization or individual is appointed for representation on any and all claims the claimant has before the Department. Under § 14.631(f)(2), however, an agent or attorney may limit the scope of his or her representation to a particular claim by describing the limitation on VA Form 21–22a. Under this section, organizations or individuals with an unlimited power of attorney retain representation for all claims before VA with the exception of the particular claim indicated on the VA Form 21–22a. Agents and attorneys advising claimants concerning limited representation are obligated to exercise care in ensuring that claimants understand the precise scope of the representation to be provided by the agent or attorney, and that which will be provided by other individuals or organizations, if any. In such cases, the agent or attorney should inquire whether the claimant has an existing power of attorney appointing a VSO as his or her representative, and, when necessary, communicate with the other individuals or organizations representing the claimant before the Department. In the event that an agent or attorney withdraws from representation on a particular claim and the claimant has an existing power of attorney in favor of a VSO, representation on the particular claim defaults to the VSO, and, as a result, VA would send future information on the particular claim to the VSO. It is the shared obligation of the claimant and the organization, representative, agent, or attorney, to fully communicate concerning any modification to the scope of representation.

Commenters also expressed concern that VA lacked the capacity to distinguish between a claimant represented by an agent or attorney for all purposes and one represented by an agent or attorney only on one particular claim. Because such inability could result in miscommunication between VA, the claimant, and the representative, the commenters suggested that VA develop such capability. VA's current benefits delivery database does not have the capability described by the commenter, but VA has procedures in place to communicate with organizations and individuals providing a claimant with representation on different claims. VA is currently developing a replacement database, but it is unknown at this time whether the capability described will be included in the final version.

Section 14.632—Standards of Conduct for Persons Providing Representation Before the Department

We received a number of comments opposing the requirement in § 14.632(a)(2) that individuals representing claimants ''conduct themselves in accordance with the non-adversarial nature of the practice before the agency of original jurisdiction and the Board.'' One commenter suggested that attorneys are by nature adversarial and that VA incorrectly assumed Congress intended them to act in a non-adversarial way before VA. The same commenter also suggested that an attorney's ethical obligation to represent a client with ''zeal'' and the proposed regulation's mandate that attorneys adhere to the non-adversarial procedure cannot co-exist. Two commenters recommended that agents be permitted to represent claimants with ''zeal,'' presumably, in an adversarial manner.

We agree that Congress did not intend to prohibit ''adversarial'' conduct to the extent that such conduct meets the standard established by VA in 38 CFR 14.632 and is consistent with ethical advocacy on behalf of a claimant contesting an initial VA decision on a claim. However, we do not interpret the amendments to chapter 59 as expressing Congress's intent to create a new adversarial system of adjudication. In amending section 5904, Congress specified that claimants may pay for the ''services'' of agents and attorneys with respect to proceedings before the Department after the date on which a Notice of Disagreement is filed in the case. Congress did not define the scope of the services provided by agents and attorneys, except to specify that they involve, among other things, assisting claimants who challenge a VA decision. We interpret these provisions to mean that VA's adjudication system shall be flexible enough to permit agents and attorneys to act as advocates for their client in contested matters. Accordingly, we will modify § 14.632(a)(2) to remove the requirement that individuals providing representation shall conduct themselves in accordance with the non-adversarial nature of practice before VA. The remaining provisions in § 14.632, which are comprehensive in prohibiting disruptive conduct, are sufficient to protect the VA system.

One commenter suggested that we amend § 14.632(c) to proscribe ''knowing'' violations. The commenter speculated that VSO representatives are not familiar with the Model Rules and could unknowingly violate them.

First, the Model Rules have not been adopted, nor do they govern practice before VA. Section 5904(b) requires VA to prescribe regulations concerning standards of conduct for practice before VA that are *consistent with* the Model Rules. In other words, Congress directed VA to take them into account when establishing standards of conduct and qualifications for practice before VA. While 38 U.S.C. 5902 and 5903 subject representatives and individuals to suspension or exclusion from practice before VA as prescribed by 38 U.S.C. 5904(b), neither section adopts the Model Rules. Rather, in implementing the statute, VA is establishing standards of conduct for all persons representing claimants before VA in § 14.632. These standards are based upon the Model Rules and we intend to look to the commentary to the Model Rules and relevant administrative and judicial opinions on the Model Rules when interpreting them. Section 14.632(d) is clear that attorneys must additionally comply with the rules of professional conduct of any jurisdiction in which they are admitted to practice to the extent that those rules do not conflict with VA's regulations. Because the Model Rules have not been adopted, the

commenter's concern that a non-attorney representative may unknowingly violate them is unfounded.

The commenter also expressed concern that the General Counsel would discipline a representative based upon an unknowing violation of the Model Rules and recommended that we amend § 14.633(c) to clarify that disciplinary action is appropriate only for knowing violations. An individual representing a claimant before VA should be capable of comprehending what is required of them under the standards of conduct in § 14.632 and act accordingly. However, upon further review, we believe that the General Counsel should consider the circumstances surrounding a violation of those standards and have sufficient discretion to impose the proper remedy. While we opt not to add a knowledge element § 14.632(c), we will address the General Counsel's discretion in suspension and cancellation of accreditation proceedings in § 14.633(c).

One commenter expressed concern that § 14.632(b)(2), which requires individuals representing claimants before VA to ''act with reasonable diligence and promptness in representing claimants,'' fails to clearly define what constitutes a ''prompt'' response. The commenter also sought clarification of ''good cause'' under § 14.632(c)(7) and as it relates to § 14.632(b)(2). The meaning of ''prompt'' and ''good cause'' for purposes of this provision cannot be defined according to a set of criteria, such as particular number of days, given the variety of circumstances that may arise in claim adjudication. Rather, we intend only that individuals interacting with VA in a representational capacity be ready and quick to act as the occasion demands. We expect individuals representing claimants before VA will make reasonable efforts to expedite the administrative process and not use dilatory tactics. When VA requests information from a claimant or his or her representative, reasonable efforts should be made to respond to VA's request as soon as practicable as this is in the best interest of the claimant. This section is intended to put all representatives on notice that unreasonable delay will not be tolerated.

One commenter stated that § 14.632(c)(5), which prohibits agents and attorneys from entering into fee agreements that are ''clearly unreasonable [or] excessive,'' is ambiguous. We agree in part and disagree in part. First, the term ''excessive'' is redundant because any excessive fee will be ''unreasonable.'' Therefore, we will remove ''excessive'' from the regulation text.

We disagree, however, that there is ambiguity in our use of the term ''unreasonable'' and will not change the rule based upon the comment. As an initial matter, 38 CFR 14.636(e) lists eight factors that VA considers when reviewing a fee agreement for reasonableness. They are the same factors that the Board considered under former law, and we did not intend any substantive change when we moved those criteria to 38 CFR Part 14. Second, § 14.636(f) implements the statutory presumption that fees of 20 percent or less are presumed reasonable. The presumption of reasonableness, combined with the criteria for reviewing fee agreements, provides agents and attorneys sufficient notice concerning the reasonableness of fees.

A number of commenters also expressed concern about § 14.632(c)(9) and requested clarification of the ''acts or behavior prejudicial to the fair and orderly conduct of the administrative proceedings before VA.'' While § 14.632(c)(7) concerns an individual's obligation to provide prompt representation to a claimant, § 14.632(c)(9) concerns an individual's use of dilatory or obstructive tactics during representation. Such tactics might include advising a claimant to withhold cooperation, filing duplicative pleadings, unnecessarily disrupting hearings, intentionally misleading adjudicators, or other tactics that cause unnecessary delay. In our view, this provision is sufficiently clear to put individuals on notice that they cannot employ such tactics when providing representation in a proceeding before the Department. Accordingly, we will not make any changes based upon the comments.

One commenter recommended that we amend § 14.632(c)(10) to clarify that disclosure of a claimant's information to paralegals and other support staff is not prohibited and not a violation of VA's standards of conduct. We disagree and will not make any changes based on the comment. As discussed above regarding § 14.629(c)(3), a claimant must specifically authorize a legal intern, law student, or paralegal to assist an attorney in providing representation. The change recommended by the commenter would conflict with § 14.629(c)(3) and interfere with our obligation to protect the confidentiality of claimants' information.

One commenter opposed § 14.632(c)(11), which prohibits, among other things, a claimant's representative from engaging in ''unprofessional'' conduct. The commenter suggested that there is no universal definition of ''professional'' and that determining what is ''unprofessional'' for purposes of enforcing VA's standards of conduct would be difficult absent precise guidance. We agree and will remove engaging in ''unprofessional'' conduct as violation of VA's standards of conduct.

Section 14.633—Termination of Accreditation or Authority To Provide Representation Under § 14.630

We received numerous comments regarding the proposed regulations governing suspension and cancellation of accreditation under 38 CFR 14.633. In general, commenters expressed concern about the role of OGC in suspension and cancellation proceedings, suspension and cancellation procedures, the types of sanctions that could be imposed, and the grounds for suspension and cancellation of accreditation.

We received ten comments expressing concern about OGC's role in accreditation matters. Under proposed § 14.633, the Assistant General Counsel managing VA's accreditation program investigates and presents disciplinary matters to a hearing officer and forwards the hearing officer's findings to the General Counsel with a recommendation for a final decision. A commenter questioned whether the Assistant General Counsel should have responsibility for both the prosecutorial function and the adjudicative function, recommending a final decision, in disciplinary proceedings. According to the commenter, the procedure in § 14.633 ''raises the perception of unfairness or conflict of interest in cancellation proceedings.'' The commenter recommended that we amend the rule to provide a more independent disciplinary counsel to investigate and present VA's case in suspension and cancellation proceedings. The commenter also recommended that the rule explicitly provide that the presiding hearing officer ''not directly or indirectly report to, or be employed under, the General Counsel or others designated to decide disciplinary matters'' and ''that the hearing officer not be a VA employee.''

Other commenters also expressed concern about the General Counsel's broad authority in accreditation matters. One commenter stated that there was an inherent conflict with the same entity making accreditation and disbarment decisions. Another commenter suggested that OGC, as his ''adversary,'' would use the authority under § 14.633 to find that he was not competent to represent claimants before the Department. One individual generally

suggested that concentration of accreditation authority in OGC invited abuse. To remedy the potential for and/or perception of conflict, one commenter suggested that VA appoint an independent body, not under the supervision of the General Counsel, to conduct initial investigations, hold hearings, and make accreditation decisions. Another commenter stated that the General Counsel, as the Secretary's counsel of record before the U.S. Court of Appeals for Veterans Claims, would be biased, or at least conflicted, in making disciplinary determinations as to whether an attorney's conduct was unprofessional or that an attorney's representation lacked competence; therefore, such decisions should be decided by an independent third party, not the commenter's opposing counsel.

It is well-settled that a Federal agency may police the behavior of attorneys and other professionals practicing before it. *See Polydoroff* v. *Interstate Commerce Comm'n*, 773 F.2d 372, 374 (D.C. Cir. 1985). Moreover, the combination of investigative and adjudicative functions in a single entity to regulate the conduct of professionals, as proposed in § 14.633, without more, does not violate due process. In *Withrow* v. *Larkin*, 421 U.S. 35, 56 (1975), the Supreme Court held, ''[i]t is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.'' The Secretary of Veterans Affairs may lawfully delegate authority for accreditation matters to OGC. 38 U.S.C. 5904 (Secretary's authority to recognize individuals for practice before the Department); 38 U.S.C. 512 (Secretary's delegation authority concerning decisions under laws administered by VA). The General Counsel has made the final decision on matters of accreditation concerning representatives, agents, and attorneys since 1954 without being challenged based upon evidence of actual conflict of interest or bias. *See* 38 CFR 14.629 (1954) (''[a]ny cause considered sufficient to reject the application of an attorney or agent or to cancel recognition previously granted will be reported through the Chief Attorney to the General Counsel for final determination''); 38 CFR 14.637 (1954) (''[i]f the charge or charges be sustained, the General Counsel if he concurs in the recommendation, will suspend or revoke the recognition of such attorney or agent'').

Management of VA's accreditation program is a proper function of OGC. The office is staffed by attorneys who have the necessary expertise to administer the program and these attorneys are not involved in the adjudication of claims before VA's agencies of original jurisdiction or the Board where accredited individuals provide representation. Further, VA does not have authority to regulate the practice of individuals before the Court of Appeals for Veterans Claims and the OGC attorneys that represent VA before that court are under the supervision of a separate Assistant General Counsel who is not involved in administration of the accreditation program. The commenters did not raise any issue of actual conflict or bias sufficient to disturb VA's long-standing practice of managing the accreditation program in OGC. Nonetheless, we agree that the process for suspending or cancelling accreditation can be improved to minimize the appearance of conflict and bias. To that end, we will amend the rule to clarify that the hearing officer will not directly or indirectly report to, or be employed under, the General Counsel or the head of any VA agency of original jurisdiction before which the individual provides representation.

To further insulate the General Counsel's adjudication of suspension or cancellation decisions from investigation, prosecution, and fact finding, we will amend the rule to remove the procedural requirement in proposed § 14.633(f) that the Assistant General Counsel provide a recommendation on a final decision to the General Counsel after reviewing the record provided by the hearing officer. Instead, the rule provides that the hearing officer shall submit the entire hearing transcript, any pertinent records or information, and a recommended finding to the Assistant General Counsel within 30 days after closing the record. Participation of the Assistant General Counsel following the investigation and prosecution of any disciplinary matters will be limited to providing administrative support to the hearing officer in compiling the record and forwarding it to the General Counsel with the hearing officer's recommendation.

The amendments described above, which ensure a neutral hearing officer and insulate the General Counsel's adjudicative decision from the investigative and prosecutorial functions of the Assistant General Counsel, are sufficient to minimize the appearance or perception of a conflict of interest. Accordingly, we will not make further changes to the proposed rule based on the comments.

We received three comments concerning the Assistant General Counsel's notice in disciplinary proceedings under § 14.633. One commenter suggested that we amend the rule to provide notice and opportunity to respond to allegations of misconduct or incompetence prior to initiating an inquiry. Another commenter suggested that we additionally provide ''remedial notice'' under § 14.633. Such notice would advise the individual of the infraction and provide an opportunity for the individual to correct the offending behavior in lieu of formal disciplinary proceedings. Finally, a commenter stated that an individual who requests a disciplinary hearing should receive all information about the complaint, including its source.

We agree that the notice provided to individuals in disciplinary proceedings could be expanded to improve the process and, consistent with current practice, may reduce the number of formal inquiries resulting from inadvertent acts or technical violations. Accordingly, we will amend the rule to provide that the Assistant General Counsel, before deciding whether to conduct an inquiry under § 14.633, will inform the individual of the allegations, potential violations of law, and the source of the complaint, and will provide the subject with an opportunity to respond. Additionally, we will amend the rule to provide that when appropriate, including but not limited to situations when the seriousness of the violation does not justify an inquiry because no harm results to the claimant or VA, the Assistant General Counsel will provide an opportunity for the subject to correct the offending behavior before deciding whether to conduct an inquiry. This clarification reflects current practice in that the Assistant General Counsel provided notice and opportunity for remedial actions prior to initiating formal inquiries in some cases under former law.

We received two comments regarding the absence of suspension as a sanction in proposed § 14.633. One commenter questioned the omission of suspension from proposed § 14.633 because section 5904(b) expressly provides that VA may suspend or exclude individuals from practice before the Department and stated that VA's failure to include the lesser sanction of suspension is an unreasonable interpretation of the statute. Another commenter disagreed with VA's use of terms ''cancel'' and ''terminate'' in § 14.633 when the statute

provides that ''the Secretary may suspend or exclude.'' The commenter recommended that VA use the statutory terms and specify several kinds of discipline with the most severe sanction being exclusion from practice before VA. This commenter also recommended that the timing and methods of seeking reaccreditation be specified.

We agree that suspension may be appropriate in cases involving extenuating circumstances or where the misconduct is not so severe as to warrant the harsher penalty of canceling accreditation. On October 12, 2007, VA published in the **Federal Register** (72 FR 58009) a final rule amending § 14.633 to provide for suspension of accreditation as a lesser sanction for conduct prohibited by section 5904. The amendments provide that the General Counsel may suspend accreditation for a definite period or until the individual satisfies the conditions established by the General Counsel for reinstatement. The General Counsel will reinstate suspended accreditations at the end of the period of suspension or upon verification that the individual has satisfied the conditions for reinstatement. The General Counsel's decision to suspend or cancel an individual's accreditation will be based on the facts and circumstances of the particular case, with suspension being appropriate in cases involving extenuating circumstances or less egregious conduct not warranting permanent cancellation.

VA's use of the terms ''cancel'' or ''terminate,'' instead of ''exclude,'' in § 14.633 is intentional. In section 5904(b), the terms ''suspend'' and ''exclude'' refer to the General Counsel's decision to temporarily or permanently prohibit an individual from providing representation before the Department. Accreditation is analogous to a license to practice before VA, which the General Counsel suspends, cancels or terminates. The General Counsel does not ''exclude'' an accreditation.

Two commenters disagreed about the provisions in § 14.633 that subject VSO representatives to suspension or exclusion from practice before VA on the same grounds as apply to agents and attorneys. The commenters found it ''inherently inequitable'' that the proposed regulation did not distinguish between individuals who provide paid representation and those who do so without charge. We disagree and will not change the rule based on these comments.

All claimants for VA benefits are entitled to responsible, qualified representation, and VA did not propose any change to § 14.633 to the extent that it treated VSO representatives and agents and attorneys the same for purposes of discipline. In amending section 5904(b), Congress did not distinguish between paid and unpaid representation. Further, under the plain language of 38 U.S.C. 5902(a)(2), VSO representatives ''shall be subject to the [disciplinary] provisions of section 5904(b) of this title on the same basis as'' an agent or attorney accredited under section 5904(a).

Several commenters expressed concern with § 14.633(c)(4), which adds the submission of a frivolous claim, issue, or argument as grounds for suspension or exclusion from practice before VA. Two commenters stated that all veterans are entitled to representation and that it is VSO policy to present all claims to VA for processing, even if the claimant does not have evidence supporting a grant of benefits. These commenters are concerned that VSO representatives might be held responsible for claims and arguments submitted by claimants directly to VA without the knowledge of the representative or VSO. They also expressed concern about the definition of ''frivolous'' in VA's regulation. Two commenters complained that the rule does not clearly define ''good faith argument'' and questioned whether an argument could shift from being non-frivolous to frivolous. The commenters all noted the tension between the need to file a claim to gain the earliest possible effective date and the need to determine whether a claim, issue, or argument is frivolous.

A veteran's right to representation under 38 U.S.C Chapter 59 does not include the right to representation for frivolous claims. The plain language of section 5904(b)(6), made applicable to representatives by section 5902(b)(2), provides that the Secretary may suspend or exclude agents and attorneys who present a frivolous claim, issue, or argument. In the Committee Report accompanying the predecessor bill to S. 3421, S. 2694, the Senate Committee on Veterans' Affairs specifically recognized the adverse impact that frivolous claims filed by service organizations have on VA's system of adjudication. *See* S. Rep. No. 109–297, at 17 (2006) (''service organizations must ensure that * * * frivolous claims are removed so that valid claims are not needlessly delayed''). Noting the growth in the number of claims filed with VA, the Committee resolved that ''requiring all veterans' representatives to advocate responsibly, by avoiding frivolous claims, arguments, or issues, could be of significant help in ensuring that 'valid claims are not needlessly delayed.' '' *Id.* at 19 (citations omitted).

VA's definition of ''frivolous'' in § 14.633(b)(4) is based on Model Rule 3.1. In our view, the regulation is sufficiently clear to provide notice of prohibited conduct. Additionally, were VA to discipline a representative, agent, or attorney for filing a frivolous claim, and such action were appealed to the Board, precedent opinions of the Court of Appeals for Veterans Claims and Court of Appeals for the Federal Circuit would control. In the Senate Committee's report, it quoted *Abbs* v. *Principi*, 237 F.3d 1342, 1345 (Fed. Cir. 2001), in defining frivolous arguments or issues as those '' 'that are beyond the reasonable contemplation of fair-minded people.' '' S. Rep. No. 109–297, at 19–20. In *Abbs*, the court also noted that an action is frivolous when the individual providing representation ''has significantly misrepresented the law or facts, or has abused the judicial process by repeatedly litigating the same issue in the same court.'' *Abbs*, 237 F.3d at 1345.

Comment 2 to Model Rule 3.1 is instructive concerning whether filing a claim when all the facts are not known or all the evidence is not fully developed can be regarded as frivolous:

> The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. *What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions.* Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Model Rules of Prof'l Conduct R. 3.1 cmt. (2000) (emphasis added). Like agents and attorneys, VSO representatives must inform themselves about the facts of each case and the applicable law, and before providing further representation, determine whether they can make a good faith argument in support of a claim. In this context, VA interprets ''good faith'' as ''honesty of purpose'' and ''freedom of intention to defraud.'' Black's Law Dictionary 477 (6th ed. 1991). In the event that a good faith argument cannot be made, representatives, agents, and attorneys must withdraw from representation or assume the risk of

suspension or exclusion from further practice before VA.

The commenters also asserted that certain unspecified State and County veterans agencies are prohibited by State and local law from refusing to represent veterans seeking benefits. As a result, the commenters claim that VA's regulation would be in conflict with State law. Without reviewing the specific State and local laws in question, it is difficult to respond to this comment. However, to the extent that the existence of a State or local law requiring an organization to provide representation conflicts with the prohibition on the filing of frivolous claims under section 5904(b)(6) and 38 CFR 14.633(c)(4), we do not agree that a change is necessary. Federal law generally preempts the application of State law by virtue of the preemption doctrine. *See* U.S. Const. art. VI, cl. 2. Despite the fact that Congress did not expressly command that State laws regarding representation would be superseded by those in 38 U.S.C Chapter 59, Congress' intent can be inferred ''because '[the] scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' '' *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Unless otherwise specified in statute, Congress has left no room for the States to supplement the law related to the provision of Federal veterans benefits. Federal regulations have the same preemptive effect as Federal statutes. *Id.* at 154. Accordingly, we will make no changes to the rule in this area based on the comments.

Two commenters recommended that VA discipline an individual for presenting a frivolous claim, argument or issue only if it was a knowing violation of the law. One commenter stated that adding a knowledge requirement would bring the proposed rule in line with the standard expressed in § 14.633(c)(2) that limits sanctions for presenting or prosecuting a fraudulent claim to those made ''knowingly.'' The other commenter suggested that we amend the rule to provide that a service officer must have acted intentionally or recklessly in providing representation before VA takes disciplinary action. We agree that a violation of § 14.633(c)(4) should include a requirement that such violation was made knowingly and will amend the rule to add such language.

One commenter expressed concern that § 14.633(c)(7), which states that ''any other unlawful, unprofessional, or unethical practice'' may be grounds for suspension or exclusion from practice before VA, is too broad and allows VA to disaccredit representatives for any unlawful practice, such as speeding.

Section 14.633(c)(7) is intended to provide the General Counsel with authority to cancel accreditation for any unlawful, unprofessional, and unethical practice adversely affecting an individual's fitness for practice before VA. Despite the fact that current § 14.633(c)(4) has contained similar language for many years, VA has never used this authority to disaccredit individuals for traffic violations or other conduct unrelated to fitness to practice before VA. However, for the reasons expressed above, we will strike the term ''unprofessional'' and amend the final rule to clarify that that the General Counsel's authority to cancel accreditation for unlawful and unethical practices is limited to conduct adversely affecting an individual's fitness for practice before VA.

Three commenters were concerned that in proposed § 14.633(d) providing that accreditation shall be cancelled when the General Counsel finds that the performance of an individual providing representation under § 14.630, representative, agent, or attorney demonstrates a lack of the degree of competence necessary to adequately prepare, present, and prosecute claims for veterans benefits, was too vague and would lead to inconsistent disciplinary decisions. They suggested that VA establish specific and objective criteria in an effort to better define the concept. VA agrees that further explanation would improve understanding of the concept.

Competent representation encompasses many factors, among others, the level of knowledge and skill required for a particular case, the degree of preparation required for a particular case, and the analysis of the facts and issues required in a particular case. *See* Model Rules of Prof'l Conduct R. 1.1 cmt. (2000). A representative, agent, or attorney demonstrates a lack of the degree of competence necessary to adequately prepare, present, and prosecute a claim for veterans benefits when his or her performance indicates a lack of the knowledge, skill, or preparation required for a particular case. At a minimum, individuals representing claimants before VA must be familiar with the facts of the particular case, applicable law, and the procedures for filing claims and appeals. Because the facts and circumstances of a particular case and the skills possessed by a representative, agent, or attorney are unique, a checklist of specific criteria demonstrating a lack of competence would necessarily be incomplete; however, we will amend the final rule to provide that a lack of the degree of competence required will be based on the factors discussed in the current commentary to Model Rule 1.1.

Concerning consistency in determining whether a representative demonstrates a lack of the degree of competence required to prepare, present, and prosecute a claim, the investigation of such allegations is centralized with the Assistant General Counsel managing VA's accreditation program under § 14.633. Centralization will result in uniform application of the disciplinary standards in § 14.633.

One commenter expressed concern about the provision in § 14.633(e) requiring VA to initiate an inquiry ''upon receipt of information from any source.'' According to the commenter, without specific guidelines as to what type of information VA would act upon, VA will be overwhelmed with allegations of incompetent representation, some of which could be unfounded. To better balance the interests of individuals providing representation before the Department with the interests of the Department in ensuring the competent representation of claimants, we will amend the rule to specify that VA will initiate an inquiry under § 14.633 only upon receipt of credible, written information, including e-mail messages, indicating improper conduct or incompetence. As discussed earlier, when VA receives information concerning misconduct or incompetent representation of claimants before the Department, the Assistant General Counsel will provide notice to the individual concerned and an opportunity to respond before initiating a formal inquiry. Consistent with current practice, we believe that requiring written complaints and providing notice to the individual concerned will reduce the potential for unfounded complaints.

Two commenters stated that the 30-day period for an individual to respond to the Assistant General Counsel's notice of intent to suspend or cancel accreditation is an unreasonably short period of time to respond to such notice and request a hearing. One commenter stated that the 30-day period is ''arbitrarily short'' and ''does not meet the standard for meaningful due process.'' The other commenter suggested that the final rule address whether time periods are based on calendar or business days and whether a response is deemed timely based on the date of mailing or date of receipt. It was also suggested that a 45-day time

period would avoid forcing individuals to chose between attending to client representation and responding to VA. We do not agree that the 30-day period for responding to the Assistant General Counsel's notice is unreasonable and will not make any changes to the rule based on these comments.

As we discussed above, procedural due process under the U.S. Constitution is a flexible concept depending upon the demands of the particular situation. VA is obligated under its accreditation authority to ensure the responsible, qualified representation of claimants for benefits. In our view, it would be unreasonable and prejudicial to claimants to provide accredited individuals more time than is reasonably necessary to respond in these disciplinary matters. Accordingly, we will not provide more than 30 days for responding to the Assistant General Counsel's notice of intent to suspend or cancel accreditation. The 30-day period is appropriate and fair because it strikes a balance between VA's interests in protecting claimants and the interests of individuals responding to a notice of intent to cancel accreditation. We note that § 14.633(e)(1)(i) requires the Assistant General Counsel to provide notice concerning the right to submit additional evidence during disciplinary proceedings and to request a hearing. Further, under § 14.633(f), individuals may present evidence at a hearing and may supplement that evidence during the 10-day period following the hearing. In our view, these measures reasonably balance VA's obligations to claimants and individuals who are the subject of disciplinary proceedings. Finally, should the 30-day period be insufficient to formulate an answer, § 14.633(e)(2)(iii) provides that the Assistant General Counsel ''may extend the time to file an answer or request a hearing for a reasonable period upon a showing of sufficient cause.''

We agree that we need to clarify the scope of the 30-day response period in § 14.633(e)(2)(i). Accordingly, we will amend the rule to provide that an individual providing representation under § 14.630, representative, agent, or attorney has 30 calendar days from the date on which the Assistant General Counsel mails notice of intent to suspend or cancel accreditation to file an answer and to request a hearing. In computing the time period for filing a response, the date on which the notice was mailed by the Assistant General Counsel shall be excluded from the 30-day period. A response postmarked prior to the expiration of the 30-day period shall be accepted as having been timely filed. If the 30th day falls on a weekend or legal holiday, then the first business day thereafter shall be included in the computation. We define ''legal holiday'' consistent with Rule 6 of the Federal Rules of Civil Procedure.

Two commenters disagreed with the General Counsel's discretion under § 14.633(f) to hold disciplinary hearings at a VA Regional Office or at the VA Central Office. One commenter suggested that the individual who is the subject of the disciplinary proceeding should be allowed to choose where the hearing is held. The other commenter suggested that the final rule prescribe criteria for deciding the location of a hearing. According to this commenter, requiring a representative, agent, or attorney to travel to Washington, DC for a hearing would be a hardship and potentially impair the individual's ability to produce evidence or compel the appearance of witnesses. The commenter also noted that VA's regulation providing subpoena authority to officials in designated positions prescribes a 100-mile radius from the place of a hearing for such authority and questioned whether VA would extend the 100-mile limit for purposes of this regulation. *See* 38 CFR 2.2(b).

We agree that in promulgating regulations designating the location of hearings under § 14.633 we must consider the interests of individuals defending allegations of misconduct or incompetence. Individuals defending allegations of improper conduct or incompetence would indeed suffer costs in traveling to VA's Central Office and may be unable to compel the attendance of witnesses or the production of evidence outside the 100-mile radius provided in 38 CFR 2.2(b). The General Counsel, claimants, and those accused of improper conduct or incompetence have an interest in the consistency of the hearing process. To ensure equity and consistency in the hearing process, VA will amend the language of § 14.633(f) to provide that if a hearing is requested, it will held at the VA Regional Office nearest the individual's principal place of business. If the individual's principal place of business is in Washington, DC, the hearing will be held at the VA Central Office.

Another commenter recommended that VA add provisions to § 14.633(f) prescribing the authority of the hearing officer. The commenter recommended that the regulation expressly provide the hearing officer with authority to change the time or place of a hearing and to deal with the conduct of the hearing. We believe that the hearing officer currently has the inherent authority necessary to conduct an efficient and orderly hearing. We will make no changes to the final rule based on this comment.

One commenter stated that it would be unfair for the Board to use or seek General Counsel opinions during its review of the General Counsel's disciplinary decisions and suggested that we amend § 14.633(g) to prohibit the Board from doing so. We disagree and will not change the rule based on this comment.

The General Counsel is the Department's chief legal officer and is responsible for advising the Secretary concerning VA programs and policies. 38 U.S.C. 311; 38 CFR 14.500(b). A written legal opinion of the General Counsel involving laws administered by VA is binding as to all VA employees and officials, 38 CFR 14.507(a), to include the Board. 38 U.S.C. 7104(c) (''[t]he Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department''). The Board is responsible for providing one administrative review on appeal after considering all of the evidence of record and applicable provisions of law. 38 U.S.C. 7104(a). Accordingly, in reviewing the General Counsel's disciplinary decisions, the Board applies the law to the facts of the case and is bound by any precedent opinion of the General Counsel that interprets that law. VA does not have authority to create an exception to section 7104(c) as the commenter appears to suggest. This does not mean that the Board is bound by the General Counsel's decision in the matter on appeal. In fact, § 14.633(g) provides ''[n]othing in this section shall be construed to limit the Board's authority to remand a matter to the General Counsel under 38 CFR 19.9 for any action that is essential or a proper appellate decision or the General Counsel's ability to issue a Supplemental Statement of the Case under 38 CFR 19.31.'' Additionally, we note that the Board is required to provide in its decision a written statement of the reasons and bases as to its findings on the material issues of fact based on the entire record and without deference to any factual findings of the General Counsel. *See* 38 U.S.C. 7104(d). Moreover, any reviewing appellate court would not be bound by a General Counsel precedent opinion. Therefore, the suggestion that the Board could use a General Counsel opinion to unfairly influence its review of a General Counsel accreditation decision is unfounded.

Another commenter asked whether General Counsel's disciplinary

decisions may be appealed to the Board and the Veterans Court and whether normal appeal procedures would apply. Under § 14.633(g), the General Counsel's decision to suspend or cancel accreditation ''is a final adjudicative decision of an agency of original jurisdiction and may be appealed to the Board of Veterans' Appeals.'' Notwithstanding provisions for closing the record, ''appeals shall be initiated and processed using the procedures in 38 CFR parts 19 and 20.'' Because the proposed rules address the commenter's concerns, we will not change the rule based on the comment.

Section 14.636—Payment of Fees for Representation by Agents and Attorneys in Proceedings Before the Agency of Original Jurisdiction and Before the Board of Veterans' Appeals

One commenter urged us to clarify the effect delayed implementation of the regulations will have on fee agreements entered into on or after June 20, 2007. We agree that clarification is necessary. The new regulations apply to fee agreements entered on or after June 23, 2008. They do not apply to fee agreements entered before June 23, 2008.

One commenter expressed concern that § 14.636(b), which authorizes only accredited agents and attorneys to charge fees for representation, conflicts with the standards of conduct in § 14.632(c)(5). Section 14.632(c)(5) prohibits individuals recognized under § 14.630, representatives, agents, and attorneys from entering into unreasonable or unlawful fee agreements.

We disagree that this section needs clarification. Section 14.632 establishes standards of conduct applicable to all persons authorized to represent claimants before VA. Section 14.636(b) implements 38 U.S.C. 5904, which permits agents and attorneys to charge fees for representation under specified circumstances. Individuals authorized under 38 U.S.C. 5902 and 5903 are prohibited by law from charging fees for representing claimants. Therefore, any attempt by these individuals to charge, solicit, or receive a fee for representation is a violation of the standards of conduct prescribed in § 14.632(c)(5). We will not change the rule based upon the comment.

Three commenters recommended that § 14.636(c) be amended to reflect the General Counsel's May 24, 2004, letter to the former Ranking Member of the U.S. House of Representatives Committee on Veterans' Affairs, which concluded that 38 U.S.C. 5904 permits attorneys to charge fees for pre-filing consultation. In his letter to the Secretary, the former Chairman described two factual situations involving attorneys and requested the General Counsel's legal opinion as to whether the attorneys violated former 38 U.S.C. 5904. We do not believe that it is appropriate to incorporate the legal conclusions of that letter in this regulation. The General Counsel's response was based on two detailed, yet similar, fact patterns. There may be other fact patterns which the General Counsel did not consider that might result in a different legal conclusion. Therefore, we decline to include the legal conclusion reached in the May 24, 2004, letter to apply generally in all cases. Further, the law is clear that VA's authority to regulate is limited to accreditation for purposes of preparation, presentation, and prosecution of claims, and to reviewing the fees that agents and attorneys charge for representing claimants in ''proceedings before the Department.'' *See* 38 U.S.C. 5904(a), (c). We do not think that it is necessary to expand the scope of VA's regulations to address the legal services that occur outside a proceeding before the Department on a claim for benefits.

One commenter, citing the potential for abuse, recommended that we limit the circumstances in which hourly or flat fees can be charged by agents or attorneys. We did not propose limiting claimants' options for contracting with agents and attorneys for representational services. In our view, it would be prudent to revisit the issue in a later rulemaking if we receive information concerning agents' and attorneys' abuse of hourly or flat-rate fees. Without such information, the current options (fixed fee, hourly rate, percentage of past-due benefits recovered, or a combination thereof) appear to provide claimants, agents, and attorneys flexibility in negotiating the appropriate compensation structure, and appear to promote choice in representation. Accordingly, we will not change the rule based on the commenter's recommendation.

Contingent fee agreements, however, present a more specific risk of exploitation. Attorneys who litigate before the VA have, on average, a better sense of the value of a particular veteran's claim than the veteran does. Contingent fees also provide attorneys with an incentive to take cases that can be easily resolved at the administrative level. Finally, a veteran may lack sufficient bargaining power to negotiate a fair deal on fees. Thus, contingent fees give rise to the potential that a significant portion of a veteran's past-due benefits could be transferred to a lawyer for less work than was expected by the client at the time of the agreement. Indeed, experts such as the American Bar Association, while concluding that contingent fees are ethical, have noted such agreements must be individually evaluated to determine whether the final payment is appropriate and reasonable.

One commenter, citing *Silverman* v. *Brown*, 7 Vet. App. 487, 488 (1995) (fee of 50 percent of benefits awarded is patently unreasonable), recommended that we establish a regulatory presumption that a fee in excess of 33⅓ percent of the past-due benefits awarded is unreasonable. The commenter went on to assert that ''VA need only determine whether the fee called for is more or less than one-third of the past due benefits'' when reviewing a non-direct-pay fee agreement for reasonableness. Public Law 109–461 amended 38 U.S.C. 5904 to provide that a fee that does not exceed 20 percent of the past-due benefits awarded ''shall be presumed reasonable.'' Congress also authorized VA to ''prescribe in regulations reasonable restrictions on the amount of fees that an agent or attorney may charge a claimant'' for representation before the Department. In practice, agents and attorneys appear to agree with the commenter that any fee in excess of 33⅓ percent of the past-due benefits awarded by VA to a claimant would generally be unreasonable. No fee agreement filed with the Department since the June 20, 2007, effective date of amended section 5904 has called for a fee in excess of 30 percent of past-due benefits. Accordingly, we will clarify in § 14.636(f) that fees which exceed 33⅓ percent of any past-due benefits awarded shall be presumed to be unreasonable. We will also clarify that the presumptions prescribed in § 14.636(f) for fees that do not exceed 20 percent of any past-due benefits and fees that exceed 33⅓ percent of any past-due benefits may be rebutted by clear and convincing evidence relating to the factors in § 14.636(e). As evidenced by the presumption for fees that exceed 33⅓ percent, and the absence of such fees in the current market, we are not currently of the mind that such fees are justified. Accordingly, only in the rare case where there is clear and convincing evidence relating to the factors in § 14.636(e) would such fees be justified.

For fees above 20 percent but below 33⅓ percent, additional scrutiny may be necessary if VA or the claimant or appellant challenges the reasonableness of the fee under the procedures in § 14.636(i). Under those procedures, the

burden is on the agent or attorney to demonstrate that this fee is reasonable under the individual circumstances. Such fees may not always, in every circumstance, be reasonable. Rather, VA will apply the factors in § 14.636(e) in a review that considers all of the individual circumstances of the representation.

Although we agree with the commenter's suggestion that some administrative efficiency will result from prescribing a presumption for fees which exceed 33⅓ percent of any past-due benefits, we do not agree that VA need only determine whether a fee exceeds the 33⅓ percent threshold when reviewing non-direct-pay fees for reasonableness. The commenter appears to suggest that we would create an implied presumption of reasonableness for non-direct-pay fees between 20 percent and 33⅓ percent. However, in section 5904(c)(3)(A), Congress authorized VA to review any fee agreement filed with the Department under section 5904(c)(2) and to order a reduction in the fee if it is excessive or unreasonable. Therefore, we have adopted a three-tier system. In accord with the statute, fees of 20 percent or less are presumed reasonable, absent specific evidence to the contrary. Fees above 33⅓ percent are presumptively unreasonable, absent specific evidence to the contrary. We interpret section 5904(c)(3)(A) to mean that any fee agreement, regardless of any applicable presumption, may be reviewed for reasonableness upon VA's own motion or upon the motion of the claimant or appellant. Accordingly, the presumptions in § 14.636(f) must be construed in the context provided by § 14.636(i) regarding motions for review of fee agreements.

We received two comments regarding § 14.636(g). One commenter objected to requiring the filing of fee agreements with OGC suggesting the provision is unnecessarily intrusive, unconstitutional, and that compliance would violate professional ethical standards. The second commenter suggested we could improve communication between the claimant and the attorney and ensure only reasonable fees are charged by requiring additional information in fee agreements; this commenter, however, made no recommendation as to what kinds of information VA should require, and we believe that we have prescribed sufficient information to permit us to determine whether a fee is reasonable.

We disagree that requiring an agent or attorney to file fee agreements with OGC is intrusive, unconstitutional, or violates ethical standards of conduct. First, 38 U.S.C. 5904(c)(2) expressly provides that agents and attorneys must file a copy of any fee agreement with VA. Therefore, VA has no choice but to implement the statutory requirement. Second, with respect to the constitutionality of the statute, given the requirement to file fee agreements with VA is current law properly passed by Congress and signed by the President, we presume its constitutionality. Finally, the commenter merely states that requiring fee agreements to be filed with OGC is a violation of professional ethical standards without further explanation. We do not see how such a requirement violates ethical standards. Furthermore, thousands of fee agreements have already been filed with VA, and we are unaware of any attorney having been found to have violated his or her rules of professional conduct for having done so. Therefore, we will make no change to the rule based on the comments.

We did not receive any comments with respect to § 14.636(g)(2) but have determined that changes pertaining to the presumption of reasonableness under § 14.636(e) warrant changes in this section. We still require fee agreements to clearly specify whether the agent or attorney is to be paid by VA directly out of an award of past due benefits. However, the regulation will be clarified to provide that any fee agreement that fails to clearly specify whether it is a direct-pay fee agreement will be deemed an agreement for which the agent or attorney is responsible for collecting fees for representation.

We received a number of comments on § 14.636(h). Two commenters expressed concern that § 14.636(h)(3) improperly permits paid representation in cases in which a Notice of Disagreement has not been filed. One commenter recommended that § 14.636(h)(3) be amended to clarify that ancillary benefits are not ''past-due benefits.'' Two commenters recommended amending § 14.636(h)(3)(iii) and adopting a consistent definition of the terms ''case,'' ''claim,'' and ''issue.''

We disagree that § 14.636(h)(3) improperly permits paid representation in cases in which a Notice of Disagreement has not been filed. Congress amended 38 U.S.C. 5904(c)(1) to permit paid representation after the claimant files a Notice of Disagreement. Congress further amended section 5904(c)(1) to remove the requirement that an agent or attorney be hired within a year of a final Board decision in a case. We interpret this to mean that Congress wanted claimants to have the option to hire an agent or attorney at any time so long as an agency or original jurisdiction has rendered a decision on a claim and a Notice of Disagreement has been filed with respect to that decision. Therefore, § 14.636(h) properly reflects congressional intent and we decline to amend it.

An agent or attorney may receive fees for representing a claimant before VA pursuant to a direct-pay fee agreement or an agreement specifying payment by the claimant. To the extent that an agent or attorney seeks payment from the claimant, there is no limitation on the parties' ability to include fees for representation on ancillary benefit claims in the fee agreement. Clearly, Congress generally intended that claimants would have choice in representation with respect to all claims for benefits when it enacted Public Law 109–461. However, under 38 U.S.C. 5904(d), VA's authority to honor direct-pay fee agreements is limited to payment out of ''past-due'' benefits.

Section 14.636(h)(3), interprets VA's authority in 38 U.S.C. 5904 to pay fees out of ''past-due'' benefit awards as being limited to payment out of ''nonrecurring payment resulting from a benefit, or benefits, granted on appeal or awarded on the basis of a claim reopened after a denial by an agency of original jurisdiction or the Board of Veterans' Appeals or the lump sum payment that represents the total amount of recurring cash payments that accrued between the effective date of the award, as determined by applicable laws and regulations, and the date of the grant of the benefit by the agency of original jurisdiction, the Board of Veterans' Appeals, or an appellate court.'' Most ancillary benefits are not recurring cash payments and, therefore, fall outside the definition of ''past-due'' benefits for purposes of determining the amount to be paid directly to an agent or attorney under a direct-pay fee agreement.

As discussed with regard to § 14.627(g) above, we must reconcile our rules prescribing permissible fees with Federal Circuit case law. To accomplish this, we will amend § 14.636(c) to clarify when agents or attorneys may charge fees. However, we will not create new universal definitions for ''case'' and ''claim'' because the terms may have different meanings in contexts other than agent and attorney fees.

As an initial matter, we note that the Veterans Judicial Review Act of 1988 (VJRA) removed the long-standing limitation on fees but also, for the first time, restricted claimant's access to paid representation to the point after which the first administrative appeal of a claim is complete. In limiting fees to services

rendered after a first final Board decision, Congress ensured that VA would initially decide a matter and, upon request, review that decision before the Board without encountering paid representation. In this context, the Federal Circuit issued its opinions in *Stanley* v. *Principi*, 283 F.3d 1350 (Fed. Cir. 2002), and *Carpenter* v. *Nicholson*, 452 F.3d 1379 (Fed. Cir. 2006), both of which concerned the payment of fees after a first final Board decision.

Under the amendments to chapter 59, Congress shifted the entry point for paid representation to the filing of a Notice of Disagreement. Thus, paid representation is available in the administrative appeal process, which includes the Decision Review Officer process, the process for developing an appeal for certification to the Board, and the Board proceedings. We interpret this significant change as an expression of congressional intent to remove all restrictions on paid representation, provided that an agency of original jurisdiction has rendered a decision on a benefits matter and the claimant has filed a Notice of Disagreement with respect to that decision. In our view, Congress balanced claimants' choice in representation with its interest in ensuring that claimants' benefits are not unnecessarily reduced by payment of agents' and attorneys' fees. In balancing these competing interests, Congress concluded that an agency of original jurisdiction should have an opportunity to consider the merits of a claim on the basis of the available evidence of record and render a decision. Only if a claimant disagrees with that decision would the balance tip in favor of choice of representation.

We interpret Congress' designation of the Notice of Disagreement as the entry point for paid representation in section 5904(c) to mean that an agency of original jurisdiction must be allowed to initially decide a matter before a claimant seeks paid representation. Accordingly, with respect to claims to reopen based upon new and material evidence or claims for increase in rate of a benefit being paid based upon a change in disability or other circumstances, a claimant must seek an agency of original jurisdiction decision on the claim and file a Notice of Disagreement with respect to that decision before hiring an agent or attorney to provide representation before the Department. By definition, evidence that is new and material was not considered in any prior agency of original jurisdiction decision. *See* 38 CFR 3.156(a) (''new evidence means existing evidence not previously submitted to agency decisionmakers'').

The same rationale applies to claims for increase. VA must have the opportunity to consider new evidence and, if appropriate, award the claimant the full amount of benefits due under law. Congress has determined that claimants for VA benefits should have the option of diverting benefits or other personal funds to agents and attorneys only after the claimant has expressed disagreement with an agency of original jurisdiction decision on a matter.

The rationale for proscribing paid representation for claims to reopen and for increase in rate of a benefit does not apply to requests for revision of decisions based on clear and unmistakable error. When a claimant asserts that the correct facts were not before an agency of original jurisdiction or the Board at the time of a decision, or the appropriate law or regulations extant at the time of the decision were incorrectly applied by an agency of original jurisdiction or the Board, he or she seeks to attack the prior decision based upon alleged error, not to obtain a new decision based upon new and material evidence or other change in circumstance. VA had an opportunity to initially decide the claim based on the same law and evidence, and under our interpretation of the amendments to chapter 59 there is no reason to preclude paid representation if the claimant filed a Notice of Disagreement with respect to the original, allegedly erroneous, decision on or after June 20, 2007.

For the reasons stated above, we will modify § 14.636(c) to clearly state the general rule that VA must have an opportunity to decide a matter before paid representation is available, and to clarify application of the rule in claims to reopen, claims for increase, and requests for revision based upon clear and unmistakable error.

We will also modify § 14.636(c) to clarify that it is generally the agency of original jurisdiction that issued the decision on a claim or claims identified in the Notice of Disagreement that will decide whether an agent or attorney is eligible for fees under the criteria in that section. In *Scates* v. *Principi*, 282 F.3d 1362, 1367 (Fed. Cir. 2002), the Court noted that the line between entitlement to and reasonableness of fees under former 38 U.S.C. 5904 was not always clear and might require a factual determination by an agency of original jurisdiction concerning eligibility for fees before the Board of Veterans' Appeals could consider the issue of reasonableness under its original jurisdiction. Under current section 5904, the Board has only appellate jurisdiction over fee matters and all initial decisions regarding eligibility for and the reasonableness of fees are made by VA's agencies of original jurisdiction. *See* 38 CFR 14.627(b) (definition of *agency of original jurisdiction*). Whether an initial eligibility determination is made by the agency of original jurisdiction that decided the benefit claim or claims identified in the Notice of Disagreement, as will generally occur in the case of a direct-pay fee agreement filed with an agency of original jurisdiction under § 14.636(h)(4), or by the Office of the General Counsel as the agency of original jurisdiction with authority to review fee agreements for reasonableness, will depend on the facts of each case. Regardless, agency of original jurisdiction decisions concerning eligibility for fees under § 14.636(c) are appealable to the Board.

One commenter objected to § 14.636(h)(3)(iv), in which we proposed to clarify VA's policy of calculating agents' and attorneys' fees based on past-due benefits awarded and reduced due to certain conditions, such as incarceration. The Court of Appeals for the Federal Circuit recently interpreted 38 U.S.C. 5904 to mean that payment of agents' and attorneys' fees from past-due benefits must be based upon the amount of benefits awarded, not the amount actually paid to the claimant. *Snyder* v. *Nicholson*, 2007 U.S. App. LEXIS 13302 (Fed. Cir. 2007). The *Snyder* decision was issued after the proposed rule was published. In light of the need to further consider the scope of *Snyder*, we will remove § 14.636(h)(3)(iv).

We received numerous comments regarding § 14.636(i), which prescribes the procedures for seeking review of fee agreements. Three commenters, citing a conflict of interest, objected to OGC's authority to review fee agreements on its own motion. One commenter requested that we describe when VA could unilaterally review fee agreements. Two commenters asserted that the procedures for reviewing fee agreements are unfair because they do not provide for an increase in agents' and attorneys' fees. Two commenters also recommended that VA establish a set period of time in which VA or a claimant could seek review of a fee agreement. Finally, two commenters expressed concern that claimants will not know what it means to ''serve'' a motion for review and recommended that claimants merely ask for a fee review at the agency of original jurisdiction. These commenters also suggested that VA, not the claimant, should have the responsibility of notifying the agent or attorney of the claimant's request for review.

For the reasons discussed at length above regarding § 14.629, we disagree that there is a conflict of interest in OGC's review of fee agreements. With respect to the commenter's request that we clarify under what circumstances OGC will review fee agreements on its own motion, we believe § 14.636(e) and (f) are sufficiently clear. Section 14.636(e) describes in detail the fees that are permitted under current law. Section 14.636(f) implements the statutory presumption that fees that do not exceed 20 percent of past-due benefits awarded are reasonable. We interpret these provisions to mean that VA is not required to initiate the review of a fee that is less than or equal to 20 percent of past-due benefits awarded, and that any fee in excess of 20 percent does not benefit from the presumption and is subject to review by OGC on its own motion.

We also disagree with the commenters who suggested that OGC should also review fees to determine whether an agent or attorney is entitled to an increase in fees notwithstanding fee agreement terms. First, we note that in imposing fee limitations, Congress intended to protect veterans' benefits from unscrupulous lawyers. S. Rep. No. 109–297, at 6 (2006). Second, section 5904(c)(3)(A) clearly expresses Congress' intent that only VA or a claimant may seek review of a fee agreement and only for the purpose of reducing the fee called for in an agreement. Accordingly, VA does not have authority to review fees as the commenter suggests, and we will not make any changes based on the comment. We agree with the commenter's recommendation that we limit the period during which a fee agreement may be reviewed by OGC and have amended § 14.636(i) to prescribe that VA or a claimant may seek review of the fee agreement within 120 days of the final VA decision on the claim.

We disagree with the commenter who suggested that claimants will not know what it means to ''serve'' an agent or attorney with a motion for review of a fee agreement because they lack access to regulations. The predecessor provision, 38 CFR 20.609(i), required a party contesting the fee agreement to file the motion for review with the Board and certify that a copy was mailed to the other party. While the procedure for filing a motion for review is changing, the substance of what is required of the claimant seeking review is not. We note that VA regulations are available to the public through a variety of sources, including electronic media. To the extent that a claimant is unaware of the fee-agreement-review provisions and seeks a review at an agency of original jurisdiction, the agency of original jurisdiction will forward the request to OGC for a decision. Therefore, we do not believe the provisions requiring claimants to complete service of documents are too onerous or confusing or in any way prejudice claimants. Further, we have defined ''service'' in § 14.627(o) to clarify the notice requirements applicable to individuals seeking review of fee agreements.

We also decline to change the procedure for filing motions for review of fee agreements. Under prior law, claimants mailed a copy of the motion and supporting evidence to the agent or attorney; this rule merely retains that requirement. Furthermore, disagreements are often the result of a communication breakdown between the parties to an agreement. We believe the notice requirements will help parties resolve fee disputes without getting VA actively involved. Finally, it is appropriate to place some burden on a claimant challenging an agreement he or she entered into. Requiring a claimant to serve the agent or attorney concerning their contract, as opposed to having VA do the work, will force the claimant to assume some of the effort required to dispute a fee agreement and to determine whether it is worth their time and effort. In our view, this procedure is reasonable in light of Congress' decision to expand choice of representation.

Section 14.637—Payment of the Expenses of Agents and Attorneys in Proceedings Before the Agency of Original Jurisdiction and Before the Board of Veterans' Appeals

One commenter objected to § 14.637(c), which establishes the types of reimbursable ''expenses'' that an agent or attorney may charge a claimant, and essentially disagreed with our determination that overhead costs are not reasonable expenses. Although we proposed to reorganize parts 14 and 20 of VA's regulations governing accreditation and fee matters, we did not make any substantive change to former 38 CFR 20.610(c), which we redesignated as § 14.637. In any event, we continue to believe that it would be unreasonable for agents and attorneys to charge claimants for costs that are not directly incurred as a result of providing representation in the case. Accordingly, we will not make any changes based on this comment.

General Matters; Applicability of Accreditation Provisions

We received five comments expressing concern with the lack of a stated transition plan to implement the proposed changes in VA's accreditation program. More specifically, the commenters expressed concern that VA's implementation of new accreditation standards, without a transition plan for claimants currently represented by agents and attorneys before agencies of original jurisdiction and the Board, would potentially deny representation to such claimants.

We agree that implementation of its new accreditation rules should not impede or otherwise interfere with ongoing representation before agencies of original jurisdiction and the Board. To avoid that result, agents and attorneys providing representation in cases as of the effective date of the final rule need not meet the new accreditation requirements, unless the agent or attorney intends to provide representation in cases in which a Notice of Disagreement is filed after the effective date. An agent or attorney will be deemed to be providing representation on a claim before an agency of original jurisdiction or the Board if VA has evidence that the agent or attorney complied with the accreditation and power of attorney requirements in former 38 CFR 14.629 and 14.631 prior to the effective date of this final rule. Further, agents and attorneys providing representation as of the effective date may continue to do so through the final resolution of the claim. Agents and attorneys seeking to provide representation in a claim in which the Notice of Disagreement was filed after the effective date of the final rule, however, must file an application with OGC as provided in § 14.629(b) and receive notice of accreditation before providing representation. The delayed effective date, prospective application, and phased initial compliance dates for CLE will ensure that agent and attorney representation is uninterrupted during the transition period between the old and new accreditation programs. Accordingly, we will not make further changes based on these comments.

Several commenters also suggested that VA limit its authority to review applications for accreditation after a specified period of time has expired. OGC cannot commit to reviewing accreditation applications in a specific time period and will not establish a deadline following which an application must be approved notwithstanding that it may be incomplete or that the individual does not meet the standards in § 14.629. VA could not meet its obligation to ensure responsible, competent representation without sufficient administrative flexibility. While some applications may

be reviewed and approved very quickly, others may be delayed due to legitimate administrative concerns. However, we recognize that representation cannot begin without accreditation and that attorney applications may generally be approved upon submission of the supporting documents identified in § 14.629; therefore, we will attempt to review and respond to complete applications in less than 30 days.

We received one comment regarding section 101(c)(2) of Public Law 109–461, which requires VA to report to Congress on the effects of allowing agents and attorneys to charge fees for representation after a Notice of Disagreement has been filed. The commenter suggested that VA ''begin gathering data now to provide Congress with a proper assessment'' and ''urged the Secretary to set forth specifically in regulation what data will be used to provide Congress with the assessment.''

VA agrees that data gathering must begin as soon as possible to provide an accurate assessment of the effects of Public Law 109–461 and has already taken affirmative steps to measure the impact of the new law. However, the development and gathering of such information are internal agency procedural matters exempt from notice and comment. *See* 5 U.S.C. 553(b)(3)(A). Accordingly, we will make no changes based on this comment.

Paperwork Reduction Act

This final rule contains provisions that constitute collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) in 38 CFR 14.629 and 14.631. The collections are approved under Office of Management and Budget control number 2900–0605 and 2900–0321. We display the control numbers under the applicable regulation text in this final rule.

Regulatory Flexibility Act

The Secretary hereby certifies that this rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. At a minimum, this rule would affect the 117 attorneys who filed fee agreements with the Board under the predecessor law and the 47 agents currently accredited by VA. However, it would not have a significant economic impact on these individuals because it would only impose accreditation and reasonable fee requirements the costs of which would not be significant. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a ''significant regulatory action,'' requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. VA has examined the economic, legal, and policy implications of this rule and has concluded that it is a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers and Titles

There are no Federal Domestic Assistance programs associated with this final rule.

List of Subjects

38 CFR Part 1

Administrative practice and procedure, Archives and records, Cemeteries, Claims, Courts, Crime, Flags, Freedom of information, Government contracts, Government employees, Government property, Infants and children, Inventions and patents, Parking, Penalties, Privacy, Reporting and recordkeeping requirements, Seals and insignia, Security measures, Wages.

38 CFR Part 14

Administrative practice and procedure, Claims, Courts, Foreign relations, Government employees, Lawyers, Legal services, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Surety bonds, Trusts and trustees, Veterans.

38 CFR Parts 19 and 20

Administrative practice and procedure, Claims, Veterans.

Approved: May 9, 2008.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

■ For the reasons set forth in the preamble, the Department of Veterans Affairs amends 38 CFR parts 1, 14, 19 and 20 as follows:

PART 14—LEGAL SERVICES, GENERAL COUNSEL, AND MISCELLANEOUS CLAIMS

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

Authority: 5 U.S.C. 301; 28 U.S.C. 2671–2680; 38 U.S.C. 501(a), 512, 515, 5502, 5902–5905; 28 CFR part 14, appendix to part 14, unless otherwise noted.

■ 2. Remove the undesignated center heading ''Expanded Remote Access to Computerized Veterans Claims Records by Accredited Representatives'' that precedes § 14.640 and redesignate §§ 14.640 through 14.643 as §§ 1.600 through 1.603, respectively.

■ 3. Revise § 14.626 to read as follows:

§ 14.626 Purpose.

The purpose of the regulation of representatives, agents, attorneys, and other individuals is to ensure that claimants for Department of Veterans Affairs (VA) benefits have responsible, qualified representation in the preparation, presentation, and prosecution of claims for veterans' benefits.

■ 4. Amend § 14.627 by:

■ a. Revising the introductory text.

■ b. Revising paragraph (a).

■ c. Redesignating paragraphs (b) through (l) and (m) and (n) as paragraphs (c) through (m) and (p) and (q), respectively.

■ d. Adding new paragraphs (b), (n), and (o).

■ e. Revising newly redesignated paragraphs (d), (e), (g), (l), and (m).

The revisions and additions read as follows:

§ 14.627 Definitions.

As used in regulations on representation of VA claimants:

(a) *Accreditation* means the authority granted by VA to representatives, agents, and attorneys to assist claimants in the preparation, presentation, and prosecution of claims for VA benefits.

(b) *Agency of original jurisdiction* means the VA activity or administration that made the initial determination on a claim or matter or that handles any subsequent adjudication of a claim or matter in the first instance, and includes the Office of the General Counsel with respect to proceedings under part 14 of this chapter to suspend or cancel accreditation or to review fee agreements.

* * * * *

(d) *Attorney* means a member in good standing of a State bar who has met the standards and qualifications in § 14.629(b).

(e) *Benefit* means any payment, service, commodity, function, or status, entitlement to which is determined under laws administered by VA pertaining to veterans, dependents, and survivors.

* * * * *

(g) *Claim* means application made under title 38 U.S.C., and implementing directives, for entitlement to VA benefits, reinstatement, continuation, or increase of benefits, or the defense of a proposed agency adverse action concerning benefits.

* * * * *

(l) *Recognition* means certification by VA of organizations to assist claimants in the preparation, presentation, and prosecution of claims for VA benefits.

(m) *Representative* means a person who has been recommended by a recognized organization and accredited by VA.

(n) *Representation* means the acts associated with representing a claimant in a proceeding before VA pursuant to a properly executed and filed VA Form 21–22, ''Appointment of Veterans Service Organization as Claimant's Representative,'' or VA Form 21–22a, ''Appointment of Individual as Claimant's Representative.''

(o) *Service* means the delivery of a motion, response, or reply to a person or entity to which it is directed. Proof of service consists of a statement by the person who made service certifying the date and manner of service, the names of the persons served, and the addresses of the place of delivery. For service by mail, proof of service shall include the date and manner by which the document was mailed.

* * * * *

■ 5. Amend § 14.629 by:

■ a. Revising the introductory text.

■ b. In paragraph (a)(1), removing ''the Department of Veterans Affairs'', and adding, in its place, ''VA''.

■ c. Revising the paragraph (b) heading.

■ d. Redesignating paragraph (b)(2) as (b)(6), and paragraph (b)(1) as new paragraph (b)(2).

■ e. Adding a new paragraph (b)(1).

■ f. Revising newly redesignated paragraph (b)(2) introductory text and paragraph (b)(2)(i).

■ g. Redesignating paragraphs (b)(2)(vii) and (viii) as paragraphs (b)(2)(viii) and (ix), respectively.

■ h. Adding a new paragraph (b)(2)(vii).

■ i. Revising newly redesignated paragraph (b)(2)(ix).

■ j. Adding new paragraphs (b)(2)(x), (b)(3), (b)(4), and (b)(5).

■ k. Revising newly redesignated paragraph (b)(6).

■ l. Revising paragraph (c) heading.

■ m. Revising paragraphs (c)(1) and (c)(3).

■ n. Revising the note following paragraph (c)(4).

The additions and revisions read as follows:

§ 14.629 Requirements for accreditation of service organization representatives, agents, and attorneys.

The Assistant General Counsel of jurisdiction or his or her designee will conduct an inquiry and make an initial determination regarding any question relating to the qualifications of a prospective service organization representative, agent, or attorney. If the Assistant General Counsel or designee determines that the prospective service organization representative, agent, or attorney meets the requirements for accreditation in paragraphs (a) or (b) of this section, notification of accreditation will be issued by the Assistant General Counsel or the Assistant General Counsel's designee and will constitute authority to prepare, present, and prosecute claims before an agency of original jurisdiction or the Board of Veterans' Appeals. If the Assistant General Counsel determines that the prospective representative, agent, or attorney does not meet the requirements for accreditation, notification will be issued by the Assistant General Counsel concerning the reasons for disapproval, an opportunity to submit additional information, and any restrictions on further application for accreditation. If an applicant submits additional evidence, the Assistant General Counsel will consider such evidence and provide further notice concerning his or her final decision. The determination of the Assistant General Counsel regarding the qualifications of a prospective service organization representative, agent, or attorney may be appealed by the applicant to the General Counsel. Appeals must be in writing and filed with the Office of the General Counsel (022D), 810 Vermont Avenue, NW., Washington, DC 20420, not later than 30 days from the date on which the Assistant General Counsel's decision was mailed. In deciding the appeal, the General Counsel's decision shall be limited to the evidence of record before the Assistant General Counsel. A decision of the General Counsel is a final agency action for purposes of review under the Administrative Procedure Act, 5 U.S.C. 701–706.

* * * * *

(b) *Accreditation of Agents and Attorneys*. (1) No individual may assist claimants in the preparation, presentation, and prosecution of claims for VA benefits as an agent or attorney unless he or she has first been accredited by VA for such purpose.

(i) For agents, the initial accreditation process consists of application to the General Counsel, self-certification of admission information concerning practice before any other court, bar, or State or Federal agency, an affirmative determination of character and fitness by VA, and a written examination.

(ii) For attorneys, the initial accreditation process consists of application to the General Counsel, self-certification of admission information concerning practice before any other court, bar, or State or Federal agency, and a determination of character and fitness. The General Counsel will presume an attorney's character and fitness to practice before VA based on State bar membership in good standing unless the General Counsel receives credible information to the contrary.

(iii) As a further condition of initial accreditation, both agents and attorneys are required to complete 3 hours of qualifying continuing legal education (CLE) during the first 12-month period following the date of initial accreditation by VA. To qualify under this subsection, a CLE course must be approved for a minimum of 3 hours of CLE credit by any State bar association and, at a minimum, must cover the following topics: representation before VA, claims procedures, basic eligibility for VA benefits, right to appeal, disability compensation (38 U.S.C. Chapter 11), dependency and indemnity compensation (38 U.S.C. Chapter 13), and pension (38 U.S.C. Chapter 15).

Upon completion of the initial CLE requirement, agents and attorneys shall certify to the Office of the General Counsel in writing that they have completed qualifying CLE. Such certification shall include the title of the CLE, date and time of the CLE, and identification of the CLE provider, and shall be submitted to VA as part of the annual certification prescribed by § 14.629(b)(4).

(iv) To maintain accreditation, agents and attorneys are required to complete an additional 3 hours of qualifying CLE on veterans benefits law and procedure not later than 3 years from the date of initial accreditation and every 2 years thereafter. To qualify under this subsection, a CLE course must be approved for a minimum of 3 hours of CLE credit by any State bar association. Agents and attorneys shall certify completion of the post-accreditation CLE requirement in the same manner as described in § 14.629(b)(1)(iii).

(2) An individual desiring accreditation as an agent or attorney must establish that he or she is of good character and reputation, is qualified to render valuable assistance to claimants, and is otherwise competent to advise and assist claimants in the preparation, presentation, and prosecution of their claim(s) before the Department. An individual desiring accreditation as an agent or attorney must file a completed application (VA Form 21a) with the Office of the General Counsel (022D), 810 Vermont Avenue, NW., Washington, DC 20420, on which the applicant submits the following:

(i) His or her full name and home and business addresses;

* * * * *

(vii) Information concerning the applicant's level of education and academic history;

* * * * *

(ix) Information relevant to whether the applicant for accreditation as an agent has any physical limitations that would interfere with the completion of a comprehensive written examination administered under the supervision of a VA Regional Counsel (agents only); and

(x) Certification that the applicant has satisfied the qualifications and standards required for accreditation as prescribed by VA in this section, and that the applicant will abide by the standards of conduct prescribed by VA in § 14.632 of this part.

(3) Evidence showing lack of good character and reputation includes, but is not limited to, one or more of the following: Conviction of a felony, conviction of a misdemeanor involving fraud, bribery, deceit, theft, or misappropriation; suspension or disbarment from a court, bar, or Federal or State agency on ethical grounds; or resignation from admission to a court, bar, or Federal or State agency while under investigation to avoid sanction.

(4) As a further condition of initial accreditation and annually thereafter, each person seeking accreditation as an agent or attorney shall submit to VA information about any court, bar, or Federal or State agency to which the agent or attorney is admitted to practice or otherwise authorized to appear. Applicants shall provide identification numbers and membership information for each jurisdiction in which the applicant is admitted and a certification that the agent or attorney is in good standing in every jurisdiction in which admitted. After accreditation, agents and attorneys must notify VA within 30 days of any change in their status in any jurisdiction in which they are admitted to appear.

(5) VA will not accredit an individual as an agent or attorney if the individual has been suspended by any court, bar, or Federal or State agency in which the individual was previously admitted and not subsequently reinstated. However, if an individual remains suspended in a jurisdiction on grounds solely derivative of suspension or disbarment in another jurisdiction to which he or she has been subsequently reinstated, the General Counsel may evaluate the facts and grant or reinstate accreditation as appropriate.

(6) After an affirmative determination of character and fitness for practice before the Department, applicants for accreditation as a claims agent must achieve a score of 75 percent or more on a written examination administered by VA as a prerequisite to accreditation. No applicant shall be allowed to sit for the examination more than twice in any 6-month period.

(c) *Representation by Attorneys, Law Firms, Law Students and Paralegals.* (1) After accreditation by the General Counsel, an attorney may represent a claimant upon submission of a VA Form 21–22a, ''Appointment of Attorney or Agent as Claimant's Representative.''

* * * * *

(3) A legal intern, law student, or paralegal may not be independently accredited to represent claimants under this paragraph. A legal intern, law student, or certified paralegal may assist in the preparation, presentation, or prosecution of a claim, under the direct supervision of an attorney of record designated under § 14.631(a), if the claimant's written consent is furnished to VA. Such consent must specifically state that participation in all aspects of the claim by a legal intern, law student, or paralegal furnishing written authorization from the attorney of record is authorized. In addition, suitable authorization for access to the claimant's records must be provided in order for such an individual to participate. The supervising attorney must be present at any hearing in which a legal intern, law student, or paralegal participates. The written consent must include the name of the veteran, or the name of the appellant if other than the veteran (e.g., a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf); the applicable VA file number; the name of the attorney-at-law; the consent of the appellant for the use of the services of legal interns, law students, or paralegals and for such individuals to have access to applicable VA records; and the names of the legal interns, law students, or paralegals who will be assisting in the case. The signed consent must be submitted to the agency of original jurisdiction and maintained in the claimant's file. In the case of appeals before the Board in Washington, DC, the signed consent must be submitted to: Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. In the case of hearings before a Member or Members of the Board at VA field facilities, the consent must be presented to the presiding Member of the hearing.

* * * * *

Note to § 14.629: A legal intern, law student, paralegal, or veterans service organization support-staff person, working under the supervision of an individual designated under § 14.631(a) as the claimant's representative, attorney, or agent, may qualify for read-only access to pertinent Veterans Benefits Administration automated claims records as described in §§ 1.600 through 1.603 in part 1 of this chapter.

* * * * *

■ 6. Amend § 14.630 by:
■ a. Revising paragraph (a).
■ b. Revising paragraph (b)(1) introductory text.
■ c. Adding paragraphs (c) and (d) immediately preceding the authority citation at the end of the section.

The revisions and additions read as follows:

§ 14.630 Authorization for a particular claim.

(a) Any person may be authorized to prepare, present, and prosecute one claim. A power of attorney executed on VA Form 21–22a, ''Appointment of Attorney or Agent as Claimant's Representative,'' and a statement signed

by the person and the claimant that no compensation will be charged or paid for the services, shall be filed with the agency of original jurisdiction where the claim is presented. The power of attorney identifies to VA the claimant's appointment of representation and authorizes VA's disclosure of information to the person representing the claimant.

(b) * * *

(1) The number of accredited representatives, agents, and attorneys operating in the claimant's geographic region;

* * * * *

(c) Persons providing representation under this section must comply with the laws administered by VA and with the regulations governing practice before VA including the rules of conduct in § 14.632 of this part.

(d) Persons providing representation under this section are subject to suspension and or exclusion from representation of claimants before VA on the same grounds as apply to representatives, agents, and attorneys in § 14.633 of this part.

* * * * *

■ 7. Amend § 14.631 by:
■ a. Revising the section heading.
■ b. Revising paragraph (a) introductory text.
■ c. Adding paragraph (a)(1)(iv).
■ d. In paragraph (a)(2), removing ''Department of Veterans Affairs'' and adding, in its place, ''VA''.
■ e. Removing paragraph (b).
■ f. Redesignating paragraphs (c) through (g) as paragraphs (b) through (f).
■ g. Revising newly redesignated paragraphs (b) and (c).
■ h. In newly redesignated paragraph (e)(1), removing ''the Department of Veterans Affairs'' and add, in its place, ''VA''.
■ i. Revising newly redesignated paragraph (f).
■ j. Adding a parenthetical at the end of the section.

The revisions and addition read as follows:

§ 14.631 Powers of attorney; disclosure of claimant information.

(a) A power of attorney, executed on either VA Form 21–22, ''Appointment of Veterans Service Organization as Claimant's Representative,'' or VA Form 21–22a, ''Appointment of Attorney or Agent as Claimant's Representative,'' is required to represent a claimant before VA and to authorize VA's disclosure of information to any person or organization representing a claimant before the Department. Without the signature of a person providing representation for a particular claim under § 14.630 of this part or an accredited veterans service organization representative, agent, or attorney, the appointment is invalid, and the person appointed to provide representation is under no obligation to do so. The power of attorney shall meet the following requirements:

(1) * * *

(iv) An individual providing representation on a particular claim under § 14.630 of this part or an accredited veterans service organization representative, agent, or attorney; and

* * * * *

(b) VA may, for any purpose, treat a power of attorney naming as a claimant's representative an organization recognized under § 14.628, a particular office of such an organization, or an individual representative of such an organization as an appointment of the entire organization as the claimant's representative, unless the claimant specifically indicates in the power of attorney a desire to appoint only the individual representative. Such specific indication must be made in the space on the power-of-attorney form for designation of the representative and must use the word ''only'' with reference to the individual representative.

(c) An organization, individual providing representation on a particular claim under § 14.630, representative, agent, or attorney named in a power of attorney executed pursuant to paragraph (a) of this section may withdraw from representation provided before a VA agency of original jurisdiction if such withdrawal would not adversely impact the claimant's interests. This section is applicable until an agency of original jurisdiction certifies an appeal to the Board of Veterans' Appeals after which time 38 CFR 20.608 governs withdrawal from representation before the Board. Withdrawal is also permissible if a claimant persists in a course of action that the organization or individual providing representation reasonably believes is fraudulent or criminal and is furthered through the representation of the organization or individual; the claimant fails to uphold an obligation to the organization or individual providing representation regarding the services of the organization or individual; or other good cause for withdrawal exists. An organization or individual providing representation withdraws from representation by notifying the claimant, the VA organization in possession of the claims file, and the agency of original jurisdiction in writing prior to taking any action to withdraw and takes steps necessary to protect the claimant's interests including, but not limited to, giving advance notice to the claimant, allowing time for appointment of alternative representation, and returning any documents provided by VA in the course of the representation to the agency of original jurisdiction or pursuant to the claimant's instructions, to the organization or individual substituted as the representative, agent, or attorney of record. Upon withdrawing from representation, all property of the claimant must be returned to the claimant. If the claimant is unavailable, all documents provided by VA for purposes of representation must be returned to the VA organization in possession of the claims file. Any other property of the claimant must be maintained by the organization or individual according to applicable law.

* * * * *

(f)(1) A power of attorney may be revoked at any time, and an agent or attorney may be discharged at any time. Unless a claimant specifically indicates otherwise, the receipt of a new power of attorney executed by the claimant and the organization or individual providing representation shall constitute a revocation of an existing power of attorney.

(2) If an agent or attorney limits the scope of his or her representation regarding a particular claim by so indicating on VA Form 21–22a, or a claimant authorizes a person to provide representation in a particular claim under § 14.630, such specific authority shall constitute a revocation of an existing general power of attorney filed under paragraph (a) of this section only as it pertains to, and during the pendency of, that particular claim. Following the final determination of such claim, the general power of attorney shall remain in effect as to any new or reopened claim.

* * * * *

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0321.)

■ 8. Revise § 14.632 to read as follows:

§ 14.632 Standards of conduct for persons providing representation before the Department

(a)(1) All persons acting on behalf of a claimant shall faithfully execute their duties as individuals providing representation on a particular claim under § 14.630, representatives, agents, or attorneys.

(2) All individuals providing representation are required to be

truthful in their dealings with claimants and VA.

(b) An individual providing representation on a particular claim under § 14.630, representative, agent, or attorney shall:

(1) Provide claimants with competent representation before VA. Competent representation requires the knowledge, skill, thoroughness, and preparation necessary for the representation. This includes understanding the issues of fact and law relevant to the claim as well as the applicable provisions of title 38, United States Code, and title 38, Code of Federal Regulations;

(2) Act with reasonable diligence and promptness in representing claimants. This includes responding promptly to VA requests for information or assisting a claimant in responding promptly to VA requests for information.

(c) An individual providing representation on a particular claim under § 14.630, representative, agent, or attorney shall not:

(1) Violate the standards of conduct as described in this section;

(2) Circumvent a rule of conduct through the actions of another;

(3) Engage in conduct involving fraud, deceit, misrepresentation, or dishonesty;

(4) Violate any of the provisions of title 38, United States Code, or title 38, Code of Federal Regulations;

(5) Enter into an agreement for, charge, solicit, or receive a fee that is clearly unreasonable or otherwise prohibited by law or regulation;

(6) Solicit, receive, or enter into agreements for gifts related to representation provided before an agency of original jurisdiction has issued a decision on a claim or claims and a Notice of Disagreement has been filed with respect to that decision;

(7) Delay, without good cause, the processing of a claim at any stage of the administrative process;

(8) Mislead, threaten, coerce, or deceive a claimant regarding benefits or other rights under programs administered by VA;

(9) Engage in, or counsel or advise a claimant to engage in acts or behavior prejudicial to the fair and orderly conduct of administrative proceedings before VA;

(10) Disclose, without the claimant's authorization, any information provided by VA for purposes of representation; or

(11) Engage in any other unlawful or unethical conduct.

(d) In addition to complying with standards of conduct for practice before VA in paragraphs (a) through (c) of this section, an attorney shall not, in providing representation to a claimant before VA, engage in behavior or activities prohibited by the rules of professional conduct of any jurisdiction in which the attorney is licensed to practice law.

(Authority: 38 U.S.C. 501(a), 5902, 5904)

■ 9. Amend § 14.633 by:

■ a. Revising the section heading.

■ b. Revising paragraphs (a), (b), (c) introductory text, and (c)(1).

■ c. Redesignating paragraph (c)(4) as paragraph (c)(7).

■ d. Revising newly redesignated paragraph (c)(7),

■ e. Adding new paragraphs (c)(4), (c)(5), and (c)(6).

■ f. Revising paragraphs (d) through (f).

■ g. Revising paragraph (h).

■ h. Adding new paragraph (i).

The revisions and additions read as follows:

§ 14.633 Termination of accreditation or authority to provide representation under § 14.630.

(a) Accreditation or authority to provide representation on a particular claim under § 14.630 may be suspended or canceled at the request of an organization, individual providing representation under § 14.630, representative, agent, or attorney. When an organization requests suspension or cancellation of the accreditation of a representative due to misconduct or lack of competence on the part of the representative or because the representative resigned to avoid suspension or cancellation of accreditation for misconduct or lack of competence, the organization shall inform VA of the reason for the request for suspension or cancellation and the facts and circumstances surrounding any incident that led to the request.

(b) Accreditation shall be canceled at such time as a determination is made by the General Counsel that any requirement of § 14.629 is no longer met by a representative, agent, or attorney.

(c) Accreditation or authority to provide representation on a particular claim shall be canceled when the General Counsel finds, by clear and convincing evidence, one or more of the following:

(1) Violation of or refusal to comply with the laws administered by VA or with the regulations governing practice before VA including the standards of conduct in § 14.632;

* * * * *

(4) Knowingly presenting to VA a frivolous claim, issue, or argument. A claim, issue, or argument is frivolous if the individual providing representation under § 14.630, representative, agent, or attorney is unable to make a good faith argument on the merits of the position taken or to support the position taken by a good faith argument for an extension, modification, or reversal of existing law;

(5) Suspension or disbarment by any court, bar, or Federal or State agency to which such individual providing representation under § 14.630, representative, agent, or attorney was previously admitted to practice, or disqualification from participating in or appearing before any court, bar, or Federal or State agency and lack of subsequent reinstatement;

(6) Charging excessive or unreasonable fees for representation as determined by VA, the Court of Appeals for Veterans Claims, or the United States Court of Appeals for the Federal Circuit; or

(7) Any other unlawful or unethical practice adversely affecting an individual's fitness for practice before VA.

(d) Accreditation or authority to provide representation on a particular claim shall be canceled when the General Counsel finds that the performance of an individual providing representation under § 14.630, representative, agent, or attorney before VA demonstrates a lack of the degree of competence necessary to adequately prepare, present, and prosecute claims for veteran's benefits. A determination that the performance of an individual providing representation under § 14.630, representative, agent, or attorney before VA demonstrates a lack of the degree of competence required to represent claimants before VA will be based upon consideration of the following factors:

(1) The relative complexity and specialized nature of the matter;

(2) The individual's general experience;

(3) The individual's training and experience; and

(4) The preparation and study the individual is able to give veterans benefits matters and whether it is feasible to refer such matters to, or associate or consult with, an individual of established competence in the field of practice.

(e) As to cancellation of accreditation under paragraphs (c) or (d) of this section, upon receipt of credible written information from any source indicating improper conduct, or incompetence, the Assistant General Counsel of jurisdiction shall inform the subject of the allegations about the specific law, regulation, or policy alleged to have been violated or the nature of the alleged incompetence and the source of the complaint, and shall provide the subject with the opportunity to respond. If the matter involves an accredited

representative of a recognized organization, the notice shall include contact with the representative's organization. When appropriate, including situations where no harm results to the claimant or VA, the Assistant General Counsel will provide the subject with an opportunity to correct the offending behavior before deciding whether to proceed with a formal inquiry. If the subject refuses to comply and the matter remains unresolved, or the behavior subsequently results in harm to a claimant or VA, the Assistant General Counsel shall immediately initiate a formal inquiry into the matter.

(1) If the result of the inquiry does not justify further action, the Assistant General Counsel will close the inquiry and maintain the record for 3 years.

(2) If the result of the inquiry justifies further action, the Assistant General Counsel shall:

(i) Inform the General Counsel of the result of the inquiry and notify the individual providing representation under § 14.630, representative, agent or attorney of an intent to cancel accreditation or authority to provide representation on a particular claim. The notice will be sent to individuals providing representation on a particular claim by certified or registered mail to the individual's last known address of record as indicated on the VA Form 21–22a on file with the agency of original jurisdiction. The notice will be sent to accredited individuals by certified or registered mail to the individual's last known address of record as indicated in VA's accreditation records. The notice will state the reason(s) for the cancellation proceeding and advise the individual to file an answer, in oath or affidavit form or the form specified for unsworn declarations under penalty of perjury in 28 U.S.C. 1746, within 30 days from the date the notice was mailed, responding to the stated reasons for cancellation and explaining why he or she should not be suspended or excluded from practice before VA. The notice will also advise the individual of the right to submit additional evidence and the right to request a hearing on the matter. Requests for hearings must be made in the answer. If the individual does not file an answer with the Office of the General Counsel within 30 days of the date that the Assistant General Counsel mailed the notice, the Assistant General Counsel shall close the record and forward it with a recommendation to the General Counsel for a final decision.

(ii) In the event that a hearing is not requested, the Assistant General Counsel shall close the record and forward it with a recommendation to the General Counsel for a final decision.

(iii) The Assistant General Counsel may extend the time to file an answer or request a hearing for a reasonable period upon a showing of sufficient cause.

(iv) For purposes of computing time for responses to notices of intent to cancel accreditation, *days* means calendar days. In computing the time for filing this response, the date on which the notice was mailed by the Assistant General Counsel shall be excluded. A response postmarked prior to the expiration of the 30th day shall be accepted as timely filed. If the 30th day falls on a weekend or legal holiday, the first business day thereafter shall be included in the computation. As used in this section, *legal holiday* means New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the State in which the individual resides.

(f) If a hearing is requested, it will be held at the VA Regional Office nearest the individual's principal place of business. If the individual's principal place of business is Washington, DC, the hearing will be held at the VA Central Office or other VA facility in Washington, DC. For hearings conducted at either location, the Assistant General Counsel or his or her designee shall present the evidence. The hearing officer shall not report, directly or indirectly to, or be employed by the General Counsel or the head of the VA agency of original jurisdiction before which the individual provided representation. The hearing officer shall provide notice of the hearing to the individual providing representation under § 14.630, representative, agent, or attorney by certified or registered mail at least 21 days before the date of the hearing. Hearings shall not be scheduled before the completion of the 30-day period for filing an answer to the notice of intent to cancel accreditation. The hearing officer will have authority to administer oaths. The party requesting the hearing will have a right to counsel, to present evidence, and to cross-examine witnesses. Upon request of the individual requesting the hearing, an appropriate VA official designated in § 2.1 of this chapter may issue subpoenas to compel the attendance of witnesses and the production of documents necessary for a fair hearing. The hearing shall be conducted in an informal manner and court rules of evidence shall not apply. Testimony shall be recorded verbatim. The evidentiary record shall be closed 10 days after the completion of the hearing. The hearing officer shall submit the entire hearing transcript, any pertinent records or information, and a recommended finding to the Assistant General Counsel within 30 days of closing the record. The Assistant General Counsel shall immediately forward the record and the hearing officer's recommendation to the General Counsel for a final decision.

* * * * *

(h) The decision of the General Counsel is a final adjudicative determination of an agency of original jurisdiction and may be appealed to the Board of Veterans' Appeals. The effective date for cancellation of accreditation or authority to provide representation on a particular claim shall be the date upon which the General Counsel's final decision is rendered. Notwithstanding provisions in this section for closing the record at the end of the 30-day period for filing an answer or 10 days after a hearing, appeals shall be initiated and processed using the procedures in 38 CFR parts 19 and 20. Nothing in this section shall be construed to limit the Board's authority to remand a matter to the General Counsel under 38 CFR 19.9 for any action that is essential for a proper appellate decision or the General Counsel's ability to issue a Supplemental Statement of the Case under 38 CFR 19.31.

(i) In cases where the accreditation of an agent or attorney is cancelled, the Office of the General Counsel may notify all agencies, courts, and bars to which the agent or attorney is admitted to practice.

* * * * *

■ 10. Add § 14.636 to read as follows:

§ 14.636. Payment of fees for representation by agents and attorneys in proceedings before Agencies of Original Jurisdiction and before the Board of Veterans' Appeals.

(a) *Applicability of rule.* The provisions of this section apply to the services of accredited agents and attorneys with respect to benefits under laws administered by VA in all proceedings before the agency of original jurisdiction or before the Board of Veterans' Appeals regardless of whether an appeal has been initiated.

(b) *Who may charge fees for representation.* Only accredited agents and attorneys may receive fees from claimants or appellants for their services provided in connection with representation. Recognized

organizations (including their accredited representatives when acting as such) and individuals recognized under § 14.630 of this part are not permitted to receive fees. An agent or attorney who may also be an accredited representative of a recognized organization may not receive such fees unless he or she has been properly designated as an agent or attorney in accordance with § 14.631 of this part in his or her individual capacity as an accredited agent or attorney.

(c) *Circumstances under which fees may be charged.* Except as noted in paragraph (c)(2) and in paragraph (d) of this section, agents and attorneys may charge claimants or appellants for representation provided: after an agency of original jurisdiction has issued a decision on a claim or claims, including any claim to reopen under 38 CFR 3.156 or for an increase in rate of a benefit; a Notice of Disagreement has been filed with respect to that decision on or after June 20, 2007; and the agent or attorney has complied with the power of attorney requirements in § 14.631 and the fee agreement requirements in paragraph (g) of this section.

(1) Agents and attorneys may charge fees for representation provided with respect to a request for revision of a decision of an agency of original jurisdiction under 38 U.S.C. 5109A or the Board of Veterans' Appeals under 38 U.S.C. 7111 based on clear and unmistakable error if a Notice of Disagreement was filed with respect to the challenged decision on or after June 20, 2007, and the agent or attorney has complied with the power of attorney requirements in § 14.631 and the fee agreement requirements in paragraph (g) of this section.

(2) In cases in which a Notice of Disagreement was filed on or before June 19, 2007, agents and attorneys may charge fees only for services provided after both of the following conditions have been met:

(i) A final decision was promulgated by the Board with respect to the issue, or issues, involved in the appeal; and

(ii) The agent or attorney was retained not later than 1 year following the date that the decision by the Board was promulgated. (This condition will be considered to have been met with respect to all successor agents or attorneys acting in the continuous prosecution of the same matter if a predecessor was retained within the required time period.)

(3) Except as noted in paragraph (i) of this section and § 14.637(d), the agency of original jurisdiction that issued the decision identified in a Notice of Disagreement shall determine whether an agent or attorney is eligible for fees under this section. The agency of original jurisdiction's eligibility determination is a final adjudicative action and may be appealed to the Board.

(d) *Exceptions*—(1) *Chapter 37 loans.* With respect to services of agents and attorneys provided after October 9, 1992, a reasonable fee may be charged or paid in connection with any proceeding in a case arising out of a loan made, guaranteed, or insured under chapter 37, United States Code, even though the conditions set forth in paragraph (c) of this section are not met.

(2) *Payment of fee by disinterested third party.* (i) An agent or attorney may receive a fee or salary from an organization, governmental entity, or other disinterested third party for representation of a claimant or appellant even though the conditions set forth in paragraph (c) of this section have not been met. An organization, governmental entity, or other third party is considered disinterested only if the entity or individual does not stand to benefit financially from the successful outcome of the claim. In no such case may the attorney or agent charge a fee which is contingent, in whole or in part, on whether the matter is resolved in a manner favorable to the claimant or appellant.

(ii) For purposes of this part, a person shall be presumed not to be disinterested if that person is the spouse, child, or parent of the claimant or appellant, or if that person resides with the claimant or appellant. This presumption may be rebutted by clear and convincing evidence that the person in question has no financial interest in the success of the claim.

(iii) The provisions of paragraph (g) of this section (relating to fee agreements) shall apply to all payments or agreements to pay involving disinterested third parties. In addition, the agreement shall include or be accompanied by the following statement, signed by the attorney or agent: ''I certify that no agreement, oral or otherwise, exists under which the claimant or appellant will provide anything of value to the third-party payer in this case in return for payment of my fee or salary, including, but not limited to, reimbursement of any fees paid.''

(e) *Fees permitted.* Fees permitted for services of an agent or attorney admitted to practice before VA must be reasonable. They may be based on a fixed fee, hourly rate, a percentage of benefits recovered, or a combination of such bases. Factors considered in determining whether fees are reasonable include:

(1) The extent and type of services the representative performed;

(2) The complexity of the case;

(3) The level of skill and competence required of the representative in giving the services;

(4) The amount of time the representative spent on the case;

(5) The results the representative achieved, including the amount of any benefits recovered;

(6) The level of review to which the claim was taken and the level of the review at which the representative was retained;

(7) Rates charged by other representatives for similar services; and

(8) Whether, and to what extent, the payment of fees is contingent upon the results achieved.

(f) *Presumptions.* Fees which do not exceed 20 percent of any past-due benefits awarded as defined in paragraph (h)(3) of this section shall be presumed to be reasonable. Fees which exceed 33⅓ percent of any past-due benefits awarded shall be presumed to be unreasonable. These presumptions may be rebutted through an examination of the factors in paragraph (e) of this section establishing that there is clear and convincing evidence that a fee which does not exceed 20 percent of any past-due benefits awarded is not reasonable or that a fee which exceeds 33⅓ percent is reasonable in a specific circumstance.

(g) *Fee agreements.* All agreements for the payment of fees for services of agents and attorneys (including agreements involving fees or salary paid by an organization, governmental entity or other disinterested third party) must be in writing and signed by both the claimant or appellant and the agent or attorney.

(1) To be valid, a fee agreement must include the following:

(i) The name of the veteran,

(ii) The name of the claimant or appellant if other than the veteran,

(iii) The name of any disinterested third-party payer (see paragraph (d)(2) of this section) and the relationship between the third-party payer and the veteran, claimant, or appellant,

(iv) The applicable VA file number, and

(v) The specific terms under which the amount to be paid for the services of the attorney or agent will be determined.

(2) Fee agreements must also clearly specify if VA is to pay the agent or attorney directly out of past due benefits. A direct-pay fee agreement is a fee agreement between the claimant or

appellant and an agent or attorney providing for payment of fees out of past-due benefits awarded directly to an agent or attorney. A fee agreement that does not clearly specify that VA is to pay the agent or attorney out of past-due benefits or that specifies a fee greater than 20 percent of past-due benefits awarded by VA shall be considered to be an agreement in which the agent or attorney is responsible for collecting any fees for representation from the claimant without assistance from VA.

(3) A copy of the agreement must be filed with the Office of the General Counsel within 30 days of its execution by mailing the copy to the following address: Office of the General Counsel (022D), 810 Vermont Avenue, NW., Washington, DC 20420. Only fee agreements and documents related to review of fees under paragraph (i) of this section and expenses under § 14.637 may be filed with the Office of the General Counsel. All documents relating the adjudication of a claim for VA benefits, including any correspondence, evidence, or argument, must be filed with the agency of original jurisdiction, Board of Veterans' Appeals, or other VA office as appropriate.

(h) *Payment of fees by Department of Veterans Affairs directly to an agent or attorney from past-due benefits.* (1) Subject to the requirements of the other paragraphs of this section, including paragraphs (c) and (e), the claimant or appellant and an agent or attorney may enter into a fee agreement providing that payment for the services of the agent or attorney will be made directly to the agent or attorney by VA out of any past-due benefits awarded in any proceeding before VA or the United States Court of Appeals for Veterans Claims. VA will charge and collect an assessment out of the fees paid directly to agents or attorneys from past-due benefits awarded. The amount of such assessment shall be equal to five percent of the amount of the fee required to be paid to the agent or attorney, but in no event shall the assessment exceed $100. Such an agreement will be honored by VA only if the following conditions are met:

(i) The total fee payable (excluding expenses) does not exceed 20 percent of the total amount of the past-due benefits awarded,

(ii) The amount of the fee is contingent on whether or not the claim is resolved in a manner favorable to the claimant or appellant, and

(iii) The award of past-due benefits results in a cash payment to a claimant or an appellant from which the fee may be deducted. (An award of past-due benefits will not always result in a cash payment to a claimant or an appellant. For example, no cash payment will be made to military retirees unless there is a corresponding waiver of retirement pay. (*See* 38 U.S.C. 5304(a) and 38 CFR 3.750)

(2) For purposes of this paragraph (h), a claim will be considered to have been resolved in a manner favorable to the claimant or appellant if all or any part of the relief sought is granted.

(3) For purposes of this paragraph (h), ''past-due benefits'' means a nonrecurring payment resulting from a benefit, or benefits, granted on appeal or awarded on the basis of a claim reopened after a denial by a VA agency of original jurisdiction or the Board of Veterans' Appeals or the lump sum payment that represents the total amount of recurring cash payments that accrued between the effective date of the award, as determined by applicable laws and regulations, and the date of the grant of the benefit by the agency of original jurisdiction, the Board of Veterans' Appeals, or an appellate court.

(i) When the benefit granted on appeal, or as the result of the reopened claim, is service connection for a disability, the ''past-due benefits'' will be based on the initial disability rating assigned by the agency of original jurisdiction following the award of service connection. The sum will equal the payments accruing from the effective date of the award to the date of the initial disability rating decision. If an increased evaluation is subsequently granted as the result of an appeal of the disability evaluation initially assigned by the agency of original jurisdiction, and if the agent or attorney represents the claimant or appellant in that phase of the claim, the agent or attorney will be paid a supplemental payment based upon the increase granted on appeal, to the extent that the increased amount of disability is found to have existed between the initial effective date of the award following the grant of service connection and the date of the rating action implementing the appellate decision granting the increase.

(ii) Unless otherwise provided in the fee agreement between the claimant or appellant and the agent or attorney, the agent's or attorney's fees will be determined on the basis of the total amount of the past-due benefits even though a portion of those benefits may have been apportioned to the claimant's or appellant's dependents.

(iii) If an award is made as the result of favorable action with respect to several issues, the past-due benefits will be calculated only on the basis of that portion of the award which results from action taken on issues concerning which the criteria in paragraph (c) of this section have been met.

(4) In addition to filing a copy of the fee agreement with the Office of the General Counsel as required by paragraph (g) of this section, the agent or attorney must notify the agency of original jurisdiction within 30 days of the date of execution of the agreement of the existence of an agreement providing for the direct payment of fees out of any benefits subsequently determined to be past due and provide that agency with a copy of the fee agreement.

(i) *Motion for review of fee agreement.* Before the expiration of 120 days from the date of the final VA action, the Office of the General Counsel may review a fee agreement between a claimant or appellant and an agent or attorney upon its own motion or upon the motion of the claimant or appellant. The Office of the General Counsel may order a reduction in the fee called for in the agreement if it finds by a preponderance of the evidence, or by clear and convincing evidence in the case of a fee presumed reasonable under paragraph (f) of this section, that the fee is unreasonable. The Office of the General Counsel may approve a fee presumed unreasonable under paragraph (f) of this section if it finds by clear and convincing evidence that the fee is reasonable. The Office of the General Counsel's review of the agreement under this paragraph will address the issues of eligibility under paragraph (c) of this section and reasonableness under paragraph (e) of this section. The Office of the General Counsel will limit its review and decision under this paragraph to the issue of reasonableness if another agency of original jurisdiction has reviewed the agreement and made an eligibility determination under paragraph (c) of this section. Motions for review of fee agreements must be in writing and must include the name of the veteran, the name of the claimant or appellant if other than the veteran, and the applicable VA file number. Such motions must set forth the reason, or reasons, why the fee called for in the agreement is unreasonable and must be accompanied by all evidence the moving party desires to submit.

(1) A claimant's or appellant's motion for review of a fee agreement must be served on the agent or attorney and must be filed at the following address: Office of the General Counsel (022D), 810 Vermont Avenue, NW., Washington, DC 20420. The agent or attorney may file a response to the motion, with any relevant evidence,

with the Office of the General Counsel not later than 30 days from the date on which the claimant or appellant served the motion on the agent or attorney. Such responses must be served on the claimant or appellant. The claimant or appellant then has 15 days from the date on which the agent or attorney served a response to file a reply with the Office of the General Counsel. Such replies must be served on the agent or attorney.

(2) The Assistant General Counsel shall initiate the Office of the General Counsel's review of a fee agreement on its own motion by serving the motion on the agent or attorney and the claimant or appellant. The agent or attorney may file a response to the motion, with any relevant evidence, with the Office of the General Counsel (022D), 810 Vermont Avenue, NW., Washington, DC 20420, not later than 30 days from the date on which the Office of the General Counsel served the motion on the agent or attorney. Such responses must be served on the claimant or appellant.

(3) The Office of the General Counsel shall close the record in proceedings to review fee agreements 15 days after the date on which the agent or attorney served a response on the claimant or appellant, or 30 days after the claimant, appellant, or the Office of the General Counsel served the motion on the agent or attorney if there is no response. The Assistant General Counsel may, for a reasonable period upon a showing of sufficient cause, extend the time for an agent or attorney to serve an answer or for a claimant or appellant to serve a reply. The Assistant General Counsel shall forward the record and a recommendation to the General Counsel for a final decision. Unless either party files a Notice of Disagreement with the Office of the General Counsel, the agent or attorney must refund any excess payment to the claimant or appellant not later than the expiration of the time within which the General Counsel's decision may be appealed to the Board of Veterans' Appeals.

(j) In addition to whatever other penalties may be prescribed by law or regulation, failure to comply with the requirements of this section may result in proceedings under § 14.633 of this chapter to terminate the agent's or attorney's accreditation to practice before VA.

(k) Notwithstanding provisions in this section for closing the record at the end of the 30-day period for serving a response or 15 days after the date on which the agent or attorney served a response, appeals shall be initiated and processed using the procedures in 38 CFR Parts 19 and 20. Nothing in this section shall be construed to limit the Board's authority to remand a matter to the General Counsel under 38 CFR 19.9 for any action that is essential for a proper appellate decision or the General Counsel's ability to issue a Supplemental Statement of the Case under 38 CFR 19.31.

(Authority: 38 U.S.C. 5902, 5904, 5905)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0085.)

■ 11. Add § 14.637 to read as follows:

§ 14.637. Payment of the expenses of agents and attorneys in proceedings before Agencies of Original Jurisdiction and before the Board of Veterans' Appeals.

(a) *Applicability of rule.* The provisions of this section apply to the services of accredited agents and attorneys with respect to benefits under laws administered by VA in all proceedings before the agency of original jurisdiction or before the Board of Veterans' Appeals regardless of whether an appeal has been initiated.

(b) *General.* Any agent or attorney may be reimbursed for expenses incurred on behalf of a veteran or a veteran's dependents or survivors in the prosecution of a claim for benefits pending before VA. Whether such an agent or attorney will be reimbursed for expenses and the method of such reimbursement is a matter to be determined by the agent or attorney and the claimant or appellant in the fee agreement filed with the Office of the General Counsel under § 14.636 of this part. Expenses are not payable directly to the agent or attorney by VA out of benefits determined to be due to a claimant or appellant.

(c) *Nature of expenses subject to reimbursement.* ''Expenses'' include nonrecurring expenses incurred directly in the prosecution of a claim for benefits on behalf of a claimant or appellant. Examples of such expenses include expenses for travel specifically to attend a hearing with respect to a particular claim, the cost of copies of medical records or other documents obtained from an outside source, and the cost of obtaining the services of an expert witness or an expert opinion. ''Expenses'' do not include normal overhead costs of the agent or attorney such as office rent, utilities, the cost of obtaining or operating office equipment or a legal library, salaries of the representative and his or her support staff, and the cost of office supplies.

(d) *Expense charges permitted; motion for review of expenses.* Reimbursement for the expenses of an agent or attorney may be obtained only if the expenses are reasonable. The Office of the General Counsel may review the expenses charged by an agent or attorney upon its own motion or the motion of the claimant or appellant and may order a reduction in the expenses charged if it finds that they are excessive or unreasonable. The Office of the General Counsel's review of expenses under this paragraph will address the issues of eligibility under § 14.636(c) and reasonableness. The Office of the General Counsel will limit its review and decision under this paragraph to the issue of reasonableness if another agency of original jurisdiction has reviewed the fee agreement between the claimant and the agent or attorney and determined that the agent or attorney is eligible for reimbursement of expenses. Motions for review of expenses must be in writing and must include the name of the veteran, the name of the claimant or appellant if other than the veteran, and the applicable VA file number. Such motions must specifically identify which expenses charged are unreasonable; must set forth the reason, or reasons, why such expenses are excessive or unreasonable and must be accompanied by all evidence the claimant or appellant desires to submit. Factors considered in determining whether expenses are excessive or unreasonable include the complexity of the case, the potential extent of benefits recoverable, and whether travel expenses are in keeping with expenses normally incurred by other representatives.

(1) A claimant's or appellant's motion for review of expenses must be served on the agent or attorney and must be filed at the following address: Office of the General Counsel (022D), 810 Vermont Avenue, NW., Washington, DC 20420. The agent or attorney may file a response to the motion, with any accompanying evidence, with the Office of the General Counsel not later than 30 days from the date on which the claimant or appellant served the motion on the agent or attorney. Such responses must be served on the claimant or appellant. The claimant or appellant then has 15 days from the date on which the agent or attorney served a response to file a reply with the Office of the General Counsel. Such replies must be served on the agent or attorney.

(2) The Assistant General Counsel shall initiate the Office of the General Counsel's review of expenses on its own motion by serving the motion on the agent or attorney and the claimant or appellant. The agent or attorney may file a response to the motion, with any accompanying evidence, with the Office

of the General Counsel (022D), 810 Vermont Avenue, NW., Washington, DC 20420, not later than 30 days from the date on which the Office of the General Counsel served the motion on the agent or attorney. Such responses must be served on the claimant or appellant.

(3) The Office of the General Counsel shall close the record in proceedings to review expenses 15 days after the date on which the agent or attorney served a response on the claimant or appellant, or 30 days after the claimant, appellant, or the Office of the General Counsel served the motion on the agent or attorney if there is no response. The Assistant General Counsel may, for a reasonable period upon a showing of sufficient cause, extend the time for an agent or attorney to serve an answer or for a claimant or appellant to serve a reply. Unless either party files a Notice of Disagreement with the General Counsel's decision, the attorney or agent must refund any excess payment to the claimant or appellant not later than the expiration of the time within which the General Counsel's decision may be appealed to the Board of Veterans' Appeals.

(e) In addition to whatever other penalties may be prescribed by law or regulation, failure to comply with the requirements of this section may result in proceedings under § 14.633 of this part to terminate the agent's or attorney's accreditation to practice before VA.

(f) Notwithstanding provisions in this section for closing the record at the end of the 30-day period for serving a response or 15 days after the date on which the agent or attorney served a response, appeals shall be initiated and processed using the procedures in 38 CFR parts 19 and 20. Nothing in this section shall be construed to limit the Board's authority to remand a matter to the General Counsel under 38 CFR 19.9 for any action that is essential for a proper appellate decision or the General Counsel's ability to issue a Supplemental Statement of the Case under 38 CFR 19.31.

(Authority: 38 U.S.C. 5904)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0085.)

PART 1—GENERAL PROVISIONS

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

Authority: 38 U.S.C. 501(a), and as noted in specific sections.

■ 13. Amend newly redesignated § 1.600 by:

■ a. Adding an undesignated center heading before the section heading .

■ b. In paragraph (a) introductory text, removing ''14.640 through 14.643'' and adding, in its place, ''1.600 through 1.603''.

■ c. In paragraph (b)(1), removing ''14.640 through 14.643'' and adding, in its place, ''1.600 through 1.603''.

■ d. In paragraph (b)(4), removing ''14.640 through 14.643'' and adding, in its place, ''1.600 through 1.603''.

■ e. In paragraph (d) introductory text, removing ''14.640 through 14.643'' and adding, in its place, ''1.600 through 1.603''.

The addition reads as follows:

Expanded Remote Access to Computerized Veterans Claims Records by Accredited Representatives

§ 1.600 Purpose.

* * * * *

§ 1.602 [Amended]

■ 14. Amend newly redesignated § 1.602 by:

■ a. In paragraph (b), removing ''14.643'' and adding, in its place, ''1.603''.

■ b. In paragraph (c)(3), removing ''14.640 through 14.643'' and adding, in its place, ''1.600 through 1.603''.

§ 1.603 [Amended]

■ 15. Amend newly redesignated § 1.603 by:

■ a. In paragraph (b)(1), removing ''14.640 through 14.643'' and adding, in its place, ''1.600 through 1.603''.

■ b. In paragraph (c), removing ''14.643'' and adding, in its place, ''1.603''.

PART 19—BOARD OF VETERANS' APPEALS: APPEALS REGULATIONS

■ 16. The authority citation for part 19 continues to read as follows:

Authority: 38 U.S.C. 501(a) unless otherwise noted.

■ 17. Amend § 19.31 by adding a paragraph (d) and revising the authority citation at the end of the section to read as follows.

§ 19.31 Supplemental statement of the case.

* * * * *

(d) *Exception.* Paragraph (b)(1) of this section does not apply in proceedings before the General Counsel conducted under part 14 of this chapter to cancel accreditation or to review fee agreements and expenses for reasonableness.

(Authority: 38 U.S.C. 7105(d); 38 U.S.C. 5902, 5903, 5904)

■ 18. Amend § 19.36 by adding a sentence at the end of the paragraph and revising the authority citation to read as follows:

§ 19.36 Notification of certification of appeal and transfer of appellate record.

* * * Provisions in this section for submitting additional evidence and references to § 20.1304 do not apply in proceedings before the General Counsel conducted under part 14 of this chapter to suspend or cancel accreditation or to review fee agreements and expenses for reasonableness.

(Authority: 38 U.S.C. 7105; 38 U.S.C. 5902, 5903, 5904)

■ 19. Amend § 19.37 by adding a paragraph (c) and revising the authority citation at the end of the section to read as follows:

§ 19.37 Consideration of additional evidence received by the agency of original jurisdiction after an appeal has been initiated.

* * * * *

(c) The provisions of this section do not apply in proceedings before the General Counsel conducted under part 14 of this chapter to cancel accreditation or to review fee agreements and expenses for reasonableness.

(Authority: 38 U.S.C. 7105(d)(1), 5902, 5903, 5904)

PART 20—BOARD OF VETERANS' APPEALS: RULES OF PRACTICE

■ 20. The authority citation for part 20 continues to read as follows:

Authority: 38 U.S.C. 501(a) and as noted in specific sections.

■ 21. Amend § 20.608 by revising paragraph (a) to read as follows:

§ 20.608 Rule 608. Withdrawal of services by a representative.

(a) *Withdrawal of services prior to certification of an appeal.* A representative may withdraw services as representative in an appeal at any time prior to certification of the appeal to the Board of Veterans' Appeals by the agency of original jurisdiction by complying with the requirements of § 14.631 of this chapter.

* * * * *

§§ 20.609 and 20.610 [Removed]

■ 22. Remove §§ 20.609 and 20.610.

■ 23. Amend § 20.800 by adding a sentence at the end of the paragraph and revising the authority citation to read as follows:

§ 20.800 Rule 800. Submission of additional evidence after initiation of appeal.

* * * The provisions of this section do not apply in proceedings before the General Counsel conducted under part 14 of this chapter to cancel accreditation or to review fee agreements and expenses for reasonableness.

(Authority: 38 U.S.C. 7105(d)(1); 38 U.S.C. 5902, 5903, 5904)

■ 24. Amend § 20.1304 by adding a paragraph (e) and revising the authority citation at the end of the section to read as follows:

§ 20.1304 Rule 1304. Request for change in representation, request for personal hearing, or submission of additional evidence following certification of an appeal to the Board of Veterans' Appeals.

* * * * *

(e) *Relationship to proceedings before the General Counsel to cancel accreditation or to review the reasonableness of fees and expenses.* The provisions of paragraphs (a), (b), and (d) of this section allowing appellants to submit additional evidence do not apply in proceedings before the General Counsel conducted under part 14 of this chapter to cancel accreditation or to review fee agreements and expenses for reasonableness.

(Authority: 38 U.S.C. 7104, 7105, 7105A; 38 U.S.C. 5902, 5903, 5904)

[FR Doc. E8–10779 Filed 5–21–08; 8:45 am]

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Federal Register

Thursday,
May 22, 2008

Part III

Department of Defense

Office of Personnel Management

5 CFR Part 9901

National Security Personnel System; Proposed Rule

DEPARTMENT OF DEFENSE

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 9901

RIN 3206–AL62

National Security Personnel System

AGENCY: Department of Defense; Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Department of Defense (DoD) and the Office of Personnel Management (OPM) are issuing proposed regulations revising the National Security Personnel System (NSPS), a human resources management system for DoD, as originally authorized by the National Defense Authorization Act for Fiscal Year 2004 and amended by the National Defense Authorization Act for Fiscal Year 2008. The proposed regulation governs compensation, classification and performance management under NSPS. NSPS aligns DoD's human resources management system with the Department's critical mission requirements and protects the civil service rights of its employees.

DATES: Comments must be received on or before June 23, 2008.

ADDRESSES: You may submit comments identified by docket number NSPS–OPM–2008–0081 and/or Regulatory Information Number (RIN) 3206–AL62. Please arrange and identify your comments on the regulatory text by subpart and section number; if your comments relate to the supplementary information, please refer to the heading and page number. There are two methods for submitting comments. Please submit only one set of comments via one of the methods described.

- *Preferred Method for Comments:* The preferred method for submitting comments is through the Federal Rulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Alternative Method for Comments:* If unable to access the Federal Rulemaking Portal, comments may be mailed to the following address: DOD/OPM/NSPS Public Comments, PO Box 14474, Washington, DC 20044.

Instructions: All submissions must include the agency name and docket number or RIN for this rulemaking. Mailed comments must be in paper form. No mailed comments in electronic form (CDs, floppy disk, or other media) will be accepted. The Federal Rulemaking Portal, *http://www.regulations.gov*, will contain any public comments as received, without change, unless the comment contains security-sensitive material, confidential business information, or other information for which public disclosure is restricted by statute. If such material is received, we will provide a reference to that material in the version of the comment that is placed in the docket. The docket system is an ''anonymous access'' system, which means that DoD and OPM will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment. Unless a comment is submitted anonymously, the names of all commenters will be public information.

Please ensure your comments are submitted within the specified open comment period. Comments received after the close of the comment period will be marked ''late,'' and DoD and OPM are not required to consider them in formulating a final decision.

Before acting on this proposal, DoD and OPM will consider all comments we receive on or before the closing date for comments. Comments filed late will be considered only if it is possible to do so without incurring expense or delay. Changes to this proposal may be made in light of the comments we receive.

FOR FURTHER INFORMATION CONTACT: For DoD, Bradley B. Bunn, (703) 696–5604; for OPM, Charles D. Grimes III, (202) 606–8079.

SUPPLEMENTARY INFORMATION: The Department of Defense (DoD or ''the Department'') and the Office of Personnel Management (OPM) are proposing to amend the National Security Personnel System (NSPS or ''the System''), a human resources (HR) management system for DoD under 5 U.S.C. 9902, as enacted by section 1101 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136, November 24, 2003) and amended by section 1106 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181, January 28, 2008). The following information is intended to provide interested parties with relevant background material about (1) the changes to the regulations, (2) the process used to make the changes, (3) a description of the revised NSPS regulations, and (4) an analysis of the costs and benefits of those proposed regulations.

To the extent that this rule is consistent with the rule published in **Federal Register** dated November 1, 2005 (Volume 70, Number 210) [Rules and Regulations] [Page 66115–66220] (*http://edocket.access.gpo.gov/2005/05–21494.htm*), the supplementary information pertaining to that rule is adopted as part of the supplementary information to this rule.

The Need for Change

DoD civilian employees are unique in Government: They are an integral part of an organization that has a military function. DoD civilian employees complement and support the military around the world. To support the interests of the United States in today's national security environment, civilian employees must be an integrated, flexible, and responsive part of the DoD team. Just as new threats, new missions, new technology, and new tactics are changing the work of the military, they are changing the work of DoD's 700,000 civilian employees.

The Department's experience operating under the current NSPS regulations as well as the 20 years of experience with transformational personnel demonstration projects, covering nearly 30,000 DoD employees, has shown that fundamental change in personnel management has a positive impact on individual career growth and opportunities, workforce responsiveness, and innovation; all these things enhance mission effectiveness.

Public Law 108–136 amended title 5, United States Code, to provide the Department with the authority to meet this transformation challenge through development and deployment of the NSPS. Public Law 110–181, while amending Public Law 108–136, continues to promote a performance culture in which the performance and contributions of the DoD civilian workforce are linked to strategic mission objectives and are more fully recognized and rewarded. It also retains flexibilities to streamline the method for classifying positions and to provide a more flexible support structure for both pay and classification in order to help attract skilled and talented workers; retain and appropriately reward current employees; respond to DoD mission requirements; and create opportunities for employees to participate more fully in the total integrated workforce. The System offers the more than 181,000 currently covered employees a contemporary pay banding construct, which includes performance-based pay. NSPS allows the Department to be more competitive in setting salaries and to adjust salaries based on factors, such as labor market conditions, performance, and changes in duties. The updated HR management system rules more specifically govern how retained classification, compensation, and performance management flexibilities

will be implemented. The greater level of detail reflects a continued commitment to greater transparency regarding provisions of Pub. L. 110–181 and system improvements in light of operational experience with NSPS. The System retains the core values of the civil service, including merit systems principles and veterans' preference, and allows employees to be paid and rewarded based on performance, innovation, and results.

Significant Changes to the Original Law

The original NSPS statute was enacted on November 24, 2003, and provided the Secretary of Defense, in regulations jointly prescribed with the Director of OPM, the authority to establish a flexible and contemporary civilian personnel system called the National Security Personnel System. This new civilian personnel system was intended to cover most of the approximately 700,000 DoD civilian employees, including blue-collar employees.

Among its features, it provided authority to establish a pay-for-performance system that recognizes and rewards employees based on performance and contribution to the mission; a new pay banding system to replace the General Schedule (GS); a simplified job classification process and flexible processes to assign new or different work; streamlined hiring processes and the ability to offer more competitive, market-sensitive compensation; improved workforce shaping procedures that reduce disruption with greater emphasis on performance as a factor in retention; expedited disciplinary and employee appeals processes for faster resolution of workplace issues, while preserving due process rights of employees; and a labor-management relations system that recognized DoD's critical national security mission and the need to act swiftly to execute that mission, while preserving collective bargaining rights of employees. The changes to labor relations included the ability to negotiate at the national level instead of negotiating with more than 1,500 local bargaining units, and the ability to establish a new independent third party to resolve labor relations disputes in DoD.

Public Law 110–181 amended title 5, United States Code, retaining authority for performance-based pay and classification and compensation flexibilities, but substantially modifying other NSPS authorities. The law, among other things—

- Brings NSPS under Governmentwide labor-management relations rules.
- Excludes Federal Wage System (blue collar) employees from coverage under NSPS.
- Requires DoD to collectively bargain procedures and appropriate arrangements for bringing DoD bargaining unit employees under NSPS prior to conversion of these employees.
- Brings NSPS under Governmentwide rules for disciplinary actions and employee appeals of adverse actions.
- Brings NSPS under Governmentwide rules for workforce shaping (reduction in force, furlough, and transfer of function).
- Requires that this rule be considered a major rule for the purposes of section 801 of title 5, United States Code, with advance Congressional notification for OPM/DoD jointly-prescribed NSPS regulations.
- Gives these rules the status of Governmentwide rules for the purpose of collective bargaining under chapter 71 when these rules are uniformly applicable to all organizational or functional units included in NSPS.
- Mandates that all employees with a performance rating above ''unacceptable'' or who do not have current performance ratings receive no less than sixty percent of the annual Governmentwide General Schedule pay increase (with the balance allocated to pay pool funding for the purpose of increasing rates of pay on the basis of employee performance).

Based on the changes Public Law 110–181 made to Section 9902 of title 5, the proposed rule deletes subparts F, G, H, and I (dealing with workforce shaping, adverse actions, appeals, and labor relations, respectively) of the current NSPS regulations. Subpart E (dealing with staffing) is also removed.

Public Law 110–181 also modifies the authority to conduct national-level bargaining and retains the rights of employees to organize, bargain collectively and participate through labor organizations of their own choosing in decisions which affect them, subject to any exclusion from coverage or limitation on negotiability established pursuant to law. It extends and expands exclusions from NSPS coverage for certain DoD laboratories through October 1, 2011. Some of these laboratories operate under demonstration project authorities which provide their own pay-for-performance systems.

In establishing the revised System, only certain provisions of title 5, United States Code, may be waived or modified by DoD and OPM:

- Chapter 43 (dealing with performance management);
- Chapter 51 (dealing with General Schedule job classification);
- Chapter 53 (dealing with pay for General Schedule employees and pay for certain other employees), except for certain sections for which waiver or modification is barred by law; and
- Subchapter V of chapter 55 (dealing with premium pay), except sections 5544 (dealing with prevailing rate employees) and 5545b (dealing with firefighter pay).

Two Years Operational Experience Under NSPS

In order to provide consistency and uniformity of application throughout the Department, certain NSPS features previously described in DoD implementing issuances have been incorporated into this regulation. DoD now has more than 2 years of experience with these features and has determined that they effectively support key performance parameters of NSPS. In addition, the regulation includes modifications made to NSPS as a result of operational lessons learned over the last 2 years.

Classification

Effective Date of Classification of Position

The regulation now provides specific details for entitlement to retroactive effective date of a classification decision. While the prior regulation provided for both a classification reconsideration process and a retroactive effective date, more detail has been provided to enhance transparency of the regulation as well as to provide for a uniform and consistent rule.

The Table of Changes further addresses this and other changes in the NSPS regulation in the area of Classification.

Compensation

Compensation Architecture

The proposed regulation modifies rules governing the current compensation structure by removing the link between increases in the minimum rate of the rate range and across-the-board increases. This change enables more flexibility in responding to labor market changes that may impact the lower end of a pay range for an occupation, but not the middle or upper ranges. Also, discretionary authority is now provided to give additional general salary increases to designated

occupational series within a pay band. This flexibility enables management to adjust pay to recognize market forces when the pay band itself is market competitive, but due to rapidly changing markets, the current salaries paid to employees in certain occupations are not.

Pay Administration

Several changes have been made in the area of pay administration. Pay setting flexibilities have been expanded to permit discretionary within-grade increase buy-ins when employees from outside of NSPS move to a NSPS position. Safeguards have been incorporated for employees who are moved to NSPS via management-directed actions. In these cases, the regulation now specifies a required within-grade increase buy-in. A significant level of detail has been added to describe how pay is administered upon promotion, reassignment, reduction in band and appointment to the Federal service. Most of this detail reflects the pay setting rules that have been applied during the past 2 years of NSPS operation. These practices are incorporated now to increase transparency in the system and because they have been effective in operation.

The proposed rule retains management's flexibility to set pay within a given range, but provides safeguards by placing limitations on the factors management may use in exercising their discretion as well as establishing pay increase limits that cannot be exceeded without higher level review. There have also been some modifications to pay setting practices based on DoD's experience with the System. Most significantly, pay setting rules for employees moving into NSPS from other systems or moving from NSPS positions covered by targeted local market supplements have been revised. Pay for these employees was previously set using the base salary. Pay will now be set using ''adjusted salary'' (includes base salary plus any applicable locality pay, special rate supplement, or other equivalent supplement) and any physicians' comparability allowance payable for the position held prior to the reassignment. In these cases, when the new position is in a different location, a geographic pay conversion will be processed. These rules allow management to set pay more competitively and equitably compensate employees by permitting pay to be set in a manner that prevents a loss in adjusted salary in certain circumstances. Further changes in NSPS pay setting rules include the discretion to adjust the rate of pay of a teacher moving into NSPS up to 20 percent to take into account the shorter work year incorporated in the annual rate of a teacher paid under 20 U.S.C. 901.

Pay Retention

Pay retention rules have been modified to provide a ''grandfather'' clause for employees who are covered by General Schedule grade and pay retention rules at the time they are converted into NSPS. These employees will not be subject to the 104-week limit on pay retention. They will be entitled to pay retention indefinitely subject to specifically identified pay retention termination events. Much detail has been added in the area of pay retention to identify circumstances for which pay retention is mandatory, eligibility requirements for optional pay retention and events leading to termination of pay retention. These rules reflect current practices under NSPS.

Accelerated Compensation for Developmental Positions (ACDP)

''Treatment of Developmental Positions'' (Section 9901.345) has been modified to specify criteria for Accelerated Compensation for Developmental Positions (ACDP) increases, identify the range of pay increases that are permitted under this discretionary authority, and to expand the discretionary use of ACDP to employees in developmental or trainee level positions assigned to the lowest pay band of a nonsupervisory pay schedule. To date, this authority has only been available to employees in developmental or trainee level positions in professional and analytical occupations. The change provides additional flexibility to recognize pay progression patterns in other occupations.

Premium Pay

A critical feature of NSPS compensation is the ability to modify premium pay in response to current and future needs. This flexibility facilitates the Department's ability to accomplish its diverse mission. The revised regulation incorporates rules governing NSPS premium pay. Premium pay includes pay such as overtime pay, compensatory time off, holiday, Sunday, and standby pay. Among the premium pay features unique to NSPS are: on-call premium pay for health care personnel in specified circumstances, pay for weekend duty for health care personnel, and foreign language proficiency pay. For the most part, the regulations reflect current premium pay policies under NSPS, which include certain modifications to the standard title 5 premium pay laws and regulations to address unique DoD mission requirements and differences in the NSPS classification and pay structure.

Conversion/Movement Out of NSPS

Regulations have been added to provide a process for converting employees out of NSPS when their position is removed from coverage under the System and to provide a ''virtual GS grade'' to employees who leave their NSPS position to accept employment in non-NSPS positions. These rules promote more equitable pay setting upon moves to different pay systems.

The Table of Changes further addresses these and other changes in the NSPS regulation in the area of Compensation.

Performance and Pay Pool Management

Higher Level Review

The proposed regulation more specifically outlines safeguards to ensure the NSPS performance and pay pool management system is fair and equitable based on employee performance. For example, under Subpart D, the revised regulation now provides for a higher level review of performance expectations. This review helps ensure that assigned employee objectives are reviewed for appropriateness and consistency within and across the organization and/or pay pool. This safeguard at the beginning of the performance management process helps to ensure equity at the end of it when performance payouts are paid from a common pay pool fund.

Calculating Annual Payout

Rating levels and share distribution ranges are also specified in the revised regulation as well as formulas for share values and calculation of performance payouts. This revised language enhances system transparency for all by providing additional specificity to these elements. The language also clarifies the intended application of a common share value (expressed as a percent of pay) throughout an entire pay pool, to include all sub pay pools. This further preserves equity across a pay pool.

Flexibility in Extending Performance Appraisal Periods

The authority to extend individual performance appraisal periods to enable employees to meet minimum performance appraisal periods is specified as well as limitations on this authority. By specifically providing for extension of individual rating cycles, valued performers and higher level

performing employees moving to NSPS positions can more quickly benefit from the NSPS performance based pay features.

Pay Pools

The pay pool concept has also been further defined in this regulation by providing parameters for pay pool composition and specifying the roles of pay pool officials within the pay pool process.

Much thought was given to achieving the ''right'' balance between safeguards and management flexibility. For example, although pay pool share ranges have been specified for each rating level, management still has the flexibility to determine assignment of shares within that range. System safeguards were added to ensure fairness, equity, and a performance focus by expressly stating and limiting the factors which may be used in the determination of share assignment. Similarly, management still retains the flexibility and authority to determine the distribution of a performance payout between base salary increase and bonus or a combination thereof. However, to ensure safeguards within the system, the factors management may use in exercising this authority have also been expressly defined and limited to ensure fairness, equity, and a performance focus. While pay pool funding is still determined by management, higher-level reviews have been required to provide internal controls.

Reconsideration Process

Employee performance reconsideration rights have been expanded to permit reconsideration of individual performance objective ratings in addition to the overall rating of record. This change recognizes that many pay pools use raw performance scores as a guide in determining how many shares to assign to employees. Since raw performance scores may be impacted by individual performance objective ratings, the ability to request review of individual performance objectives enables employees to seek redress on all performance rating decisions affecting their pay.

Other Changes

Other changes reflected in this regulation include language providing salary increases for employees who did not meet the minimum period of performance due to an approved paid leave status or performance of labor activities on ''official time''. These pay adjustments will be based on the modal rating of a pay pool. Likewise, provisions have been made to adjust the pay of employees returning from temporary assignments outside of NSPS or returning from long-term training for which no NSPS performance plan was assigned. These changes ensure that employee pay is not harmed by the failure to meet a minimum performance period or inability to rate performance while they either exercise statutory leave entitlements or fulfill other important roles to the organization.

Finally, the regulations permit coverage under NSPS pay setting and classification flexibilities for employees who are appointed for less than 90 days by providing limited coverage of these employees under Subpart D of Performance Management. Providing access to NSPS pay setting flexibilities for these positions enhances DoD's competitive position in the labor market when hiring temporary employees for 90 days or fewer.

The Table of Changes addresses these and other changes in the NSPS regulation.

Process for Developing Proposed Regulations

Working Groups

In January 2008, working groups began meeting to revise the current regulations. The working groups were functionally aligned to cover the following human resources program areas: (1) Compensation (classification and pay banding); (2) performance management; (3) hiring, assignment, and pay setting; and (4) workforce shaping. The working groups, staffed by DoD employees and OPM, identified and developed options and alternatives for consideration in the revised design of NSPS. These were then reviewed and approved for incorporation by DoD and OPM senior officials prior to formal coordination and publication in the **Federal Register**.

General Provisions—Subpart A

This subpart has been changed to bring NSPS into compliance with the National Defense Authorization Act for Fiscal Year 2008 and incorporate planned changes. Key changes to this subpart include deleting references to subparts that have been removed; revising the list of defined terms; and adding actions that require OPM approval prior to implementation.

The following Table of Changes lists, by specific regulatory section, a brief description of each significant change.

Citation	Description of proposed change
§ 9901.101(a)	*Purpose.* Amends paragraph to delete reference to a new labor-management system and include a provision enabling the Secretary to establish implementing issuances to supplement any matter covered by the regulation.
§ 9901.101(b)(1)	Amends paragraph to delete reference to a new labor-management system.
§ 9901.101(b)(2)	Amends paragraph to delete references to a labor relations system.
§ 9901.102(a)	*Eligibility for coverage.* Amends paragraph to remove reference to subparts E through I.
§ 9901.102(b)	Amends paragraph to (1) clarify the Secretary's sole and exclusive discretion to decide to apply coverage to an eligible category or categories of employees; (2) delete reference to subparts E, F, G, and H; (3) incorporate information previously found at § 9901.105(b) requiring DoD to advise OPM in advance when it intends to extend coverage of NSPS to specific categories of employees.
§ 9901.102(d)	Amends paragraph to reflect the interrelationship of the classification, pay, and performance management systems established under NSPS.
§ 9901.102(e)	Amends paragraph to clarify the Secretary's sole and exclusive discretion to decide to rescind coverage of NSPS for a particular category of employees or an organization or functional unit.
§ 9901.102(f)(3)	Amends paragraph to change reference from § 9901.373 to § 9901.371 to reflect number change in another subpart.
§ 9901.103	*Definitions.* Deletes definitions for *furlough, initial probationary period, in-service probationary period, labor organization, mandatory removal offenses,* and *MSPB.* Adds definitions for *appraisal period, comparable pay band or comparable level of work, Component, higher pay band or higher level of work, lower pay band or lower level of work, pay pool, Pay Pool Manager, Pay Pool Panel,* and *Performance Review Authority.* Revises definitions for *basic pay, day, implementing issuances, National Security Personnel System, promotion, rating of record, reassignment,* and *reduction in band* to add or delete information and add clarity.

Citation	Description of proposed change
§ 9901.104	*Scope of authority.* Amends section to delete paragraphs (a), (f), (g), and (h) and to redesignate the remaining paragraphs. Deletes language allowing the Department to waive portions of chapter 53 related to pay and job grading for Federal Wage System employees. Adds reference to section 5544 (dealing with premium pay for Federal Wage System employees) as another premium pay provision that may not be waived.
§ 9901.105	*OPM coordination and approval.* Amends the title of this section to add information on actions requiring OPM approval prior to implementation. Deletes paragraphs (f) and (g). Also, deletes paragraphs (h) and (i) and moves material in those paragraphs to paragraphs (d) and (e), respectively.
§ 9901.105(a)	Amends paragraph to add requirement to request OPM approval in advance of implementation of certain actions.
§ 9901.105(b)	Replaces the former § 9901.105(b) paragraph and adds items previously found at § 9901.105(c), (d), and (e).
§ 9901.105(c)	Revises paragraph to add actions requiring the Director's approval prior to implementation.
§ 9901.105(d)	Places material previously found at § 9901.105(h) in this paragraph.
§ 9901.105(e)	Places material previously found at § 9901.105(i) in this paragraph and notes that some actions require OPM approval.
§ 9901.106	*Relationship to other provisions.* Deletes the material formerly at § 9901.106 and replaces with material formerly found at § 9901.107. Removes material related to application of the back pay law in 5 U.S.C. 5596 previously found at § 9901.107(b)(2) and (3).
§ 9901.106(b)(1)	Amends paragraph to include material previously found at § 9901.107(b). Deletes reference to chapters 31, 33, 35, 71, 75, and 77.
§ 9901.106(b)(2)	Amends paragraph to include material previously found at § 9901.107(b)(1). Deletes reference to chapters 31, 33, 35, 71, 75, and 77 and removes reference to subparts E through I. Removes reference to physicians' comparability allowances under 5 U.S.C. 5948 previously found at § 9901.107(b)(1)(iv).
§ 9901.106(c)(2)	Adds paragraph specifying that the authority in 5 U.S.C. 5948 to provide physicians' comparability allowances to GS physicians does not apply to NSPS physicians.
§ 9901.107	*Program evaluation.* Moves material previously found at § 9901.108 (and deletes that section) and deletes requirements related to employee representatives.

Classification—Subpart B

Subpart B provides DoD with the authority to replace the current GS classification and qualifications systems and other current classification systems with a new method of evaluating and classifying jobs by grouping them into occupational categories and levels of work for pay and other related purposes. Under NSPS, DoD (in coordination with OPM) will have the authority to establish qualifications for positions and to assign occupations and positions to broad occupational career groups, pay schedules, and pay bands (or levels).

The NSPS classification system fully supports the merit system principle that ''equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition for excellence in performance.''

The pay banding structure replaces artificial limitations created by current classification systems. Broad pay bands provide the ability to move employees more freely across a range of work and provide opportunities that are not possible when bound by traditional narrowly described work definitions. While pay banding provides greater flexibility and agility to the Department, the classification system continues to ensure employees have access to long-established protections related to the classification of their positions. Employees are permitted to request reconsideration of the classification (pay system, career group, occupational series, official title, pay schedule, or pay band) of their official positions of record at any time with DoD and/or OPM, as they can today under the GS system. The system described in subpart B, together with the revised pay system described in subpart C, will provide DoD with greater flexibility to adapt the Department's job and pay structure to meet present and future mission requirements.

The following Table of Changes lists, by specific regulatory section, a brief description of each significant change.

Citation	Description of proposed change
§ 9901.201(a)	*Purpose.* Amends paragraph to delete reference to prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV.
§ 9901.201(b)(2)	*Coverage.* Deletes former paragraph which referenced prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV.
§ 9901.202	*Coverage.* Deletes former paragraph § 9901.202(b)(2) which referenced prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV, and redesignates remaining paragraphs accordingly.
§ 9901.203(a)	*Waivers.* Amends paragraph to delete reference to the prevailing rate system under 5 U.S.C. 5346 and 5346(c) and changes reference to § 9901.107 to § 9901.106 to reflect the renumbering of that section. Adds review of pay plan under 5 U.S.C. 5103.
§ 9901.203(b)	Adds reference to 5 U.S.C. 6304(f) (regarding annual leave ceilings for members of the Senior Executive Service (SES) and employees in senior-level positions compensated under 5 U.S.C. 5376 (SL/ST)) to reflect updates to U.S. Code.
§ 9901.204	*Definitions.* Modifies definition for *classification* to include a reference to *official title* and adds definition of *official title.*
§ 9901.205	*Bar on collective bargaining.* Deletes entire section.
§ 9901.212(d)	Restructures paragraph. Adds information on the Secretary's ability to use OPM qualification standards or establish unique qualification standards for NSPS positions. Deletes reference to § 9901.513.
§ 9901.221(b)(1)	Amends paragraph to delete reference to 5 U.S.C. 5346.
§ 9901.221(d)	Restructures paragraph and incorporates material previously found at § 9901.222(b) regarding retroactive effective dates.
§ 9901.221(d)(1)	Adds paragraph specifying retroactive classification date requirements and retroactive effective dates when § 9901.221(d) is applicable.

Citation	Description of proposed change
§ 9901.221(d)(2)	Adds paragraph specifying that the employee must file an initial request for review of the reduction in pay band or adjusted salary within 15 days to be eligible for retroactive corrective action.
§ 9901.221(d)(3)	Adds paragraph specifying that retroactive date can be established only if the appeal reversal is based on duties and responsibilities performed at the time of reduction.
§ 9901.221(e)	Redesignates former paragraph (d) as paragraph (e). Adds information to specify notification requirements when a classification action results in a reduction in an employee's pay band or adjusted salary.
§ 9901.222	*Review of classification decisions.* Revises title for clarity.
§ 9901.222(b)	Revises and restructures paragraph to address what may not be appealed.
§ 9901.222(c)	Adds paragraph to address handling of employee claim that his or her official position description is inaccurate.
§ 9901.222(d)	Relocates language found in paragraph (c) of the current regulations in proposed paragraph (d). Moves language formerly found in paragraph (d) of the current regulations to § 9901.224(d).
§ 9901.222(e)	Revises paragraph to provide that a determination under § 9901.222 will be based on criteria issued by the Secretary.
§ 9901.223	*Appeal to DoD for review of classification decisions.* Adds new § 9901.223 outlining DoD classification appeal process. • Establishes and explains employee right to representation. • Establishes the DoD classification appeals process. • States the binding nature of DoD appeal decisions. • Establishes employee and agency cancellation provisions.
§ 9901.224	*Appeal to OPM for review of classification decisions.* Adds new § 9901.224 describing OPM's classification appeal process.
§ 9901.231(a)	*Introduction to conversion section.* Amends paragraph to delete reference to a prevailing rate system. Adds cross reference to § 9901.371, which describes how to set an employee's pay at conversion.
§ 9901.231(b)	*Implementing issuances.* Adds language specifying that implementing issuances will include work level conversion tables that will be used to convert employees to an NSPS pay band. Deletes language regarding employees with grade retention immediately before conversion. This subject is now addressed in § 9901.231(d).
§ 9901.231(c)	*Temporary promotion prior to conversion.* Adds paragraph to clarify that an employee on a temporary promotion immediately prior to conversion of the temporary position into NSPS must be returned to his or her permanent position before processing the conversion.
§ 9901.231(d)	*Grade retention prior to conversion.* Adds paragraph to clarify that employees who are entitled to grade retention immediately before conversion will have their NSPS pay band set using the actual grade of the employee's current position—not the retained grade.

Pay and Pay Administration—Subpart C

This subpart provides DoD with authority to establish an NSPS pay system in lieu of the GS pay system or other pay systems that would apply to employees but for coverage under NSPS. The subpart has been revised to (1) incorporate changes in the National Defense Authorization Act (NDAA) for Fiscal Year 2008; (2) add more detailed rules drawn from existing NSPS implementing issuances; (3) make policy changes in certain areas; and (4) make technical changes and improvements. Key changes to this subpart include (1) adding a provision to define what constitutes a ''rate of pay'' for the purposes of applying 5 U.S.C. 9902(e)(9) (this change is explained in the Table of Changes); (2) adding regulations regarding pay limitations; (3) revising rules on NSPS general salary increases (including changes to comply with the NDAA); (4) revising standard local market supplements to be generally equivalent to GS locality pay (as required by the NDAA); (5) adding detailed rules regarding performance payouts from pay pools and other performance-related payments; (6) adding detailed pay administration rules; (7) establishing detailed rules regarding premium pay under NSPS (including identification of specific modifications to standard title 5 premium pay rules); (8) adding more detailed rules on conversions into the NSPS pay system; and (9) establishing new rules regarding conversions out of the NSPS pay system. Modifications to this subpart reflect the unique pay-banding architecture of NSPS; enhance management's flexibilities to respond more competitively to labor markets; facilitate pay setting upon movements between different pay systems; promote performance-based pay; provide the flexibility to facilitate the Department's ability to accomplish its diverse missions; and, in some cases, streamline and simplify pay administration rules.

Throughout this subpart, the terms ''base salary'' and ''adjusted salary'' are used. The use of the term ''salary'' is consistent with the terminology that has been used in NSPS since its inception. It is meant to capture the concept of continuing pay, excluding premium pay, bonuses, or other forms of variable pay. The term ''base salary'' refers to base or basic pay excluding any local market supplement. The term ''adjusted salary'' refers to an adjusted rate of basic pay that includes any applicable local market supplement.

The following Table of Changes lists, by specific regulatory section, a brief description of each significant change.

Citation	Description of proposed change
§ 9901.301	*Purpose.* Modifies to provide reference to waivers listed under § 9901.303.
§ 9901.302	*Prevailing rate employees.* Deletes paragraph § 9901.302(b)(2) related to waiver of the statutory provisions establishing pay systems for prevailing rate employees, consistent with 5 U.S.C. 9902(b)(4). Also deletes paragraph (c) to clarify that all employees in the NSPS classification and pay system are automatically covered by the premium pay provisions in §§ 9901.361 through 9901.364, as applicable.
§ 9901.303(a)(2)	*Premium pay.* Adds a reference to 5 U.S.C. 5544 (dealing with premium pay for prevailing rate employees) as an additional exception to the authority to waive the premium pay provisions in 5 U.S.C. chapter 55, subchapter V.
§ 9901.303(b)	*Prevailing rate employees.* Adds a paragraph referencing 5 U.S.C. 5341-5349 (dealing with prevailing rate employees) to the list of provisions in 5 U.S.C. chapter 53 that may not be waived.

Citation	Description of proposed change
§ 9901.303(c)	*Student loan repayments.* Revises existing paragraph to limit the Secretary's authority to modify the student loan repayment benefit provisions in 5 U.S.C. 5379. If necessary to address critical hiring needs, the Secretary may modify the minimum service period and the limitations on the amount of student loan repayment benefits.
§ 9901.304	*Definitions.* Adds definitions for the terms *adjusted salary, base salary, contributing factor, premium pay, retained rate,* and *sub pay pool.* Also, adds additional cross references to various terms that are defined in subpart A. Makes minor changes in various definitions to use the terms ''base salary'' and ''adjusted salary'' (which are currently used in NSPS implementing issuances). (Also, throughout the subpart, the terms ''base salary'' and ''adjusted salary'' are used as appropriate.) Revises definition of *modal rating* so that the group of employees used in determining the modal rating is the entire pay pool, not just a pay band within a pool. Revises definition of *performance share value* to specify that a share value is always computed as a percentage. Adds sentence to definition of *standard local market supplement* to conform with 5 U.S.C. 9902(e)(8)(A). Revises definition of *targeted local market supplement* to clarify that targeted local market supplements apply in place of any lower standard market supplement that is otherwise applicable. Makes minor changes in other definitions.
§ 9901.305	*Rate of pay.* Deletes former § 9901.305 and adds a new section providing an explanation of what it means to establish and adjust a ''rate of pay'' in the context of 5 U.S.C. 9902(e)(9). Under that section of law, ''any rate of pay established or adjusted in accordance with [5 U.S.C. 9902] shall be non-negotiable, but shall be subject to procedures and appropriate arrangements of [5 U.S.C. 7106(b)(2)–(3)].'' It is appropriate that NSPS regulations issued under authority of 5 U.S.C. 9902(a) address section 9902(e)(9) since section 9902(b) requires that the system established under section 9902(a) meets certain conditions, including the condition in section 9902(b)(5). Section 9902(b)(5) states that collective bargaining is subject to any ''limitation on negotiability established pursuant to law,'' which would include the limitation in section 9902(e)(9). Proposed § 9901.305 defines the term ''rate of pay'' to include (1) various pay rates applicable to individual employees (i.e., base salary rate, local market supplement rate, and overtime and other premium pay rates), (2) the pay rates that constitute the structure of the pay system, including the amount or level of those rates and the applicability conditions that define the type and coverage of each rate (including range minimums and maximums, control points, local market supplements, general limitations on maximum base salary or adjusted salary rates, and premium pay rates), and (3) the percentage rate of total base salary payroll representing the portion of a pay pool devoted to performance pay increases. The term ''rate of pay'' encompasses payments that are paid on a recurring basis at an established level or amount. Thus, variable one-time bonuses are not included. A rate of pay cannot be understood as simply an amount. A rate amount only has meaning in the context of the required set of conditions that define what the rate is and when it applies. Any rate amount is inseparably connected to a set of defining conditions that determine when employees may receive that rate amount. In other words, one cannot establish or adjust a rate of pay for employees without taking into account both the amount of the rate and the required conditions defining applicability of the type and amount of pay in question. For example, it is impossible to establish a local market supplement by merely establishing the percentage amount of that supplement. For the local market supplement to have any meaning, the establishment of the supplement necessarily requires the establishment of the geographic area in which that supplement will apply. Similarly, establishing or adjusting the minimum rate of a band requires that the rate be connected to a particular band that covers a defined group of employees. Also, establishing a new category of hazardous duty pay requires establishing the type of hazardous conditions that are linked to a given percentage rate. Accordingly, § 9901.305 makes clear that, as far as the rates that comprise the pay structure are concerned, a ''rate of pay'' is comprised of two inseparable components or elements: (1) The intrinsic applicability conditions that define what the rate of pay is and to whom it applies and (2) the amount or level of the rate. Both the amount and the applicability conditions of a rate of pay may be established or adjusted.
§ 9901.311	*Major Features.* Amends to reflect (1) the use of the term ''salary'' instead of ''pay'', (2) changes resulting from implementation of NDAA for Fiscal Year 2008 (Public Law 110-181, January 28, 2008) in the area of local market supplements and general salary increases, and (3) a DoD policy change to delink general salary increases from adjustments in the minimum rate of the band.
§ 9901.312	*Maximum rates.* Replaces former § 9901.312 with a revised section, which establishes a maximum limitation or cap on adjusted salary rates for NSPS employees (excluding doctors and dentists) equal to the rate for level IV of the Executive Schedule plus 5 percent. In addition, the revised section provides the Secretary with authority to establish a higher adjusted salary limitation for defined categories of employees. Use of this authority is subject to coordination with OPM under § 9901.105.
§ 9901.313	*Aggregate compensation limit.* Adds a new section to establish rules governing aggregate compensation limits. Normally, the limit is equal to the rate for level I of the Executive Schedule; however, in special circumstances, the Secretary may establish a cap equal to the Vice President's annual salary for specified categories of employees (subject to coordination with OPM). A special limitation tied to the President's salary applies to doctors and dentists, consistent with the similar pay limit for Department of Veterans Affairs doctors and dentists under title 38.
§ 9901.314	*Compensation comparability.* Revises § 9901.314 (formerly § 9901.313) to change references to calendar year 2008 to calendar year 2012, consistent with paragraphs (4)–(5) of new section 9902(e) in title 5, United States Code, as amended by section 1106 of Pub. L. 110–181.
§ 9901.321(c)	*Control points.* Adds a new paragraph (c) to address control points, which were previously addressed solely in § 9901.342(d). This makes clear that control points (i.e., limitations on pay setting and pay progression within a pay band that apply to specified groups of similar positions) are part of the structure of the pay system. The new paragraph includes a listing of the factors that may be considered in establishing control points: mission requirements, budget, labor market factors, and benchmarks based on duties, responsibilities, competencies, qualifications, and performance.
§ 9901.322(a)	*Rate ranges.* Clarifies that the term ''rate range'' refers to the range minimum and range maximum.

Citation	Description of proposed change
§ 9901.322(e)	*Adjustment of maximum rates in conjunction with general salary increase.* Adds requirement that the maximum rate of all pay bands must be adjusted by no less than the percentage amount of the NSPS general salary increase under § 9901.323(a)(1) effective on the date of that increase. This rule ensures that any eligible employee will receive the full amount of the NSPS general salary increase under § 9901.323(a)(1). Other general salary increases under § 9901.323 could be less than the increase in the band maximum, in which case the general salary increase would be limited by the band maximum.
§ 9901.323(a)	*General salary increase.* Revises § 9901.323 to provide that general salary increases are no longer linked to increases in the minimum rate of an employee's rate range. Instead general salary increases for employees in various bands will be determined separately, subject to the rules in this section. This section also incorporates in § 9901.323(a)(1) the new statutory requirement in 5 U.S.C. 9902(e)(7), as enacted by section 1106 of Pub. L. 110–181. Under section 9902(e)(7), all eligible employees (i.e., all employees except those with an unacceptable performance rating) in all NSPS pay bands are entitled to a general salary increase at the time of a GS general pay increase under 5 U.S.C. 5303, and that increase may not be less than 60 percent of the GS general pay increase. Under these proposed regulations, the NSPS general salary increase would be the same percentage for all eligible employees, except that the increase for retained rate employees would be fixed at 60 percent of the GS general pay increase (or lowest permitted amount established by law). As required by section 9902(e)(7), the portion of the GS general pay increase amount that is not provided as an NSPS general salary increase must be allocated to NSPS pay pool funding for the purpose of increasing base salary rates on the basis of employee performance. For example, if the GS general pay increase is 2.5 percent and the NSPS general salary increase for eligible employees in all pay bands is 1.5 percent (60 percent of GS general pay increase), the balance of 1.0 percent would be added to the pay pool and used to fund performance-based base salary increases. Proposed new § 9901.323(a)(2) makes clear that the Secretary may provide additional NSPS general salary increases for all eligible employees (except retained rate employees) in a designated occupational series in a pay band at other times to address labor market conditions, staffing difficulties, or mission priorities. This authority is subject to coordination with OPM under § 9901.105. These additional general salary increases are not system-wide increases, but instead are applied as needed. The amount and timing of the increases (if any) may vary by employee category. (Under current regulations, the Secretary could give varying general salary increases for employees in various bands by adjusting the band minimum rates by varying amounts, since adjustments in band minimum rates currently drive general salary increases; thus, a similar flexibility already exists.)
§ 9901.323(b)	*Unacceptable performers.* Revises paragraph (b) to provide that an employee who is denied a general salary increase based on an unacceptable performance rating, but who receives a rating above unacceptable for a subsequent appraisal period, is eligible to receive the next general salary increase occurring on or after the date the employee is given a rating of record above unacceptable. For example, if an employee is denied a general salary increase under § 9901.323(a)(1) in a given January, and if the next general salary increase occurs in the next January, then the employee will be eligible for that next increase if he or she receives a rating of record above unacceptable on or before the effective date of that next January increase. The employee may not receive the lost general salary increase on a delayed basis, even if the employee receives a mid-cycle rating under § 9901.412(b)(2).
§ 9901.323(c)	*Special additional increase.* Provides the Secretary with discretionary authority to provide a special additional salary increase for certain employees who are ineligible for a performance payout, such as an employee without an NSPS rating of record because he or she has not been in NSPS for the minimum 90-day period. Eligible employees may receive the system-wide general salary increase under § 9901.323(a)(1) plus an additional increase equal to the difference between the GS general pay increase and the NSPS general salary increase. Retained rate employees are not eligible for this additional increase.
§ 9901.323(d)	*Increases limited by band maximum.* Provides that a general salary increase under paragraph (a)(2) or paragraph (c) of § 9901.323 may be applied only to the extent that it does not cause an employee's base salary rate to exceed the maximum rate of the employee's band or applicable control point.
§ 9901.323(e)	*Increase in conjunction with increase in band minimum.* Provides that if the adjustment of a pay band minimum rate causes the base salary of an employee with a rating of record above unacceptable to fall below such minimum rate, the employee's salary will be set at the pay band minimum rate.
§ 9901.331(b)	*Computation of local market supplements.* Adds a new paragraph describing how local market supplements are computed and are subject to a rate cap.
§ 9901.331(c)	*Official worksite.* Adds a new paragraph providing that, in administering NSPS local market supplements, DoD will use the same concept of official worksite as used in the GS locality pay program, consistent with the requirements of 5 U.S.C. 9902(e)(8)(A), as enacted by section 1106 of Public Law 110–181.
§ 9901.331(d)	*Treatment of local market supplement as basic pay.* Redesignates former § 901.332(c) as new § 9901.331(d). Revises paragraph (d)(9) to clarify that a local market supplement is considered basic pay at the point of conversion into or out of the NSPS pay system for the purpose of applying the adverse action provisions in 5 U.S.C. chapter 75, subchapter II. (See also §§ 9901.351(g), 9901.371(d), and 9901.372(f).) Deletes former paragraph (d)(10) dealing with treatment of local market supplements as basic pay in determining internal NSPS payments and adjustments, since the regulations for those NSPS payments and adjustments now clearly address whether base salary or adjusted salary is used. Revises paragraph (d)(11) (formerly (d)(12)) to clarify that other statutory provisions must "expressly" address treatment of local market supplements as basic pay to have an effect. Also, provides that other NSPS regulations may address the basic pay issue.
§ 9901.332(a)	*General.* Deletes existing paragraph (a) and replaces it with a new paragraph explaining the relationship of standard and targeted local market supplements to 5 U.S.C. 9902(e)(8).

Citation	Description of proposed change
§ 9901.332(b)	*Standard local market supplements.* Deletes existing paragraph (b) and replaces it with a separate paragraph regarding standard local market supplements, incorporating statutory requirements in 5 U.S.C. 9902(e)(8)(A), as enacted by section 1106 of Public Law 110–181. Under section 9902(e)(8)(A), NSPS must provide standard local market supplements in the same manner as GS locality pay under 5 U.S.C. 5304 and 5304a. The proposed regulations give effect to this provision by requiring that NSPS standard local market supplements (1) be the same percentage amounts as GS locality payments, (2) be linked to the same geographic areas established under the GS locality pay program, and (3) be based on the same ''official worksite'' concept used in administering the GS locality pay program. In addition, NSPS standard local market supplements will generally be administered in other respects in a manner that parallels the administration of GS locality payments (e.g., a higher targeted local market supplement trumps a standard local market supplement just as a higher GS special rate supplement trumps a GS locality payment), except when differences are required due to differences between the NSPS and GS pay systems. For example, under NSPS, adjusted salary rates (including any local market supplement) are generally capped at the rate for level IV of the Executive Schedule plus 5 percent to accommodate the 5-percent extension of certain base salary ranges, while GS locality-adjusted rates are capped at the rate for level IV of the Executive Schedule. Also, NSPS local market supplements are paid on top of a retained pay rate, while GS locality pay is not. (Instead, locality pay is considered in setting and adjusting a GS retained rate.) In addition, while GS locality pay applies to all GS employees stationed in locality pay areas, NSPS standard local market supplements are not applicable to physicians and dentists, since (1) they are entitled to higher base salary and adjusted salary ranges to achieve comparability with title 38 physicians and dentists in the Department of Veterans Affairs and (2) their adjusted salary rates are designed to apply on a worldwide basis with no variation based on location (consistent with title 38).
§ 9901.332(c)	*Targeted local market supplements.* Replaces existing paragraph (c) with a new paragraph regarding targeted local market supplements. Targeted local market supplements are similar to GS special rate supplements. They are used to address staffing problems associated with a specific category of employees. They are payable when higher than any otherwise applicable standard local market supplement. Language formerly under paragraph (c) moves to § 9901.331(d).
§ 9901.333	*Setting and adjusting local market supplements.* Adds a new paragraph (a) to provide that standard local market supplements are set and adjusted consistent with the setting and adjusting of GS locality payments, as required by 5 U.S.C. 9902(e)(8)(A). Also, merges former paragraphs (a) and (b) into a new paragraph (b), which is revised to focus solely on targeted local market supplements.
§ 9901.334(b)	*Unacceptable performers.* Revises paragraph (b) to provide that an employee who is denied a local market supplement adjustment based on an unacceptable performance rating, but who receives a rating above unacceptable for a subsequent appraisal period, is entitled to the full amount of any applicable local market supplement effective on the date of the first adjustment in that local market supplement occurring on or after the effective date of that new rating of record, or, if earlier, the effective date of an applicable general salary increase as described in § 9901.323(b).
§ 9901.341	*Performance-based pay system.* Modifies paragraph for editorial purposes.
§ 9901.342(a)	*Overview of performance payout section.* Modifies paragraph (a)(1) to reflect the current implementation state of the NSPS performance-based pay system. Modifies paragraph (a)(2) to: (1) Delete reference to ''a more current rating of record, consistent with the former § 9901.409(b)'' (while the provision for a mid-cycle rating of record still exists under § 9901.412(b)(2), specific reference to this type of rating of record is not required for that rating to serve as the basis for a performance increase); (2) Limit circumstances for which an employee who is not eligible for a rating of record may receive a payout to the circumstances prescribed in this regulation; and (3) Change cross reference to paragraphs (f) and (g) to reflect new location in paragraphs (i) and (j) and to incorporate reference to additional payout situations in paragraphs (k) and (l). Deletes paragraph (a)(3) as found in current regulations. This material is replaced with more specific information on pay pool officials in proposed § 9901.342(c), (d), and (e).
§ 9901.342(b)	*Performance pay pools.* Modifies paragraph (b)(1) to incorporate language regarding fair and consistent treatment of employees in the pay pool process, which is found in current regulations at § 9901.342(a)(3). Paragraphs (b)(2) and (b)(3) provide uniform and consistent criteria governing the establishment of performance pay pool structures, including sub pay pools. Paragraph (b)(4) contains language previously found in paragraph (b)(2). Paragraph (b)(5) states the requirement for higher-level approval of pay pool funding floors or ceilings.
§ 9901.342(c)	*Pay Pool Panel.* Adds a new paragraph describing the roles and responsibilities of the Pay Pool Panel.
§ 9901.342(d)	*Pay Pool Manager.* Adds a new paragraph describing the roles and responsibilities of the Pay Pool Manager.
§ 9901.342(e)	*Performance Review Authority.* Adds a new paragraph describing the roles and responsibilities of the Performance Review Authority.
§ 9901.342(f)	*Performance shares.* Relocates and modifies language found in current regulations at § 9901.342(c). The modifications include: • A table assigning a uniform range of shares to rating levels 3 through 5; • A uniform list of criteria establishing parameters for determination of share assignment within a range; and • Requirement that Pay Pool Managers and Panels review recommendations for share assignment for consistent application of criteria across a pay pool.
§ 9901.342(g)	*Performance payout.* Relocates and modifies language found in current regulations at § 9901.342(d). The modifications include: • Addition of the formula for determining the value of a share; • Addition of the formula for determining the dollar value of an individual employee's payout; • Addition of a uniform list of criteria that are the only factors that may be considered in determining distribution of a pay pool payout between bonus and base salary increase; • Clarification of effective date of a performance-based pay pool payout under this section; • Addition of uniform eligibility criteria to receive a performance-based payout under § 9901.342; and

Citation	Description of proposed change
	• Modifications to language concerning performance payouts for employees on retained pay, which clarify that the performance payout must be in the form of a bonus and that the amount of the performance payout is based on the maximum rate of the pay band to which the employee is assigned.
§ 9901.342(h)	*Proration of performance payouts.* Relocates and modifies language found in current regulations at § 9901.342(e). Modifies cross-referenced paragraphs to reflect redesignations made in this proposed regulation.
§ 9901.342(i)	*Adjustments for employees returning after performing honorable service in the uniformed services.* Relocates and modifies language found in current regulations at § 9901.342(f). Modifies language to indicate that performance payouts will be based on an employee's ''NSPS'' rating of record instead of the ''DoD'' rating of record. This modification recognizes the potential inequities which may occur in comparing the NSPS and non-NSPS performance rating systems. Additionally, clarifies eligibility for performance bonus under specified circumstances and bar on prorating of pay pool payouts due to leave without pay or absence to perform uniformed service under 38 U.S.C. 4301 and § 353.102 of this chapter.
§ 9901.342(j)	*Adjustments for employees returning to duty after being in workers' compensation status.* Relocates and modifies language found in current regulations at § 9901.342(g). Modifies language to indicate that performance payouts will be based on an employee's ''NSPS'' rating of record instead of the ''DoD'' rating of record. This modification recognizes the potential difficulties which may occur in comparing the NSPS and non-NSPS performance rating systems. Additionally, clarifies eligibility for performance bonus under specified circumstances and bar on prorating of pay pool payouts due to leave without pay due to work-related injury under 5 U.S.C. chapter 81, subchapter I.
§ 9901.342(k)	*Adjustments for employees in special circumstances.* Adds a new paragraph providing a method of determining a performance payout for employees, who due to performance of union-related activities or absence while on paid approved leave, are unable to meet the minimum period for a performance rating of record.
§ 901.342(l)	*Adjustments for employees returning from temporary assignments outside of NSPS or from long-term training for which no NSPS performance plan was assigned.* Adds a new paragraph providing a method of determining performance pay adjustments for employees who either did not meet the minimum period of performance due to temporary assignment outside of NSPS or long-term training or who met the minimum period and received a rating of record, but were outside of NSPS on the effective date of the payout.
§ 9901.343	*Pay reduction based on unacceptable performance and/or conduct.* Modifies section to limit the range of a pay reduction based on unacceptable performance and/or conduct from 1–10 percent of base salary to 5–10 percent of base salary. Additionally, updates cross-referenced paragraphs to reflect modifications to subpart C.
§ 9901.344	*Other performance payments.* Modifies section by changing title of Extraordinary Pay Increases (EPI) to Extraordinary Performance Recognition (EPR) and establishing uniform eligibility criteria and methods of payment for Extraordinary Performance Recognition (EPR) and Organizational Achievement Recognition (OAR) payments.
§ 9901.345	*Accelerated Compensation for Developmental Positions.* Modifies section by establishing uniform eligibility criteria for Accelerated Compensation for Developmental Positions (ACDP), limiting the form of an ACDP payment to that of a base salary increase, and adding general limits on the amount of ACDP that may be provided.
§ 9901.351	*General rules governing pay administration.* Adds a new section providing general pay setting rules.
§ 9901.351(a)	*Introduction.* Provides that base salary rates are used in pay administration, except when specifically otherwise provided.
§ 9901.351(b)	*Geographic recalculation.* Provides for a geographic recalculation on pay setting for movements from one geographic area to another geographic area, consistent with the geographic conversion principle described in 5 CFR 531.205. This provision is used in special circumstances when adjusted salary rates are used in applying certain pay administration rules.
§ 9901.351(c)	*Within-grade increase (WGI) adjustment equivalent.* Provides for a WGI equivalent for employees moving into NSPS, consistent with the conversion process in § 9901.371, under specified conditions. Provides for a WGI equivalent for employees moving into NSPS through a management-directed action, including a management-directed reassignment, realignment, or placement via the Priority Placement Program, Reemployment Priority List, or Interagency Career Transition Assistance Plan. An employee placed in an NSPS position through an employee-initiated reassignment may receive this same WGI equivalent at the discretion of the authorized management official.
§ 9901.351(d)	*Minimum rate.* Relocates language (with minor modifications) found in current regulations at § 9901.356(a). This provision states that an employee's base salary may not be less than the minimum rate of the employee's pay band, unless the employee does not receive a pay increase under § 9901.323 because of an unacceptable rating.
§ 9901.351(e)	*Maximum rate.* Relocates language (with minor modifications) found in current regulations at § 9901.356(b). This provision states that an employee's base salary may not be more than the maximum rate of the employee's pay band, unless provided for under the pay retention provisions in § 9901.356.
§ 9901.351(f)	*Pay periods and hourly rates.* Relocates language (with minor modifications) found in current regulations at § 9901.356(c). This provision states that the Secretary will follow the rules for establishing pay periods and computing pay rates in 5 U.S.C. 5504 and 5505.
§ 9901.351(g)	*Rate comparisons upon movement to an NSPS position.* Provides for the setting of an employee's NSPS rate of basic pay when the employee moves to an NSPS position by a management-directed action, consistent with the conversion rule in § 9901.371(d).
§ 9901.351(h)	*Adjustment of teacher annual rates.* Provides authority for an adjustment of up to 20 percent when an individual leaves a teaching position under 20 U.S.C. 901 and moves to NSPS. This adjustment is for the purpose of setting the individual's NSPS pay based on that adjusted rate. This adjustment will take into account the shorter work year applicable to a teacher position.
§ 9901.352	*Setting an employee's starting pay.* Revises section (formerly § 9901.351) providing specific rules to be applied in determining an employee's starting pay for individuals who are newly appointed or reappointed to the Federal service.
§ 9901.352(a)	*Considerations in setting starting pay.* Identifies factors to be considered in setting starting pay for a newly appointed or reappointed employee.

Citation	Description of proposed change
§ 9901.352(b)	*Definitions.* Defines the terms *newly appointed* and *reappointed* and clarifies the term *Federal service.* Clarifies that to be considered as reappointed, an employee must have been separated from Federal service for at least 1 full workday immediately before employment in an NSPS position.
§ 9901.353	*Setting pay upon reassignment.* Revises section (formerly § 9901.352) providing specific rules to be applied in determining an increase or decrease under a reassignment action.
§ 9901.353(a)	*General rules governing reassignment increases.* Makes minor changes in terminology to use the term ''base salary''. Identifies factors to be used in making decision to grant a reassignment increase. Provides that an employee who is reassigned through reduction-in-force procedures will not incur a reduction in base salary and is not eligible for an increase in base salary, except to place the base salary at the minimum rate of the new pay band.
§ 9901.353(b)	*5 percent increase upon reassignment.* Provides for an employee's base salary to be increased by up to 5 percent and provides for procedures in setting pay upon a reassignment. The authorized management official may decrease an employee's base salary by any amount determined prior to the reassignment and with the employee's agreement, as long as the employee's base salary does not drop below the minimum of the assigned pay band. Provides for a higher-level approval of any increase or decrease upon a reassignment. Clarifies that an employee may receive only a total of a 5 percent cumulative increase to base salary as a result of employee-initiated action in any 12-month period, unless an exception is approved by a higher-level official.
§ 9901.353(c)	*Adjusted salary used for an employee-initiated reassignment.* Provides for use of adjusted salary in the pay setting of an employee on a voluntary reassignment. When an employee is voluntarily reassigned from a position with a targeted local market supplement or from a non-NSPS position (e.g., GS, Federal Wage System, Nonappropriated Fund), the authorized management official will set pay considering the employee's adjusted salary (including any applicable locality pay, special rate supplement, or other equivalent supplement) and any physicians' comparability allowance payable for the position held prior to the reassignment. If the NSPS adjusted salary is increased beyond the amount of the employee's current adjusted salary plus any physicians' comparability allowance, the percentage of the increase is counted toward the 12-month limitation. When an employee covered by a targeted local market supplement is changed to a new location where a different local market supplement and/or pay schedules apply, the employee's current adjusted salary must be recalculated in accordance with the rules at § 9901.351(b).
§ 9901.353(d)	*Management-directed reassignment.* Provides for the adjusted salary to be used in the pay setting of an employee on a management-directed reassignment. There are no limits to the number of times an employee may be reassigned by management, and the employee is eligible for an increase of up to 5 percent with each reassignment. Any increase associated with a management-directed reassignment does not count toward the 12-month limitation.
§ 9901.353(e)	*Adjusted salary used for a management-directed reassignment.* Provides for use of the adjusted salary in the pay setting of an employee on a management-directed reassignment. When an employee is reassigned by management-directed action from a position with a targeted local market supplement or from a non-NSPS position (e.g., GS, Federal Wage System, Nonappropriated Fund), the authorized management official will set pay considering the employee's adjusted salary (including any applicable locality pay, special rate supplement, or other equivalent supplement) and any physicians' comparability allowance payable for the position held prior to the reassignment. If the NSPS adjusted salary is increased beyond the amount of the employee's current adjusted salary plus any physicians' comparability allowance, the percentage of the increase is counted toward the 12-month limitation. When an employee covered by a targeted local market supplement is changed to a new location where a different local market supplement and/or pay schedules apply, the employee's current adjusted salary must be recalculated in accordance with the rules at § 9901.351(b).
§ 9901.353(f)	*Mandatory reduction in pay on reassignment.* Provides for a mandatory reduction of at least 5 percent and up to 10 percent to an employee's base salary when an employee is involuntarily reduced in pay via reassignment based on unacceptable performance and/or conduct. This reduction may not cause an employee's base salary to fall below the minimum rate of the employee's assigned pay band. An employee's base salary may not be reduced more than once in a 12-month period based on unacceptable performance, conduct, or both.
§ 9901.353(g)	*Expiration or termination of temporary reassignment.* Provides that any increase received while on temporary reassignment will be reversed upon return to the employee's prior position. The employee's pay will then be reconstructed to credit the employee with increases he/she would have received if not for the temporary reassignment.
§ 9901.353(h)	*Reassigned to an NSPS supervisory position.* Provides that any increase received while on reassignment to a supervisory position will be reversed upon return to the employee's prior position due to failure to complete a supervisory probationary period. The employee's pay will then be reconstructed to credit the employee with increases he/she would have received if not for the reassignment to the supervisory position.
§ 9901.354	*Promotion.* Revises section (formerly § 9901.353) providing specific rules to be applied in determining an increase under a promotion action.
§ 9901.354(a)	*Setting pay upon promotion.* Provides for an employee's base salary to be increased from 6 percent not to exceed 12 percent and provides for procedures in setting pay upon a promotion. Revises section to provide for a higher-level approval for any increase above 12 percent. Incorporates the term ''base salary''.
§ 9901.354(b)	*Criteria used for a promotion.* Provides specific criteria used in determining an increase under a promotion action.
§ 9901.354(c)(1)	*Temporary promotion made permanent.* Provides that an employee's base salary will remain unchanged when a temporary promotion is made permanent, and that no additional increase will be provided.
§ 9901.354(c)(2)	*Expiration or termination of temporary promotion.* Provides that any increase received while on temporary promotion will be reversed upon return to the employee's prior position. The employee's pay will then be reconstructed to credit the employee with increases he/she would have received if not for the temporary promotion.
§ 9901.354(d)(1)	*Promotion from pay retention.* Addresses how pay is set for an employee on retained pay who is repromoted to the pay band from which reduced (or comparable band).
§ 9901.354(d)(2)	*Promotion calculation for pay retention.* Addresses how an employee's retained base salary will be used in calculating the promotion increase.

Citation	Description of proposed change
§ 9901.355	*Setting pay upon reduction in band.* Revises section (formerly § 9901.354) providing specific rules to be applied in determining an increase or decrease for setting pay upon reduction in band.
§ 9901.355(a)	*General.* Provides for an employee's base salary to be increased or decreased, and provides procedures in setting pay upon a reduction in band.
§ 9901.355(b)	*Pay reduction.* Provides authority to reduce an employee's base salary at least 5 percent and up to 10 percent on a reduction in band based on unacceptable performance and/or conduct. This reduction may not cause an employee's base salary to fall below the minimum rate of the employee's assigned pay band. An employee's base salary may not be reduced more than once in a 12-month period based on unacceptable performance, conduct, or both.
§ 9901.355(c)	*Pay increase.* Provides for an employee's base salary to be increased by up to 5 percent, consistent with the reassignment increase procedures. An employee who is reduced in band through reduction-in-force procedures or by placement via the Priority Placement Program or Reemployment Priority List is not eligible for an increase in base salary, except to place the base salary at the minimum rate of the new pay band. Provides specific criteria used in determining an increase for setting pay upon reduction in band.
§ 9901.355(d)	*Termination of temporary promotion.* Provides that this section does not apply to a reduction in band in connection with the termination of a temporary promotion; instead, the rules in § 9901.354(c)(2) apply.
§ 9901.355(e)	*Probationary period.* Provides that any increase received while on promotion to a supervisory position will be reversed upon return to the employee's prior position due to failure to complete a supervisory probationary period. The employee's pay will then be reconstructed to credit the employee with increases he/she would have received if not for the promotion to the supervisory position.
§ 9901.356	*Pay retention.* Revises section (formerly § 9901.355) providing specific rules to be applied in determining an employee's entitlement to pay retention and the factors in terminating pay retention. Incorporates the term ''base salary''.
§ 9901.356(c)	*Period of pay retention.* Clarifies that pay retention will be granted for a period of 104 weeks.
§ 9901.356(d)	*Situations triggering eligibility.* Identifies specific situations when an employee under NSPS will be granted pay retention.
§ 9901.356(e)	*Optional pay retention.* Provides for a higher-level approval of any additional situations to grant pay retention.
§ 9901.356(f)	*Terminating conditions.* Identifies specific situations when pay retention will terminate under NSPS.
§ 9901.356(g)	*Pay setting upon termination.* Provides that an employee's pay will be set at the maximum rate of the pay band upon expiration of the 104-week period.
§ 9901.356(h)	*Pay adjustments after termination.* Provides that an employee is eligible for rate range adjustments and performance payouts upon termination of pay retention.
§ 9901.356(i)	*Situations when pay retention is not applicable.* Identifies specific circumstances when pay retention does not apply.
§ 9901.356(j)	*Performance payouts.* Provides that an employee on pay retention will receive any performance payouts in the form of bonuses, consistent with § 9901.342(g)(8).
§ 9901.356(k)	*Pay adjustments during pay retention.* Provides that employees on pay retention are eligible for general salary increases under § 9901.323(a)(1) and are eligible for local market supplement adjustments.
§ 9901.356(l)	*Extension of 104-week time limit.* Adds a new paragraph that allows for the 104-week time limit on pay retention under NSPS to be extended by the length of time that an employee is subject to a contingency operation or emergency.
§ 9901.356(m)	*Grandfather provision.* Provides that an employee with a preexisting entitlement to pay retention under 5 CFR part 536 before becoming covered by NSPS, or who obtains the entitlement to pay retention upon becoming covered by NSPS, is entitled to a retained rate without regard to the 104-week limit in § 9901.356(c).
§ 9901.361(a)	*Introduction.* Clarifies paragraphs providing waiver or modification of premium pay provisions of 5 U.S.C. chapter 55, subchapter V, and adds reference to §§ 9901.363 and 9901.364, which establish new types of premium payments in addition to those found in 5 U.S.C. chapter 55, subchapter V.
§ 9901.361(b)	*Provisions not waived or modified.* Deletes existing paragraph (b) and replaces it with separate sections, new §§ 9901.362 through 9901.364. Adds new paragraph (b) referencing 5 U.S.C. 5544 (dealing with premium pay for prevailing rate employees) and 5 U.S.C. 5545b (dealing with firefighter pay) to clarify that those premium pay provisions are not waived or modified.
§ 9901.361(c)	*Applicability of Fair Labor Standards Act.* Deletes existing paragraph (c) and replaces it with separate sections, new §§ 9901.362 through 9901.364. Adds new paragraph (c) to clarify that these regulations do not affect the applicability of FLSA overtime pay provisions.
§ 9901.361(d)	*Applying regulations in 5 CFR part 550, subpart M.* Clarifies that the reference to ''locality pay'' in 5 CFR 550.1305(e) must be interpreted to be a reference to a local market supplement. Clarifies that firefighters compensated under subpart M are eligible for compensatory time off for travel or for religious purposes and foreign language proficiency pay.
§ 9901.361(e)	*Physicians and dentists.* Provides that physicians and dentists (in occupational series 0602 and 0680, respectively) under NSPS are not eligible for premium pay except for compensatory time off for religious observances.
§ 9901.361(f)	*Senior Executive Service.* Provides that members of the Senior Executive Service (SES) are ineligible for premium pay under NSPS, except for compensatory time off for religious observances. This is consistent with the treatment of SES members under the standard title 5 premium pay provisions.
§ 9901.362	*Modification of standard provisions.* Adds a new section that identifies the modifications to the title 5 premium pay provisions and related regulations and any specific additional requirements.
§ 9901.362(a)	*Premium pay limitations.* Establishes the rules governing the premium pay limitations. The premium pay caps are consistent with title 5. In special circumstances, the Secretary may establish a higher annual premium pay cap equal to the Vice President's annual salary for specified categories of employees and situations on a time-limited basis.

Citation	Description of proposed change
§ 9901.362(b)	*Overtime pay.* Identifies requirements and modifications pertaining to the overtime pay (including compensatory time off) provisions in 5 U.S.C. 5542 and 5543 and related regulations. The proposed rule modifies the overtime hourly rate cap that applies to FLSA-exempt employees and the method for crediting overtime hours. In addition, time in a travel status does not constitute hours of work for overtime pay purposes unless actual work is performed; however, qualifying travel time not treated as hours of work will generate compensatory time off for travel hours under § 9901.362(j). Finally, any FLSA-exempt employee may be required to receive compensatory time off in lieu of overtime pay for an equal amount of overtime work.
§ 9901.362(c)	*Night pay.* Identifies the modifications to the night pay provisions in 5 U.S.C. 5545(a) and (b) and related regulations. An employee who performs overtime work at night is entitled to night pay regardless of whether the overtime work is scheduled before or after the administrative workweek begins. Night pay is not payable during paid absences, except for certain types listed in paragraph (c)(2).
§ 9901.362(d)	*Sunday pay.* Identifies the modifications to the Sunday pay provisions in 5 U.S.C. 5546 and related regulations. Work for which Sunday pay is payable is limited to applicable hours of work that are actually performed on a Sunday. In other words, Sunday pay continues to apply to nonovertime hours of work performed by full-time employees, not to exceed 8 hours for any daily tour of duty (unless the employee is on a compressed schedule); however, unlike the standard title 5 provision, non-Sunday hours within a daily tour of duty that includes Sunday hours do not count as Sunday work.
§ 9901.362(e)	*Pay for holiday work.* Identifies the modifications to the holiday premium pay provisions in 5 U.S.C. 5546 and related regulations. An employee receives pay that is twice the employee's adjusted salary hourly rate for each hour worked on a holiday, including overtime hours. If hours worked on a holiday are overtime hours, the overtime pay is contained within the double-time holiday pay rate.
§ 9901.362(f)	*Standby duty pay.* Identifies requirements and modifications for the standby duty provisions in 5 U.S.C. 5545(c)(1) and related regulations. Limits coverage to firefighters ineligible for coverage under subpart M of part 550 and to emergency medical technicians not involved in fire protection activities unless the Secretary extends coverage to other occupations. Modifies the standby duty pay formula by using an employee's adjusted salary to compute standby duty pay. Standby pay attributable to the rate beyond GS-10, step 1, is not creditable for retirement purposes. Also bars receipt of any other premium pay for an employee receiving standby duty pay.
§ 9901.362(g)	*Administratively uncontrollable overtime pay.* Provides that the administratively uncontrollable overtime pay provision in 5 U.S.C. 5545(c)(2) is waived and is not applicable to NSPS employees.
§ 9901.362(h)	*Law enforcement availability pay.* Provides that the law enforcement availability pay provisions in 5 U.S.C. 5545a and related regulations apply.
§ 9901.362(i)	*Pay for duty involving physical hardship or hazard.* Identifies requirements and modifications in connection with the hazardous duty pay provisions in 5 U.S.C. 5545(d) and related regulations. Permits the Secretary to establish new categories of hazardous duty pay (HDP), subject to OPM approval as required by § 9901.106(c). In determining eligibility for HDP, the occupational safety and health standards (OSHA) consistent with the permissible exposure limit (PEL) are generally used. An employee is eligible to receive HDP when he or she performs an assigned duty (as listed in Appendix A) and preventive measures have not reduced the element of hazard below the PEL. However, HDP may not be paid to employees in occupations or jobs in which unusual physical risk is inherent.
§ 9901.362(j)	*Compensatory time off for travel.* Identifies the requirements and modifications in connection with the compensatory time off for travel provisions in 5 U.S.C. 5550b and related regulations. Employees who are required to travel away from their official worksite when such time is not otherwise compensable are eligible for compensatory time off. If an employee is required to travel on a nonworkday, commuting time more than 1 hour beyond the employee's normal commuting time is creditable travel time. Also provides the procedures for crediting compensatory time off for travel and the treatment of unused compensatory time off when DoD employees move between NSPS and non-NSPS positions.
§ 9901.362(k)	*Compensatory time off for religious observances.* Identifies requirements and modifications in connection with the compensatory time off for religious observances provisions in 5 U.S.C. 5550a and related regulations. Prohibits payment for any unused religious compensatory time off under any circumstances.
§ 9901.362(l)	*Air traffic controller differential.* Provides that the air traffic controller differential provisions in 5 U.S.C. 5546a are waived and not applicable to NSPS employees, except for paragraphs (a)(1) and (d) of that section. Authorizes the payment of a 5-percent differential to eligible air traffic controllers. In addition, the Secretary may extend a 10-percent differential to air traffic controllers who perform on-the-job training under certain circumstances.
§ 9901.363(a)	*Coverage under premium pay provisions for health care personnel.* Adds a new section that provides premium payments for eligible DoD "health care personnel" (as defined in this paragraph) covered under NSPS. These payments include on-call premium pay, night pay, and pay for weekend duty, consistent with parallel provisions that apply to Department of Veterans Affairs health care personnel under title 38, United States Code.
§ 9901.363(b)	*On-call premium pay.* Allows heads of DoD Components to authorize on-call premium pay for officially scheduled "on-call" time when health care personnel are not otherwise compensated for that on-call time. An employee officially scheduled to be on-call is paid 15 percent of his or her adjusted salary hourly rate for each hour of on-call status. The proposed rule provides the pay administration rules for on-call pay.
§ 9901.363(c)	*Night pay for health care personnel.* Authorizes night pay for eligible employees who are scheduled to work between 6 p.m. and 6 a.m. An employee is paid 10 percent of his or her adjusted salary hourly rate for each hour worked between 6 p.m. and 6 a.m. This rate is applied to the entire tour if the employee works 4 or more hours between 6 p.m. and 6 a.m. The proposed rule provides the pay administration rules for night pay.
§ 9901.363(d)	*Pay for weekend duty for health care personnel.* Authorizes pay for weekend duty for eligible employees who are scheduled to work a tour of duty, any part of which falls in the 2-day period between midnight Friday and midnight Sunday. An employee will be paid 25 percent of his or her adjusted salary hourly rate for each hour of work during that period. The proposed rule provides the pay administration rules for pay for weekend duty.

Citation	Description of proposed change
§ 9901.364	*Foreign language proficiency pay.* Adds a new section to provide that NSPS employees may be paid foreign language proficiency pay (FLPP) if certified as proficient in foreign languages identified as necessary for national security interests and not in receipt of FLPP under 10 U.S.C. 1596 and 10 U.S.C. 1596a. FLPP is a competency-based premium pay which the Department can pay an employee to maintain his or her skills in a critical language regardless of job. The proposed rule specifies the conditions for payment.
§ 9901.371	*Conversion into NSPS pay system.* Consolidates all provisions related to conversion into the NSPS pay system, including provisions found in §§ 9901.371 and 9901.373 in the current regulations. Adds additional detailed rules as noted by paragraph below.
§ 9901.371(a)	*Introduction.* Provides cross reference to § 9901.231, which contains information on determining an employee's NSPS pay band upon conversion into NSPS. Corrects cross reference to reflect changes made by these proposed regulations.
§ 9901.371(b)	*Implementing issuances.* Addresses the Secretary's authority to issue implementing issuances prescribing policies and procedures for conversions into NSPS.
§ 9901.371(c)	*Bar on pay reduction.* Incorporates material previously found at § 9901.373(a). Clarifies that simultaneous actions must be processed before applying this rule, consistent with § 9901.371(e).
§ 9901.371(d)	*Rate comparison.* Incorporates and clarifies material previously found at § 9901.373(b).
§ 9901.371(e)	*Simultaneous actions.* Incorporates material previously found at § 9901.373(c).
§ 9901.371(f)	*Temporary promotion prior to conversion.* Incorporates material previously found at § 9901.373(d), including the requirement to reconstruct pay in the permanent position of record prior to conversion.
§ 9901.371(g)	*Grade retention prior to conversion.* Addresses how to treat employees who were on grade retention prior to conversion.
§ 9901.371(h)	*Pay retention prior to conversion.* Addresses how to treat employees who were on pay retention prior to conversion.
§ 9901.371(i)	*Conversion adjustments.* Provides that the only base salary adjustments that may be made in conjunction with conversion are those listed in paragraphs (j) through (m).
§ 9901.371(j)	*Within-grade increase (WGI) adjustment.* Provides for a prorated within-grade adjustment for eligible GS employees converting into NSPS to account for the time since their last equivalent pay increase.
§ 9901.371(k)	*Special increase for employees on temporary promotion prior to conversion.* Authorizes management to preserve an employee's rate of basic pay held on a temporary promotion immediately prior to conversion of that temporary promotion position into NSPS if the employee is placed back into that temporary position after its conversion.
§ 9901.371(l)	*Special increases equivalent to a GS promotion increase.* Adopts provisions to (1) provide for a one-time base salary increase after conversion for eligible employees that would permit an increase in base salary equivalent to what they would have received in their career ladder position had it not been converted into NSPS, and (2) provide for a base salary increase when an employee has been selected for a position that converts into NSPS before the employee is actually placed in the position that would equal the increase the employee would have received if placed into that position prior to its conversion (e.g., GS-12 employee selected for a GS-13 position that would be a promotion before conversion but a reassignment after conversion).
§ 9901.371(m)	*Adjustment for physicians and dentists.* Authorizes special conversion adjustment for a GS physician or dentist who was regularly receiving physicians' comparability allowance or premium pay prior to conversion so that his/her base salary at the time of conversion may be increased by the Component to account for the loss of the allowance and premium pay under NSPS.
§ 9901.372	*Conversion or movement out of NSPS pay system.* Adds a new section that addresses pay setting when employees convert or move out of the NSPS pay system and are placed in another Federal pay system (e.g., the General Schedule). Additional information on these rules is provided by paragraph below. (Existing § 9901.372 in the current regulations is deleted, since it dealt with the establishment of the initial NSPS pay ranges, which has already occurred.)
§ 9901.372(a)	*General.* Introduces the new § 9901.372, which now addresses the treatment of an employee who is converted out of NSPS when the Secretary makes a decision to rescind the application of one or more subparts of this part to a particular category of employees or an organization or functional unit or who moves from a position covered by NSPS to a position in a different pay system. Provides definitions of ''conversion'' and ''movement'' and related terms.
§ 9901.372(b)	*Classification of covered position.* Provides for a requirement that prior to converting an employee and his/her position out of NSPS, the position must be classified consistent with appropriate classification guidance and/or other appropriate criteria applicable to the gaining system (usually, the General Schedule). (Such a classification determination is not needed if an employee is moving out of the NSPS by some action other than conversion.)
§ 9901.372(c)	*Determining pay under the new system.* Establishes a requirement that the pay setting rules of the gaining system be applied when an employee converts or moves out of NSPS. For the purpose of applying those rules, the employee's final pay under NSPS is based on the employee's NSPS permanent position as of the day immediately before the date of conversion or movement out of NSPS. Also, provides that NSPS rules do not apply to any personnel or pay action taking effect on the date of conversion or movement.
§ 9901.372(d)	*Virtual GS grade and rate.* Prescribes rules for establishing a virtual GS grade and rate of pay to be used for the purpose of applying GS pay administration rules upon conversion or movement from NSPS.
§ 9901.372(e)	*GS within-grade increases.* States rule that NSPS service is creditable for GS within-grade increase purposes, as required by regulations at 5 CFR part 531, subpart D.
§ 9901.372(f)	*Comparison of rates of basic pay.* Provides that any reallocation of an employee's adjusted pay between basic pay and any locality payment, local market supplement, special rate supplement, or equivalent supplement in conjunction with conversion or movement out of NSPS does not have adverse action consequences, since such supplements are considered basic pay under 5 U.S.C. chapter 75 at the point of conversion or movement.

Performance Management—Subpart D

Subpart D regulates performance management for NSPS employees. The regulations have been revised to (1) establish in regulation the performance management system required by 5 U.S.C. 9902, as amended by the National Defense Authorization Act for Fiscal Year 2008, (2) provide for uniform and consistent application of the System within the Department of Defense, and (3) incorporate planned changes. Key changes to this part include (1) revising or adding definitions for clarity or to address concepts added to the regulation (such as appraisal period, minimum period, pay pool manager, pay pool panel, and performance review authority), (2) adding new sections or paragraphs to existing or revised sections to ensure uniform and consistent application of the System (such as minimum period, employees on time-limited appointments, and appraisal periods), and (3) rewriting some sections and paragraphs for regulatory format and clarity.

The following Table of Changes lists, by specific regulatory section, a brief description of each significant change.

Citation	Description of proposed change
§ 9901.401(b)	*Performance Management System*. Amends paragraph (b) to clarify the system is established in the regulations and its implementation and operation will adhere to the statutory requirements listed in the paragraph.
§ 9901.402(a)	*Coverage*. Amends paragraph (a) to refer to all of § 9901.102.
§ 9901.402(c)	*Applicability*. Amends paragraph (c) to allow application of this subpart under provisions specified in § 9901.408 to employees who do not meet the minimum performance period described in § 9901.407.
§ 9901.404	*Definitions*. Revises current definition for minimum period to conform to new § 9901.407. Adds cross-reference to new definitions in § 9901.103 for *appraisal period, Pay Pool Manager, Pay Pool Panel*, and *Performance Review Authority*.
§ 9901.405(a)	*System requirements*. Amends the section to clarify that these regulations establish the performance management system required by 5 U.S.C. 9902 and the Secretary may further define the System through implementing issuances.
§ 9901.405(b)(1)	*System requirements—coverage*. Deletes requirement for an NSPS performance management system to ''specify the employees covered by the system(s)'' since these regulations establish the system. In accordance with § 9901.102(b)(2), coverage under subpart D is a mandatory requirement for all employees covered by any subpart of this regulation. Subsequent paragraphs under § 9901.405 are redesignated accordingly.
§ 9901.405(b)(3)	*System requirements—minimum period*. Moves current paragraph (b)(3) on the minimum period and places it in a separate section, new § 9901.407, and redesignates the remaining paragraphs accordingly.
§ 9901.405(b)(5)	*System requirements—rating levels*. Adds a new paragraph specifying the rating levels that apply to the NSPS performance management system established under this subpart.
§ 9901.405(c)	*System requirements—supervisory responsibilities*. Rewords paragraph and its paragraphs for regulatory format and clarity.
§ 9901.406(b)	*Performance expectations—communication*. Restructures for regulatory format and clarity and redesignates the paragraph accordingly.
§ 9901.406(h)	*Performance expectations—approval*. Adds new paragraph requiring higher-level review of performance expectations.
§ 9901.406(i)	*Performance expectations—plan approval*. Adds new paragraph specifying an NSPS performance plan is an approved plan when given to the employee in writing.
§ 9901.407	*Minimum period*. Adds a new section addressing the minimum appraisal period and eligibility for appraisal. Subsequent sections are renumbered accordingly.
§ 9901.408	*Employees on time-limited appointments*. Adds a new section permitting the evaluation of employees on time-limited appointments not expected to exceed 90 days. Subsequent sections are renumbered accordingly.
§ 9901.409	*Monitoring and developing performance*. Redesignates and retitles current § 9901.407 and combines it with developing performance. Additional revisions are noted by paragraph below.
§ 9901.409(a)	*Monitoring and developing performance—interim review*. Amends paragraph (a) to require at least one documented interim performance review while specifying that periods of performance of less than 180 days do not require a documented interim review.
§ 9901.409(b)	*Monitoring and developing performance—development*. Adds a new paragraph emphasizing the value of developing employee performance.
§ 9901.410	*Addressing performance that does not meet expectations*. Redesignates current § 9901.408. Revisions are noted by paragraph below.
§ 9901.410(a)(1)	*Addressing performance that does not meet expectations—unacceptable performance*. Adds a new paragraph requiring the identification of specific performance deficiencies that employees must improve.
§ 9901.410(b)	*Addressing performance that does not meet expectations—taking action*. Revises the paragraph to specify adverse actions will be taken under 5 U.S.C. chapter 75 or other applicable procedures, such as those for National Guard Technicians.
§ 9901.411	*Appraisal periods*. Adds a new section specifying the dates associated with the annual appraisal period and rating of record.
§ 9901.412	*Rating and rewarding performance*. Relocates provisions dealing with rating and rewarding performance from § 9901.409 in the current regulations to a new § 9901.412. Additional revisions are noted by paragraph below.
§ 9901.412(a)	*Rating and rewarding performance—forced distribution*. Adds a new paragraph prohibiting the forced distribution of ratings.
§ 9901.412(b)	*Rating and rewarding performance—additional rating of record*. Restructures the paragraph for regulatory format and clarity, amends it to specify that an additional rating of record to reflect sustained improved performance may only be used following an unacceptable rating of record, and specifies the effective date of such a rating.
§ 9901.412(c)	*Rating and rewarding performance—assessments*. Moves language regarding when a rating of record is final from current § 9901.409(c) to proposed § 9901.412(e).
§ 9901.412(d)	*Rating and rewarding performance—impact of misconduct*. Adds a new paragraph clarifying that misconduct may impact the rating of record.
§ 9901.412(e)	*Rating and rewarding performance—final rating*. Adds new language to specify that the Pay Pool Manager is the final approval authority for ratings of record and incorporates the requirement from current § 9901.409(c) regarding when a rating of record is final.

Citation	Description of proposed change
§ 9901.412(f)	*Rating and rewarding performance—communication*. Moves requirement regarding communication of ratings from current § 9901.409(d) to proposed § 9901.412(f) and otherwise is unchanged.
§ 9901.412(g)	*Rating and rewarding performance—approved absence from work*. Moves requirement regarding approved absence from work from current § 9901.409(f) to proposed § 9901.412(g) and otherwise is unchanged.
§ 9901.412(h)	*Rating and rewarding performance—ratings of record*. Restructures for regulatory format and clarity and moves the last sentence from current § 9901.409(b)(1)–(3) into proposed paragraph (h)(3).
§ 9901.412(i)	*Rating and rewarding performance—job change*. Adds a new paragraph addressing the special situation of employees who change jobs after the end of the appraisal cycle and before the payout date.
§ 9901.412(j)	*Rating and rewarding performance—additional appraisal*. Moves current paragraph (i) to proposed paragraph (j) and adds a reference to implementing issuances.
§ 9901.413	*Reconsideration*. Relocates provisions dealing with reconsideration of ratings of record from § 9901.409 in the current regulations to a new section § 9901.413. Additional revisions are noted by paragraph below.
§ 9901.413(a)	*Reconsideration—nonbargaining unit employees*. Revises to specify the roles and responsibilities of the deciding officials and to expand topics of reconsideration to include a job objective rating.
§ 9901.413(b)	*Reconsideration—bargaining unit employees*. Reforms language previously in paragraph § 9901.409(h) to comply with 5 U.S.C. chapter 71, expands topics to include a job objective rating, and restructures and revises for regulatory format and clarity.
§ 9901.413(c)	*Reconsideration—revised ratings*. Adds a new paragraph addressing revised ratings that result from reconsideration.

Next Steps

The National Defense Authorization Act for Fiscal Year 2008 requires that this rule be considered a major rule for the purpose of section 801 of title 5, United States Code. As such, before it can take effect, the Department will submit to each House of the Congress and to the Comptroller General a report containing the rule, a general statement relating to the rule, and the proposed effective date of the rule. The rule may not be effective until the date occurring 60 days after the later of (1) Congressional receipt of the report, or (2) the date the rule is published in the **Federal Register**. Congress has the opportunity to delay implementation of the rule based on the procedures set forth in 5 U.S.C. 801–808.

DoD intends to continue implementing the new NSPS HR system in phases or spirals. The Act provides that not more than 100,000 employees may be added to the System in any calendar year. As has been the case from the beginning, NSPS continues to be an event-driven system, and no decisions have been made at this time regarding when or whether additional groups or organizations will be converted to NSPS. Such decisions will be based on the best interests of the Department.

The Act also requires the Comptroller General to conduct annual reviews in calendar years 2008, 2009, and 2010. The reviews will address—

(1) Employee satisfaction with the National Security Personnel System, and

(2) The extent to which the Department of Defense has effectively implemented accountability mechanisms and internal safeguards.

DoD will fully support the Comptroller General in any review of the System.

E.O. 12866, Regulatory Review

DoD and OPM have determined that this action is a significant regulatory action within the meaning of Executive Order 12866 because there is significant public interest in the National Security Personnel System. DoD and OPM have analyzed the expected costs and benefits of the revised HR system, and that analysis is presented below.

Among the NSPS requirements is to maintain a system that is competitive, cost effective, and fiscally sound, while also being flexible, credible, and trusted. NSPS will allow DoD to move towards market-sensitive pay, to continue pay increases based on performance, and to have the flexibility to offer competitive salaries. While these flexibilities will improve DoD's ability to attract and retain a high-performing workforce, actual payroll costs under this System are constrained by the amount budgeted for overall DoD payroll expenditures, as is the case with the present GS pay system.

The continuing implementation of NSPS will result in some additional program implementation costs. This includes delivering training specifically for NSPS, conducting outreach to employees and other parties, and improving automated systems associated with NSPS performance management.

As has been the practice with implementing NSPS and other alternative personnel systems, DoD expects to incur an initial payroll cost related to the conversion of employees to the pay banding system. This includes a within-grade increase (WGI) ''buyout,'' in which an employee's basic pay, upon conversion, is adjusted by the amount of the WGI earned to date. While this increase is paid earlier than scheduled, it represents a cost that would have been incurred under the current system at some point. However, under NSPS, WGIs no longer exist. Once covered employees are under NSPS, such pay increases will be based on performance. Accordingly, the total cost of the accelerated WGI ''buyout'' is not treated as a ''new'' cost attributed to implementation of NSPS, since it is a cost that DoD would bear under the current HR system. The portion of the WGI buyout cost attributable to NSPS implementation is the marginal difference between paying out the earned portion of a WGI upon conversion and the cost of paying the same WGI according to the current schedule. The marginal cost of the accelerated payment of earned WGIs is difficult to estimate, but is not a significant factor in the cost benefit analysis for regulatory review purposes.

DoD estimates the overall costs associated with continuing to implement NSPS will be approximately $143 million from Fiscal Years 2009 through 2011. These estimates are based upon past experience, guidance from the Comptroller General, and ensuring that implementation costs are determined in the same way across the services and Defense Agencies and captured in official accounting systems.

The primary benefit to the public of NSPS resides in the HR flexibilities that will enable DoD to attract, build, and retain a high-performing workforce focused on effective and efficient mission accomplishment. A performance-based pay system that rewards excellent performance will result in a more qualified and proficient workforce and will generate a greater return on investment in terms of productivity and effectiveness. Taken as a whole, the changes included in these proposed regulations will improve upon

the original NSPS regulations and result in a contemporary, merit-based HR system that focuses on performance, generates respect and trust, and supports the primary mission of DoD.

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

Regulatory Flexibility Act

DoD and OPM have determined 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.

Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

This proposed regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

E.O. 12988, Civil Justice Reform

This proposed regulation is consistent with the requirements of E.O. 12988. The regulation clearly specifies the effects on existing Federal law or regulation; provides clear legal standards; has no retroactive effects; specifies procedures for administrative and court actions; defines key terms; and is drafted clearly.

E.O. 13132, Federalism

DoD and OPM have determined these proposed regulations would not have Federalism implications because they would apply only to Federal agencies and employees. The proposed regulations would not have financial or other effects on States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government.

Unfunded Mandates

These proposed regulations would not result in the expenditure by State, local, or tribal governments of more than $100 million annually. Thus, no written assessment of unfunded mandates is required.

List of Subjects in 5 CFR Part 9901

Administrative practice and procedure, Government employees, Labor management relations, Labor unions, Reporting and recordkeeping requirements, Wages.

Office of Personnel Management.

Linda M. Springer,

Director, Department of Defense.

Gordon England,

Deputy Secretary of Defense.

Accordingly, under the authority of section 9902 of title 5, United States Code, the Department of Defense and the Office of Personnel Management are proposing to revise part 9901 of title 5, Code of Federal Regulations to read as follows:

PART 9901—DEPARTMENT OF DEFENSE NATIONAL SECURITY PERSONNEL SYSTEM (NSPS)

Subpart A—General Provisions

Sec.
9901.101 Purpose.
9901.102 Eligibility and coverage.
9901.103 Definitions.
9901.104 Scope of authority.
9901.105 OPM coordination and approval.
9901.106 Relationship to other provisions.
9901.107 Program evaluation.

Subpart B—Classification

General

9901.201 Purpose.
9901.202 Coverage.
9901.203 Waivers.
9901.204 Definitions.

Classification Structure

9901.211 Career groups.
9901.212 Pay schedules and pay bands.

Classification Process

9901.221 Classification requirements.
9901.222 Review of classification decisions.
9901.223 Appeal to DoD for review of classification decisions.
9901.224 Appeal to OPM for review of classification decisions.

Transitional Provisions

9901.231 Conversion of positions and employees to NSPS classification system.

Subpart C—Pay and Pay Administration

General

9901.301 Purpose.
9901.302 Coverage.
9901.303 Waivers.
9901.304 Definitions.
9901.305 Rate of pay.

Overview of Pay System

9901.311 Major features.
9901.312 Maximum rates of base salary and adjusted salary.
9901.313 Aggregate compensation limitations.
9901.314 National security compensation comparability.

Rate Ranges and General Salary Increases

9901.321 Structure.
9901.322 Setting and adjusting rate ranges.
9901.323 Eligibility for general salary increase.

Local Market Supplements

9901.331 General.
9901.332 Standard and targeted local market supplements.
9901.333 Setting and adjusting local market supplements.
9901.334 Eligibility for pay increase associated with a supplement adjustment.

Performance-based Pay

9901.341 General.
9901.342 Performance payouts.
9901.343 Pay reduction based on unacceptable performance and/or conduct.
9901.344 Other performance payments.
9901.345 Accelerated Compensation for Developmental Positions (ACDP).

Pay Administration

9901.351 General.
9901.352 Setting an employee's starting pay.
9901.353 Setting pay upon reassignment.
9901.354 Setting pay upon promotion.
9901.355 Setting pay upon reduction in band.
9901.356 Pay retention.

Premium Pay

9901.361 General provisions.
9901.362 Modification of standard provisions.
9901.363 Premium pay for health care personnel.
9901.364 Foreign language proficiency pay.

Conversion Provisions

9901.371 Conversion into NSPS pay system.
9901.372 Conversion or movement out of NSPS pay system.

Subpart D—Performance Management

9901.401 Purpose.
9901.402 Coverage.
9901.403 Waivers.
9901.404 Definitions.
9901.405 Performance management system requirements.
9901.406 Setting and communicating performance expectations.
9901.407 Minimum period of performance.
9901.408 Employees on time limited appointments.
9901.409 Monitoring and developing performance.
9901.410 Addressing performance that does not meet expectations.
9901.411 Appraisal period.
9901.412 Rating and rewarding performance.
9901.413 Reconsideration of ratings.

Authority: 5 U.S.C. 9902

Subpart A—General Provisions

§ 9901.101 Purpose.

(a) This part contains regulations governing the National Security Personnel System (NSPS) within the Department of Defense (DoD), as authorized by 5 U.S.C. 9902. Consistent with 5 U.S.C. 9902, these regulations waive or modify various statutory provisions that would otherwise be applicable to affected DoD employees. These regulations are prescribed jointly by the Secretary of Defense and the Director of the Office of Personnel Management (OPM). The Secretary may establish implementing issuances to supplement any matter covered by these regulations.

(b)(1) This part is designed to meet a number of essential requirements for the implementation of a new human resources management system for DoD. The guiding principles for establishing these requirements are to put mission first; respect the individual; protect rights guaranteed by law; support the statutory merit system principles in 5 U.S.C. 2301; value talent, performance, leadership, and commitment to public service; be flexible, understandable, credible, responsive, and executable; ensure accountability at all levels; balance human resources system interoperability with unique mission requirements; and be competitive and cost effective.

(2) The key operational characteristics and requirements of NSPS, which these regulations are designed to facilitate, are as follows: *High-Performing Workforce and Management*—employees and supervisors are compensated and retained based on their performance and contribution to mission; *Agile and Responsive Workforce and Management*—workforce can be easily sized, shaped, and deployed to meet changing mission requirements; *Credible and Trusted*—system assures openness, clarity, accountability, and adherence to the public employment principles of merit and fitness; *Fiscally Sound*—aggregate increases in civilian payroll, at the appropriations level, will conform to OMB fiscal guidance; *Supporting Infrastructure*—information technology support, and training and change management plans are available and funded and *Schedule*—NSPS will be operational and demonstrate success prior to November 2009.

§ 9901.102 Eligibility and coverage.

(a) Pursuant to the provisions of 5 U.S.C. 9902, civilian employees of DoD are eligible for coverage under one or more of subparts B through D of this part, except to the extent specifically prohibited by law.

(b) At his or her sole and exclusive discretion, the Secretary may decide to apply subparts B through D to a specific category or categories of eligible civilian employees in organizations and functional units of the Department at any time in accordance with the provisions of 5 U.S.C. 9902. However, no category of employees may be covered by subparts B or C of this part unless that category is also covered by subpart D of this part. DoD will advise OPM in advance regarding the extension of NSPS coverage to specific categories of DoD employees under this paragraph.

(c) Until the Secretary makes a determination under paragraph (b) of this section to apply the provisions of one or more subparts of this part to a particular category or categories of eligible employees in organizations and functional units, those employees will continue to be covered by the applicable Federal laws and regulations that would apply to them in the absence of this part. All personnel actions affecting DoD employees will be based on the Federal laws and regulations applicable to them on the effective date of the action.

(d) Any new NSPS classification, pay, and performance management system covering Senior Executive Service (SES) members will be consistent with the policies and procedures established by the Governmentwide SES pay-for-performance framework authorized by 5 U.S.C. chapter 53, subchapter VIII, and applicable OPM regulations. If the Secretary determines that SES members employed by DoD should be covered by classification, pay, and performance management provisions that differ substantially from the Governmentwide SES pay-for-performance framework, the Secretary and the Director will issue joint regulations consistent with all of the requirements of 5 U.S.C. 9902.

(e) At his or her sole and exclusive discretion, the Secretary may decide to rescind the application of one or more subparts of this part to a particular category of employees or an organization or functional unit, subject to § 9901.372 and any related implementing issuances. The Secretary will notify affected employees and labor organizations in advance of a decision to rescind the application of one or more subparts of this part to them.

(f)(1) Notwithstanding any other provision of this part, but subject to paragraphs (f)(2) and (3) of this section, the Secretary may, at his or her sole and exclusive discretion, decide to apply one or more subparts of this part as of a specified effective date to a category of employees in organizational and functional units not currently eligible for coverage because of coverage under a system established by a provision of law outside the waivable or modifiable chapters of title 5, U.S. Code.

(2) Paragraph (f)(1) of this section applies only if the provision of law outside those waivable or modifiable title 5 chapters provides discretionary authority to cover employees under a given waivable or modifiable title 5 chapter or to cover them under a separate system established by the Secretary.

(3) In applying paragraph (f)(1) of this section with respect to coverage under subparts B and C of this part, the affected employees will be converted directly to the NSPS pay system from their current pay system. The conversion of such employees into NSPS will be governed by the rules in § 9901.371, as established in any implementing issuances prescribed by the Secretary under § 9901.371(b).

§ 9901.103 Definitions.

In this part:

Appraisal period means the period of time for reviewing employee performance (as described in § 9901.411).

Band means *pay band.*

Basic pay means an employee's pay before any deductions and exclusive of additional pay of any kind, except as expressly provided by applicable law or regulation. For the specific purposes prescribed in § 9901.331(d) only, basic pay includes any local market supplement. In subpart C, when basic pay is exclusive of any additional pay, the term ''base salary'' is used, and when basic pay includes a local market supplement, the term ''adjusted salary'' is used.

Career group means a grouping of one or more associated or related occupations. A career group may include one or more pay schedules.

Comparable pay band or *comparable level of work* means pay bands with the equivalent level of work, based on the NSPS classification structure, within and across varying pay schedules and career groups, regardless of the specific earning potential of the bands. When moving from a non-NSPS position to NSPS, a comparable level of work means a grade or level which is determined to be at an equivalent level of work as the NSPS position to be filled, based on application of the NSPS classification structure as described in implementing issuances.

Competencies means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics that an individual needs to perform a particular job or job function successfully.

Component means the Office of the Secretary of Defense (OSD), the Military Departments, Office of the Chairman of the Joint Chiefs of Staff and the Joint 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.

Contribution means a work product, service, output, or result provided or produced by an employee or group of employees that supports the Departmental or organizational mission, goals, or objectives.

Day means a calendar day, unless expressly provided otherwise under applicable law or regulations.

Department or *DoD* means the Department of Defense.

Director means the Director of the Office of Personnel Management.

Employee has the meaning given that term in 5 U.S.C. 2105.

General Schedule or *GS* means the General Schedule classification and pay system established under Chapter 51 and Subchapter III of Chapter 53 of Title 5, U.S. Code.

Higher pay band or *higher level of work* means a pay band designated to be a higher level of work than an employee's currently assigned band, based on the NSPS classification structure, either within or across varying pay schedules and career groups, regardless of the specific earning potential of the band. When moving from a non-NSPS position to NSPS, a higher level of work means a grade or level which is determined to be at a higher level of work than the NSPS position to be filled, based on application of the NSPS classification structure as described in implementing issuances.

Implementing issuance(s) means a document or documents issued by the Secretary, Deputy Secretary, Principal Staff Assistants (as authorized by the Secretary), or Secretaries and Under Secretaries of the Military Departments to establish or carry out a policy or procedure implementing this part. These issuances may apply Department-wide or to any part of DoD as determined by the Secretary.

Lower pay band or *lower level of work* means a pay band designated to be a lower level of work than an employee's currently assigned band, based on the NSPS classification structure, either within or across varying pay schedules and career groups, regardless of the specific earning potential of the band. When moving from a non-NSPS position to NSPS, a lower level of work means a grade or level which is determined to be at a lower level of work than the NSPS position to be filled, based on application of the NSPS classification structure as described in implementing issuances.

Military Department means the Department of the Army, the Department of the Navy, or the Department of the Air Force.

National Security Personnel System (NSPS) means the human resources management system established under 5 U.S.C. 9902(a) and these regulations.

Occupational series means a group or family of positions performing similar types of work. Occupational series are assigned a number for workforce information purposes (*e.g.*, 0110, Economist Series; 1410, Librarian Series).

OPM means the Office of Personnel Management.

Pay band or *band* means a work level and associated pay range within a pay schedule.

Pay pool means the organizational elements/units or other categories of employees that are combined for the purpose of determining performance payouts. Each employee is in only one pay pool at a time. *Pay pool* also refers to the funds designated for performance payouts to employees covered by a pay pool.

Pay Pool Manager means the management official designated to manage the pay pool, resolve discrepancies, ensure consistency, and approve recommendations concerning employee rating of record, share assignment, and payout distribution.

Pay Pool Panel means management officials, including the Pay Pool Manager, of the organizations or functions represented in the pay pool that assist the Pay Pool Manager in the reconciliation of recommended ratings of record, share assignments, and payout distribution.

Pay schedule means a set of related pay bands for a specified category of employees within a career group.

Performance means accomplishment of work assignments or responsibilities and contribution to achieving organizational goals, including an employee's behavior and professional demeanor (actions, attitude, and manner of performance), as demonstrated by his or her approach to completing work assignments.

Performance Review Authority means a management official who manages and oversees the operation of one or more pay pools and ensures procedural and funding consistency among pay pools under its authority.

Principal Staff Assistants means senior officials of the Office of the Secretary who report directly to the Secretary or Deputy Secretary of Defense.

Promotion means the movement of an employee from one pay band to a higher pay band while continuously employed. This includes movement of an employee currently covered by a non-NSPS Federal personnel system to a position determined to be at a higher level of work.

Rating of record means a performance appraisal approved by a Pay Pool Manager—

(1) After completion of an appraisal period covering an employee's performance of assigned duties against performance expectations over the applicable period; or

(2) As needed following an unacceptable rating to reflect a substantial and sustained change in the employee's performance since the last rating of record.

Reassignment means the movement of an employee, either employee-initiated or management-directed, to a different position or set of duties in the same or a comparable pay band while continuously employed. This includes the movement of an employee currently covered by a non-NSPS Federal personnel system to an NSPS position determined to be at a comparable level of work.

Reduction in band means the voluntary or involuntary movement of an employee from one pay band to a lower pay band on a permanent basis while continuously employed. This includes movement of an employee currently covered by a non-NSPS Federal personnel system to a position determined to be at a lower level of work.

Secretary means the Secretary of Defense, consistent with 10 U.S.C. 113.

SES means the Senior Executive Service established under 5 U.S.C. Chapter 31, subchapter II.

SL/ST refers to an employee serving in a senior-level position paid under 5 U.S.C. 5376. The term ''SL'' identifies a senior-level employee covered by 5 U.S.C. 3324 and 5108. The term ''ST'' identifies an employee who is appointed under the special authority in 5 U.S.C. 3325 to a scientific or professional position established under 5 U.S.C. 3104.

Unacceptable performance means performance of an employee which fails to meet one or more performance expectations, as amplified through work assignments or other instructions, for which the employee is held individually accountable.

§ 9901.104 Scope of authority.

The authority for this part is 5 U.S.C. 9902. The provisions in the following chapters of title 5, U.S. Code, and any related regulations, may be waived or modified in exercising the authority in 5 U.S.C. 9902:

(a) Chapter 43, dealing with performance appraisal systems;

(b) Chapter 51, dealing with General Schedule job classification;

(c) Chapter 53, dealing with pay for General Schedule employees, and pay for certain other employees, except as provided in § 9901.303; and

(d) Chapter 55, Subchapter V, dealing with premium pay, except sections 5544 and 5545b.

§ 9901.105 OPM coordination and approval.

(a) The Secretary will coordinate with or request approval from OPM in advance, as applicable, regarding the proposed promulgation of certain implementing issuances and certain other actions related to the ongoing operation of the NSPS where such actions could have a significant impact on other Federal agencies and the Federal civil service as a whole. Pre-decisional coordination under paragraph (b) of this section is intended as an internal DoD/OPM matter to recognize the Secretary's special authority to direct the operations of DoD pursuant to title 10, U.S. Code, as well as the Director's institutional responsibility to oversee the Federal civil service system pursuant to 5 U.S.C. Chapter 11. Approval from OPM is required in certain circumstances, as provided in paragraph (c) of this section.

(b) DoD will coordinate with OPM prior to—

(1) Establishing or substantially revising career groups, occupational pay schedules, and pay bands under §§ 9901.211 and 9901.212(a);

(2) Establishing alternative or additional qualification standards for a particular occupational series, career group, occupational pay schedule, and/or pay band under § 9901.212(d) that significantly differ from Governmentwide standards;

(3) Establishing alternative or additional occupational series for a particular career group or occupation under § 9901.221(b)(1) that differ from Governmentwide series and/or standards;

(4) Establishing alternative or additional classification criteria for a particular career group or occupation under § 9901.221(b)(1) that differ from Governmentwide classification standards;

(5) Establishing maximum rates of base salary under § 9901.312(a);

(6) Establishing a higher adjusted salary rate cap for a designated category of positions under § 9901.312(d);

(7) Approving waivers under § 9901.313(a)(3) of the normally applicable aggregate compensation limit;

(8) Establishing and adjusting pay ranges for occupational pay schedules and pay bands under §§ 9901.321(a) and 9901.322;

(9) Determining general salary increases under § 9901.323(a)(2); and

(10) Establishing and adjusting targeted local market supplements under §§ 9901.332(c) and 9901.333(b).

(c) The Secretary will request approval from the Director prior to—

(1) Establishing policies regarding the student loan repayment program under § 9901.303(c) that differ from Governmentwide policies with respect to repayment amounts and service commitments;

(2) Approving waivers of normally applicable premium pay limitations, as authorized under § 9901.362(a)(2);

(3) Determining pay bands for which an FLSA-exempt employee is paid overtime at an hourly rate equal to the employee's adjusted base salary hourly rate, as authorized under §§ 9901.362(b)(6)(i); and

(4) Establishing new hazardous duty pay categories under § 9901.362(i)(3).

(d) When a matter requiring OPM coordination is submitted to the Secretary for decision, the Director will be provided an opportunity, as part of the Department's normal coordination process, to review and comment on the recommendations and officially concur or nonconcur with all or part of them. The Secretary will take the Director's comments and concurrence/nonconcurrence into account, advise the Director of his or her determination, and provide the Director with reasonable advance notice of the effective date of the matter. Thereafter, the Secretary and the Director may take such action as they deem appropriate, consistent with their respective statutory authorities and responsibilities.

(e) The Secretary and the Director fully expect their staffs to work closely together on the matters specified in this section, before such matters are submitted for official OPM coordination or approval and DoD decision, so as to maximize the opportunity for consensus and agreement before an issue is so submitted.

§ 9901.106 Relationship to other provisions.

(a)(1) The provisions of title 5, U.S. Code, are waived, modified, or replaced to the extent authorized by 5 U.S.C. 9902 to conform to the provisions of this part.

(2) This part must be interpreted in a way that recognizes the critical national security mission of the Department, and each provision of this part must be construed to promote the swift, flexible, effective day-to-day accomplishment of this mission, as defined by the Secretary. The interpretation of the regulations in this part by DoD and OPM must be accorded great deference.

(b)(1) For the purpose of applying other provisions of law or Governmentwide regulations that reference provisions Under Chapters 43, 51, 53, and 55 (Subchapter V Only), of Title 5, U.S. Code, the referenced provisions are not waived but are modified consistent with the corresponding regulations in this part, except as otherwise provided in this part (including paragraph (c) of this section) or in implementing issuances.

(2) If another provision of law or Governmentwide regulations requires coverage under one of the chapters modified or waived under this part (i.e., Chapters 43, 51, 53, and 55 (Subchapter V only) of title 5, U.S. Code), DoD employees are deemed to be covered by the applicable chapter notwithstanding coverage under a system established under this part. Selected examples of provisions that continue to apply to any DoD employees (notwithstanding coverage under subparts B through D of this part) include, but are not limited to, the following:

(i) Foreign language awards for law enforcement officers under 5 U.S.C. 4521 through 4523;

(ii) Pay for firefighters under 5 U.S.C. 5545b; and

(iii) Recruitment, relocation, and retention payments under 5 U.S.C. 5753 through 5754.

(c)(1) Law enforcement officer special base rates under section 403 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Public Law 101–509) do not apply to employees who are covered by an NSPS classification and pay system established under subparts B and C of this part.

(2) Physicians' comparability allowances under 5 U.S.C. 5948 do not apply to employees covered by an NSPS classification and pay system established under subparts B and C of this part.

(d) Nothing in this part waives, modifies or otherwise affects the employment discrimination laws that the Equal Employment Opportunity Commission (EEOC) enforces under 42 U.S.C. 2000e *et seq.*, 29 U.S.C. 621 *et seq.*, 29 U.S.C. 791 *et seq.*, and 29 U.S.C. 206(d).

§ 9901.107 Program evaluation.

The Secretary will evaluate the regulations in this part and their implementation.

Subpart B—Classification

General

§ 9901.201 Purpose.

(a) This subpart establishes a classification structure and rules for covered DoD employees and positions to replace the classification structure and rules in 5 U.S.C. chapter 51, in accordance with the merit principle that equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(b) Any classification system prescribed under this subpart will be established in conjunction with the pay system described in subpart C of this part.

§ 9901.202 Coverage.

(a) This subpart applies to eligible DoD employees and positions listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b) or (f).

(b) The following employees of, or positions in, DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions that would otherwise be covered by the General Schedule classification system established under 5 U.S.C. chapter 51;

(2) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376;

(3) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9901.102(d); and

(4) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

§ 9901.203 Waivers.

(a) When a specified category of employees is covered by a classification system established under this subpart, the provisions of 5 U.S.C. chapter 51 are waived with respect to that category of employees, except as provided in paragraph (b) of this section, §§ 9901.106, and 9901.222(d) (with respect to OPM's authority to act on requests for classification decisions under 5 U.S.C. 5112(b) and review of pay plan under 5 U.S.C. 5103).

(b) Section 5108 of title 5, U.S. Code, dealing with the classification of positions above GS–15, is not waived for the purpose of defining and allocating Senior Executive Service (SES) positions under 5 U.S.C. 3132 and 3133 or applying provisions of law outside the waivable and modifiable chapters of title 5, U.S. Code—e.g., 5 U.S.C. 4507 and 4507a (regarding Presidential rank awards), 5 U.S.C. 6303(f) (regarding annual leave accrual for members of the SES and employees in SL/ST positions), and 5 U.S.C. 6304(f) (regarding annual leave ceilings for members of the SES and employees in SL/ST positions).

§ 9901.204 Definitions.

In this subpart:

Band means *pay band.*

Basic pay has the meaning given that term in § 9901.103.

Career group has the meaning given that term in § 9901.103.

Classification, also referred to as job evaluation, means the process of analyzing and assigning a job or position to an occupational series, official title, career group, pay schedule, and pay band for pay and other related purposes.

Competencies has the meaning given that term in § 9901.103.

Occupational series has the meaning given that term in § 9901.103.

Official title means the position title prescribed in an NSPS classification standard or by supplemental Component guidance.

Pay band or *band* has the meaning given that term in § 9901.103.

Pay schedule has the meaning given that term in § 9901.103.

Position or *job* means the duties, responsibilities, and related competency requirements that are assigned to an employee.

Classification Structure

§ 9901.211 Career groups.

For the purpose of classifying positions, the Secretary may establish career groups based on factors such as mission or function; nature of work; qualifications or competencies; career or pay progression patterns; relevant labor-market features; and other characteristics of those occupations or positions. The Secretary will document in implementing issuances the criteria and rationale for grouping occupations or positions into career groups.

§ 9901.212 Pay schedules and pay bands.

(a) For purposes of identifying relative levels of work and corresponding pay ranges, the Secretary may establish one or more pay schedules within each career group.

(b) Each pay schedule may include one or more pay bands.

(c) The Secretary will document in implementing issuances the definitions for each pay band which specify the type and range of difficulty and responsibility, qualifications or competencies, or other characteristics of the work encompassed by the pay band.

(d) The Secretary will—

(1) Use qualification standards established or approved by OPM, or establish qualification standards for positions covered by NSPS, in accordance with § 9901.105(b)(2); and

(2) Designate qualification standards and requirements for each career group, occupational series, pay schedule, and/or pay band.

Classification Process

§ 9901.221 Classification requirements.

(a) The Secretary will develop a methodology for describing and documenting the duties, qualifications, and other requirements of categories of jobs, and will make such descriptions and documentation available to affected employees.

(b) The Secretary will—

(1) Assign occupational series to jobs consistent with occupational series definitions established by OPM under 5 U.S.C. 5105, or by DoD; and

(2) Apply the criteria and definitions required by §§ 9901.211 and 9901.212 to assign jobs to an appropriate career group, pay schedule, and pay band.

(c) The Secretary will establish procedures for classifying jobs and may make such inquiries of the duties, responsibilities, and qualification requirements of jobs as he or she considers necessary for the purpose of this section.

(d) Except as otherwise provided in this paragraph or required by law, the effective date of a classification action is the date the authorized management official certifies the classification decision (i.e., signs or electronically validates the position description).

(1) A retroactive effective date for a classification action is permitted only if the classification action resulted in a reduction in pay band or adjusted salary and if that action is subsequently reversed on appeal.

(2) In order for a corrective action to be retroactive, the employee must file an initial request for review of the classification action with DoD or OPM not later than 15 calendar days after the effective date of the reduction.

(3) A retroactive date may be established only if the appeal reversal is based on the duties and responsibilities performed at the time of reduction. Retroactive action is mandatory under these circumstances.

(e) A classification action is implemented by a personnel action, which must be taken within four pay

periods following the effective date. If a classification action results in a reduction in an employee's pay band or adjusted salary, the employee must be advised, in writing, of the action and proposed effective date at least 7 days before the personnel action is taken. The written notice will inform the employee of the reason for the reclassification, of the right to appeal the classification decision, and that appeals must be filed within the time limitations in § 9901.223 for entitlement to retroactive action.

§ 9901.222 Review of classification decisions.

(a) An individual employee may request that DoD or OPM review the classification (i.e., pay system, career group, occupational series, official title, pay schedule, or pay band) of his or her official position of record at any time.

(b) Under this section, an employee may not appeal to either DoD or OPM the issues designated as nonappealable to the Office in 5 CFR 511.607 or the accuracy of NSPS pay schedule and pay band classification criteria. The nonappealable issues include—

(1) Classification of a proposed position or one to which the employee is not officially assigned;

(2) Classification of a position to which an employee is detailed or temporarily promoted;

(3) Accuracy of the official position description, including the inclusion or exclusion of a duty (subject to paragraph (c) of this section);

(4) Classification of a position based on position-to-position comparisons rather than the NSPS classification criteria; and

(5) Classification of a position for which a DoD or an OPM appeal decision was previously rendered unless there is a later change in the governing classification criteria or a material change in the requirements of the position.

(c) When the accuracy of the official position description is questioned by the employee, the employee will be directed to raise this issue with the employee's supervisor. If management and the employee cannot resolve this issue, the accuracy of the position description will be determined using the applicable administrative or negotiated grievance procedure. If, after completing this procedure, the issue is not resolved, the appeal will be decided on the basis of the actual duties and responsibilities assigned by management and performed by the employee.

(d) An employee may request that OPM review a DoD determination made under paragraph (a) of this section. If an employee does not request an OPM review, DoD's classification determination is final and not subject to further review or appeal.

(e) Any determination made under this section will be based on criteria issued by the Secretary.

§ 9901.223 Appeal to DoD for review of classification decisions.

(a) *Employee representation.* An employee may designate in writing a representative of his or her choice to assist in the preparation and presentation of an appeal. A management official may disallow an employee's representative when—

(1) An individual's activities as a representative would cause a conflict of interest or position,

(2) An employee cannot be released from his or her official duties because of the priority needs of the Government, or

(3) An employee's release would give rise to unreasonable costs to the Government.

(b) *DoD classification appeal process.* (1)(i) Prior to filing an appeal, an employee must formally raise the areas of concern to his or her immediate supervisor, either orally or in writing, identifying the communication as the first step in the NSPS classification appeal process.

(ii) The supervisor must respond to the employee concern within 30 calendar days of receiving the query.

(iii) If an employee is not satisfied with the supervisory response, the employee may initiate a classification appeal.

(2) Employee appeals to DoD must be submitted through the employee's servicing Human Resources Office.

(3) An employee may file a classification appeal at any time. When the issue involves a classification action that resulted in a reduction in band or adjusted salary, to preserve any entitlement to retroactive pay, the employee must file any appeals no later than 15 calendar days after the effective date of the personnel action. When an employee shows that he or she did not receive notice of the applicable time limit or was prevented from timely filing by circumstances beyond the employee's control, the deciding official may grant an extension of the appeal period.

(4) An employee must provide the following documentation when filing an appeal:

(i) The employee's name, mailing address, and office telephone and fax numbers;

(ii) The employing Component and the exact location of the employee's position within the Component (installation name, mailing address, organization, division, branch, section, unit);

(iii) The name, address, business telephone and fax numbers of the employee's representative, if any;

(iv) A statement of the employee's requested pay system, official position title, occupational series, pay schedule, and/or pay band; and

(v) Reasons why the employee believes the position is incorrectly classified. The employee must refer to classification standards that support the appeal and state specific points of disagreement with the current classification. The employee may also include a statement of facts that he or she thinks may affect the final classification decision.

(c) *Binding decisions.* DoD appeal decisions constitute certificates that are binding on all administrative, certifying, payroll, disbursing, and accounting offices within DoD.

(d) *Cancellation.* (1) An employee or representative may cancel an appeal at any time before DoD issues a decision by providing written notification to the DoD deciding official.

(2) DoD may cancel an appeal if any of the following occur:

(i) The employee, or his or her representative, does not furnish requested information within the required time period;

(ii) The employee is no longer officially assigned to, or is removed from, the position;

(iii) The duties and responsibilities of the position are significantly changed while the case is pending; or

(iv) The position is abolished.

§ 9901.224 Appeal to OPM for review of classification decisions.

(a) An employee's request for OPM review of DoD classification determination will follow the procedures in 5 CFR part 511, subpart F—Classification Appeals.

(b) Effective dates of OPM classification appeal decisions will be consistent with 5 CFR 511.702.

(c) Employee appeals to OPM may be submitted directly to OPM.

(d) OPM's final determination on an appeal made under this section is not subject to further review or appeal.

Transitional Provisions

§ 9901.231 Conversion of positions and employees to NSPS classification system.

(a) *Introduction.* This section describes the transitional provisions that apply when DoD positions and employees initially are converted to a classification system established under

this subpart. (See § 9901.371 for conversion rules related to setting an employee's pay.) Positions and employees in affected organizational or functional units may convert from the GS system, the SL/ST system, the SES system, or such other DoD systems as may be designated by the Secretary, as provided in § 9901.202. For the purpose of this part, the terms ''convert,'' ''converted,'' ''converting,'' and ''conversion'' refer to positions and employees that become covered by the NSPS classification system as a result of a coverage determination made under § 9901.102(b) and exclude employees who move from a noncovered position to a position already covered by NSPS.

(b) *Implementing issuances.* The Secretary will issue implementing issuances prescribing policies and procedures for converting DoD employees to a pay band upon initial implementation of the NSPS classification system. Those issuances will establish the work level conversion tables used to place an employee in a pay band based on the level of work of the employee's position in the formerly applicable pay system.

(c) *Temporary promotion prior to conversion.* An employee on a temporary promotion at the time of conversion will be returned to his or her official position of record prior to processing the conversion. That official position of record (including occupational series and grade) is used in determining the employee's career group, pay schedule, and band upon conversion.

(d) *Grade retention prior to conversion.* For an employee who is entitled to grade retention immediately before conversion, the grade of the actual position of record (not the grade being retained) is used in determining the employee's band upon conversion.

Subpart C—Pay and Pay Administration

General

§ 9901.301 Purpose.

(a) This subpart contains regulations establishing pay structures and pay administration rules for covered DoD employees to replace the pay structures and pay administration rules established under 5 U.S.C. Chapter 53 and 5 U.S.C. Chapter 55, subchapter V, as authorized by 5 U.S.C. 9902 (subject to the limitations on waivers in § 9901.303). Various features that link pay to employees' performance ratings are designed to promote a high-performance culture within DoD.

(b) Any pay system prescribed under this subpart will be established in conjunction with the classification system described in subpart B of this part.

(c) Any pay system prescribed under this subpart will be established in conjunction with the performance management system described in subpart D of this part.

§ 9901.302 Coverage.

(a) This subpart applies to eligible DoD employees and positions in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b) or (f).

(b) The following employees of, or positions in, DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by the General Schedule pay system established under 5 U.S.C. Chapter 53, Subchapter III;

(2) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376;

(3) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. Chapter 53, Subchapter VIII, subject to § 9901.102(d); and

(4) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

§ 9901.303 Waivers.

(a) When a specified category of employees is covered under this subpart—

(1) The provisions of 5 U.S.C. Chapter 53 are waived with respect to that category of employees, except as provided in § 9901.106 and paragraphs (b) and (c) of this section; and

(2) The provisions of 5 U.S.C. Chapter 55, Subchapter V (except sections 5544 and 5545b), are waived with respect to that category of employees to the extent that those employees are covered by alternative premium pay provisions established by the Secretary under §§ 9901.361 through 9901.364 in lieu of the provisions in 5 U.S.C. Chapter 55, Subchapter V.

(b) The following provisions of 5 U.S.C. Chapter 53 are not waived:

(1) Sections 5311 through 5318, dealing with Executive Schedule positions;

(2) Sections 5341 through 5349, dealing with prevailing rate systems;

(3) Section 5371, insofar as it authorizes OPM to apply the provisions of 38 U.S.C. Chapter 74 to DoD employees in health care positions covered by section 5371 in lieu of any NSPS classification and pay system established under this part or the following provisions of title 5, U.S. Code: Chapters 51, 53, and 61, and Subchapter V of Chapter 55. The reference to ''Chapter 51'' in section 5371(c) is deemed to include a classification system established under Subpart B of this part; and

(4) Section 5377, dealing with the critical pay authority.

(c) Section 5379 continues to apply but is modified to allow the Secretary to modify the minimum service period and the limitations on the amount of student loan benefits in order to address critical hiring needs, subject to § 9901.105.

§ 9901.304 Definitions.

In this part:

Adjusted salary means an NSPS employee's base salary plus any local market supplement paid to that employee. For an employee moving into NSPS from a non-NSPS position, *adjusted salary* also refers to non-NSPS base salary plus any applicable locality pay under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, or any equivalent supplement.

Band means *pay band.*

Base salary means an NSPS employee's pay, as set by the authorized management official, before deductions and exclusive of additional pay of any kind (e.g., local market supplement). For an employee moving into NSPS from a non-NSPS position, *base salary* also refers to non-NSPS pay, before deductions and exclusive of additional pay of any kind (e.g., locality pay or a special rate supplement).

Basic pay has the meaning given that term in § 9901.103.

Bonus means an element of the performance payout that consists of a one-time lump-sum payment made to employees. It is not part of basic pay for any purpose.

Career group has the meaning given that term in § 9901.103.

Comparable pay band or *comparable level of work* has the meaning given in § 9901.103.

Competencies has the meaning given that term in § 9901.103.

Component has the meaning given that term in § 9901.103.

Contributing factor means attributes of job performance that are significant to the accomplishment of individual job objectives.

Contribution has the meaning given that term in § 9901.103.

Contribution assessment means the determination made by the Pay Pool Manager as to the impact, extent, and scope of contribution that the employee's performance made to the accomplishment of the organization's mission and goals.

CONUS or *Continental United States* means the States of the United States, excluding Alaska and Hawaii, but including the District of Columbia.

Day has the meaning given that term in § 9901.103.

Department or *DoD* has the meaning given in § 9901.103.

Employee has the meaning given that term in § 9901.103.

General Schedule or *GS* has the meaning given that term in § 9901.103.

Implementing issuance(s) has the meaning given that term in § 9901.103.

Local market supplement means a geographic- and occupation-based supplement paid in addition to an employee's base salary, including a standard local market supplement or a targeted local market supplement, as described in § 9901.332.

Modal rating means, for the purpose of pay administration, the most frequent rating of record assigned to employees within a particular pay pool for a particular rating cycle.

National Security Personnel System (NSPS) has the meaning given that term in § 9901.103.

Occupational series has the meaning given that term in § 9901.103.

Official worksite has the meaning given that term in 5 CFR 531.605.

OPM has the meaning given that term in § 9901.103.

Pay band or *band* has the meaning given that term in § 9901.103.

Pay pool has the meaning given that term in § 9901.103.

Pay Pool Manager has the meaning given that term in § 9901.103.

Pay Pool Panel has the meaning given that term in § 9901.103.

Pay schedule has the meaning given that term in § 9901.103.

Performance has the meaning given that term in § 9901.103.

Performance payout means the total monetary value of a performance pay increase and bonus provided under § 9901.342.

Performance Review Authority has the meaning given that term in § 9901.103.

Performance share means a unit of performance payout awarded to an employee based on performance. Performance shares may be awarded in multiples based on the employee's rating of record and specified factors, as provided in § 9901.342(f).

Performance share value means a calculated value for each performance share based on pay pool funds available and the distribution of performance shares across employees within a pay pool, expressed as a percentage of base salary.

Premium pay means payments for work performed under special conditions or circumstances, as authorized under 5 U.S.C. Chapter 55, Subchapter V, or §§ 9901.361 through 9901.364 (including compensatory time off).

Promotion has the meaning given that term in § 9901.103.

Rate range means the range of base salary rates applicable to employees in a particular pay band, as described in § 9901.321. Each rate range is defined by a minimum and maximum base salary rate.

Rating of record has the meaning given that term in § 9901.103.

Reassignment has the meaning given that term in § 9901.103.

Reduction in band has the meaning given that term in § 9901.103.

Retained rate means a retained base salary rate (i.e., excluding any local market supplement) above the applicable pay band maximum rate as established for an NSPS employee under the pay retention provisions in § 9901.356. For GS employees, *retained rate* has the meaning given that term in 5 CFR part 536.

Secretary has the meaning given that term in § 9901.103.

Standard local market supplement means the local market supplement that applies to employees in a given pay schedule or band who are stationed within a specified local market area (the boundaries of which are defined under § 9901.332(b)), unless a targeted local market supplement applies. Standard local market supplements are generally administered for covered employees in the same manner as locality-based comparability payments under 5 U.S.C. 5304 and 5304a.

Sub pay pool means a subset of a pay pool that is defined for the purpose of reconciling ratings of record, share assignments, and payout determinations.

Targeted local market supplement means a local market supplement established to address recruitment or retention difficulties or for other appropriate reasons and which applies to a defined category of employees (based on occupation or other appropriate factors) in lieu of any lower standard local market supplement that would otherwise apply.

Unacceptable performance has the meaning given that term in § 9901.103.

§ 9901.305 Rate of pay.

(a) The term ''rate of pay'' in 5 U.S.C. 9902(e)(9) means—

(1) An individual employee's base salary rate, local market supplement rate, and overtime and other premium pay rates (including compensatory time off);

(2) The rates comprising the structure of the pay system that govern the setting and adjusting of the individual employee rates identified in paragraph (a)(1) of this section, including the amount of each rate in the pay structure (expressed as a dollar amount or a percentage) and the conditions defining applicability of each rate, illustrative examples include, but are not limited to—

(i) The amount of band rate range minimum and maximum rates and the applicability conditions defining the category of employees covered by the band;

(ii) The level at which control points within a band rate range are set and the applicability conditions defining the category of employees to which each control point applies;

(iii) The percentage value of local market supplement rates and the applicability conditions defining coverage (e.g., the geographic area in which the employee's official worksite must be located);

(iv) The levels constituting maximum rates of base salary and adjusted salary and the applicability conditions connected to a given level; and

(v) The value of various types of premium pay rates and the applicability conditions defining the type of work or other requirements that must be met to qualify for each type and level of premium pay; and

(3) The percentage rate of total base salary payroll constituting the portion of a pay pool applied to provide performance-based increases in employees' base salary rates.

(b) For the purpose of 5 U.S.C. 9902(e)(9), the establishment or adjustment of a rate of pay includes the establishment or adjustment of the amount or level of the rate and of the applicability conditions defining which employees may receive the type and level of pay in question. Illustrative examples of actions that establish or adjust a rate of pay include, but are not limited to, the following:

(1) Establishing the starting base salary rate for a newly hired employee;

(2) Establishing a retained rate for an employee;

(3) Determining the amount of various adjustments in an employee's base salary rate such as general increases, performance pay increases, extraordinary performance recognition increases, organizational or team achievement recognition increases, pay reductions for unacceptable performance or conduct, reassignment increases and decreases, promotion increases, accelerated compensation for

developmental positions increases, and retained rate adjustments;

(4) Establishing or adjusting the minimum or maximum rate of a band rate range or control points within that range;

(5) Establishing or adjusting the percentage amount, geographic area of a given local market supplement, or other coverage requirements associated with that supplement;

(6) Establishing or adjusting an employee's local market supplement when the employee's eligibility status changes (e.g., the employee's official worksite is changed);

(7) Determining the requirements for employees to be covered by a discretionary action under the premium pay regulations (e.g., higher premium pay limit under § 9901.362(a)(2), identification of bands at which overtime rate equals the employee's adjusted salary rate under § 9901.362(b)(6)(i), or establishment of new hazardous duty pay category under § 9901.362(i)(3)); and

(8) Determining that an employee is entitled to a premium pay rate under the established conditions.

Overview of Pay System

§ 9901.311 Major features.

Through the issuance of implementing issuances, the Secretary will further define a pay system that governs the setting and adjusting of covered employees' rates of base salary and adjusted salary and the setting of covered employees' rates of premium pay. The NSPS pay system will include the following features:

(a) A structure of rate ranges linked to various pay bands for each career group, in alignment with the classification structure described in subpart B of this part;

(b) Policies regarding the setting and adjusting of band rate ranges based on mission requirements, labor market conditions, and other factors, as described in §§ 9901.321 and 9901.322;

(c) Policies regarding the setting and adjusting of local market supplements as described in §§ 9901.331 through 9901.333;

(d) Policies regarding employees' eligibility for general salary increases and adjustments in local market supplements, as described in §§ 9901.323 and 9901.334;

(e) Policies regarding performance-based pay, as described in §§ 9901.341 through 9901.345;

(f) Policies on base salary administration, including movement between career groups, positions, pay schedules, and pay bands, as described in §§ 9901.351 through 9901.356;

(g) Linkages to employees' ratings of record, as described in subpart D of this part; and

(h) Policies regarding the setting of and limitations on premium payments, as described in §§ 9901.361 through 9901.364.

§ 9901.312 Maximum rates of base salary and adjusted salary.

(a) Subject to § 9901.105, the Secretary may establish a limitation on the maximum rate of base salary provided under authority of this subpart.

(b) No employee may receive, under authority of this subpart, an adjusted salary rate greater than the rate for level IV of the Executive Schedule plus 5 percent. The payable local market supplement for an employee must be reduced as necessary to comply with this limitation.

(c) Paragraphs (a) and (b) of this section do not apply to physicians and dentists (in occupational series 0602 and 0680, respectively).

(d) Subject to § 9901.105, the Secretary may establish a higher adjusted salary rate limitation for a specified category of positions in lieu of the limitation in paragraph (b) of this section based on mission requirements, labor market conditions, availability of funds, and any other relevant factors.

§ 9901.313 Aggregate compensation limitations.

(a) *General.* (1) Except as provided in paragraphs (a)(2) and (a)(3) of this section, no additional payment (premium pay, allowance, differential, bonus, award, or other similar cash payment) may be paid to an employee in a calendar year if, or to the extent that, when added to the adjusted salary paid to the employee for service performed as an employee in the Department or in another Federal agency, the payment would cause the total aggregate compensation to exceed the annual rate for Executive Level I as in effect on the last day of that calendar year.

(2) In the case of physicians and dentists (in occupational series 0602 and 0680, respectively) payment to the employee may not cause aggregate compensation received in a calendar year to exceed the salary of the President of the United States as in effect on the last day of that calendar year.

(3) Subject to § 9901.105, the Secretary may provide for a higher aggregate compensation limitation equal to the annual rate payable to the Vice President under 3 U.S.C. 104 as in effect on the last day of the calendar year in the case of specified categories of employees for whom a waiver has been authorized under § 9901.362(a)(2).

(4) The limitation described in this paragraph (a) applies to the total amount of aggregate compensation actually received by an employee during the calendar year without regard to the period of service for which such compensation is earned.

(b) *Types of compensation.* For the purpose of this section, aggregate compensation is the total of—

(1) Adjusted salary received as an employee of the Department;

(2) Premium pay under 5 U.S.C. Chapter 55, Subchapter V, and this subpart;

(3) Incentive awards and performance-based cash awards under 5 U.S.C. 4501–4523 and this part;

(4) Recruitment and relocation incentives under 5 U.S.C. 5753;

(5) Retention incentives under 5 U.S.C. 5754;

(6) Supervisory differentials under 5 U.S.C. 5755;

(7) Post differentials under 5 U.S.C. 5925;

(8) Danger pay allowances under 5 U.S.C. 5928;

(9) Extended assignment incentives under 5 U.S.C. 5757;

(10) Post differentials based on environmental conditions for employees stationed outside the continental United States or in Alaska under 5 U.S.C. 5941(a)(2);

(11) Foreign language proficiency pay under 10 U.S.C. 1596 and 1596a;

(12) Continuation of pay under 5 U.S.C. 8118;

(13) Other similar payments authorized under title 5, United States Code, excluding—

(i) Back pay due to an unjustified personnel action under 5 U.S.C. 5596 (but only if the back payments were originally payable in a previous calendar year);

(ii) Overtime pay under the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201–219 and 5 CFR Part 551);

(iii) Severance pay under 5 U.S.C. 5595;

(iv) Nonforeign area cost-of-living allowances under 5 U.S.C. 5941(a)(1); and

(v) Lump-sum payments for accumulated and accrued annual leave on separation under 5 U.S.C. 5551 or 5552; and

(14) Payments received from another agency during the calendar year, prior to employment with the Department, that are subject to 5 U.S.C. 5307.

(c) *Administration of aggregate limitation.* (1) At the time a payment covered by paragraph (b) of this section

(other than adjusted salary) is authorized for an employee, the employee may not receive any portion of such payment that, when added to the estimated aggregate compensation the employee is projected to receive, would cause the aggregate compensation actually received by the employee during the calendar year to exceed the limitation applicable to the employee under this section at the end of the calendar year.

(2) Payments that are creditable for retirement purposes (e.g., law enforcement availability pay (LEAP) or standby premium pay) and that are paid to an employee at a regular fixed rate each pay period may not be deferred or discontinued for any period of time in order to make another payment that would otherwise cause an employee's pay to exceed any limitation described in or established by this section.

(3) Except for physicians and dentists (in occupational series 0602 and 0680, respectively), if the estimated aggregate compensation to which an employee is entitled exceeds the applicable limitation under this section for the calendar year, the Department must defer all authorized payments (other than adjusted salary) at the time when otherwise continuing such payments would cause the aggregate compensation actually received by any employee during the calendar year to exceed the applicable limitation. Any portion of a payment deferred under this paragraph will become available for payment as provided in paragraph (d) of this section. For physicians and dentists (in occupational series 0602 and 0680, respectively), payments that exceed the limitation under paragraph (a)(2) of this section may not be made at any time.

(4) If the Department makes an incorrect estimate of aggregate compensation at an earlier date in the calendar year, the sum of an employee's remaining payments of adjusted salary (which may not be deferred) may exceed the difference between the aggregate compensation the employee has actually received to date in that calendar year and the applicable limitation under this section. In this case, the employee will become indebted to the Department for any amount paid in excess of the aggregate limitation. To the extent that the excess amount is attributable to amounts that should have been deferred and would have been payable at the beginning of the next calendar year, the debt must be nullified on January 1 of the next calendar year. As part of the correction of the error, the excess amount will be deemed to have been paid on January 1 of the next calendar year (when the debt was extinguished) as if it were a deferred excess payment as described in paragraph (c)(3) of this section and must be considered part of the employee's aggregate compensation for the new calendar year.

(d) *Payment of excess amounts.* (1) Except for physicians and dentists (in occupational series 0602 and 0680, respectively), any amount that is not paid to an employee because of the annual aggregate compensation limitation under this section must be paid in a lump-sum payment at the beginning of the following calendar year. Any amount paid the following calendar year will be taken into account for purposes of applying the limitations with respect to such calendar year. For physicians and dentists (in occupational series 0602 and 0680, respectively), payments that exceed the limitation under paragraph (a)(2) of this section may not be made at any time.

(2) If a lump-sum payment causes an employee's estimated aggregate compensation to exceed the applicable limitation under this section, the Department must consider only the employee's adjusted salary and payments that are creditable for retirement purposes (e.g., LEAP or standby pay) in determining the extent to which the lump-sum payment may be paid and will defer all other payments, in order to pay as much of the excess amount as possible. Any payments deferred under this paragraph, including any portion of the excess amount that was not payable, will become payable at the beginning of the next calendar year.

(3) If an employee moves to another Federal agency or to another position within the Department not covered by NSPS, and, at the time of the move, the employee has received payments in excess of the aggregate limitation under 5 U.S.C. 5307, the employee's indebtedness for the excess amount received will be deferred from the effective date of the transfer until the beginning of the next calendar year. Effective January 1 of the new calendar year, the debt will be nullified and the excess amount will be considered in applying that year's aggregate limitation.

(4) If an employee transfers to another agency and, at the time of transfer, the employee has excess payments deferred to the next calendar year, the provisions of 5 U.S.C. 5307 are applicable.

(5) The following conditions permit payment of excess aggregate compensation without regard to the calendar year limitation:

(i) If an employee dies, the excess amount is payable immediately as part of the settlement of accounts, in accordance with 5 U.S.C. 5582.

(ii) If an employee separates from Federal service, the entire excess amount is payable following a 30-day break in service. If the individual is reemployed in the Department under NSPS in the same calendar year as separation, any previous payment of an excess amount will be considered part of that year's aggregate compensation for the purpose of applying the limitations described in this section for the remainder of the calendar year.

§ 9901.314 National security compensation comparability.

(a) To the maximum extent practicable, for fiscal years 2004 through 2012, the overall amount allocated for compensation of the DoD civilian employees who are included in the NSPS may not be less than the amount that would have been allocated for compensation of such employees for such fiscal years if they had not been converted to the NSPS, based on, at a minimum—

(1) The number and mix of employees in such organizational or functional units prior to conversion of such employees to the NSPS; and

(2) Adjustments for normal step increases and rates of promotion that would have been expected, had such employees remained in their previous pay schedule.

(b) To the maximum extent practicable, implementing issuances will provide a formula for calculating the overall amount to be allocated for fiscal years beyond fiscal year 2012 for compensation of the civilian employees included in the NSPS. The formula will ensure that, in the aggregate, employees are not disadvantaged in terms of the overall amount of compensation available as a result of conversion to the NSPS, while providing flexibility to accommodate changes in the function of the organization and other changed circumstances that might impact compensation levels.

(c) For the purpose of this section, ''compensation'' for civilian employees means adjusted salary, taking into account any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent supplement under other legal authority.

Rate Ranges and General Salary Increases

§ 9901.321 Structure.

(a) Subject to § 9901.105, the Secretary will establish ranges of base salary rates for pay bands, with minimum and maximum rates set and adjusted as provided in § 9901.322.

(b) For each pay band within a career group, the Secretary will establish a common rate range that applies in all locations.

(c) The Secretary may establish and adjust control points within a pay band to manage compensation (e.g., limitations on pay setting and pay progression within a pay band that apply to specified positions). The Secretary may consider only the following factors in developing control points: Mission requirements, labor market conditions, and benchmarks against duties, responsibilities, competencies, qualifications, and performance.

§ 9901.322 Setting and adjusting rate ranges.

(a) Subject to § 9901.105, the Secretary may set and adjust the rate ranges (i.e., range minimums and maximums) established under § 9901.321. In determining the rate ranges, the Secretary may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, and any other relevant factors.

(b) The Secretary may determine the effective date of newly set or adjusted band rate ranges. Established rate ranges will be reviewed for possible adjustment at least annually.

(c) The Secretary may establish different rate ranges and provide different rate range adjustments for different pay bands.

(d) The Secretary may adjust the minimum and maximum rates of a pay band by different percentages.

(e) The maximum rate of each band must be adjusted at the time of a general salary increase under § 9901.323(a)(1) (excluding a lesser increase approved for retained rate employees) by no less than the percentage amount of that increase.

§ 9901.323 Eligibility for general salary increase.

(a) Employees with a current rating of record above ''unacceptable'' (Level 1) and employees who do not have a current rating of record for the most recently completed appraisal period are eligible to receive an approved general salary increase in their base salary rate subject to the following requirements:

(1) A general salary increase must be provided to eligible employees in all NSPS pay bands at the same time that a General Schedule annual adjustment takes effect under 5 U.S.C. 5303. The amount of such general salary increase is determined by the Secretary, but may not be less than 60 percent of the General Schedule annual adjustment under 5 U.S.C. 5303 (unless a lesser percentage is allowed by law). Such general salary increase must be the same percentage amount for all eligible employees under NSPS, except that the increase for employees receiving a retained rate is limited to the lowest permitted amount (i.e., 60 percent of the General Schedule annual adjustment under 5 U.S.C. 5303 unless a lesser percentage is allowed by law).

(2) In addition to the general salary increase under paragraph (a)(1) of this section, and subject to § 9901.105, a general salary increase may be provided to all eligible employees (excluding employees receiving a retained rate under § 9901.356) in a designated occupational series in a pay band at times other than the effective date of the General Schedule annual adjustment under 5 U.S.C. 5303 if the Secretary determines that such an increase is necessary considering only labor market conditions, staffing difficulties, and mission priorities. Different general salary increases may be provided under this paragraph (a)(2) to employees in different occupational series or pay bands.

(b) Employees with a current rating of record of ''unacceptable'' will not receive a general salary increase under this section. If such an employee receives a rating of record above unacceptable for a subsequent appraisal period, the employee is eligible for any general salary increase taking effect on or after the date the employee is given a rating of record above unacceptable.

(c)(1) The Secretary may provide an additional increase in the base salary rate equal to the difference between the percent of the General Schedule annual adjustment under 5 U.S.C. 5303 and the amount of the NSPS general salary increase under paragraph (a)(1) of this section to employees ineligible for performance payout under § 9901.342. This increase is effective at the same time as the NSPS general salary increase.

(2) The increase under paragraph (c)(1) of this section does not apply to employees who—

(i) Are ineligible for a performance payout due to an NSPS rating of record of Level 1 or Level 2;

(ii) Move from a non-NSPS to an NSPS position, or who are newly hired or reappointed to an NSPS position, on the effective date of the performance payment; or

(iii) Are receiving a retained rate under § 9901.356.

(d) A general salary increase under paragraph (a)(2) or paragraph (c) of this section may be applied only to the extent that it does not cause an employee's base salary rate to exceed the maximum rate of the employee's band or applicable control point.

(e) If the adjustment of a pay band minimum rate causes the base salary of an employee with a rating of record above unacceptable (Level 1) to fall below such minimum rate, the employee's salary will be set at the pay band minimum rate.

Local Market Supplements

§ 9901.331 General.

(a) *Introduction.* The base salary ranges established under §§ 9901.321 through 9901.322 may be supplemented in appropriate circumstances by local market supplements, as described in this section. These supplements are set and adjusted as described in § 9901.333. The sum of an employee's base salary plus any applicable local market supplement constitutes the employee's adjusted salary.

(b) *Computation.* Local market supplements are computed by multiplying the applicable supplement percentage rate times the employee's base salary rate and rounding the result to the nearest whole dollar. A local market supplement is payable only to the extent that it does not cause an employee's adjusted salary rate to exceed the rate limitation described in § 9901.312(b).

(c) *Official worksite.* When a local market supplement is linked to a geographic area, the employee's entitlement to the local market supplement is contingent on the employee's official worksite (as defined in 5 CFR 531.605) being located in that geographic area.

(d) *Treatment as basic pay.* Local market supplements are considered basic pay only for the following purposes:

(1) Retirement deductions, contributions, and benefits under 5 U.S.C. chapter 83 or 84;

(2) Life insurance premiums and benefits under 5 U.S.C. chapter 87;

(3) Premium pay under 5 U.S.C. chapter 55, subchapter V, or similar payments under other legal authority, including this subpart;

(4) Severance pay under 5 U.S.C. 5595;

(5) Cost-of-living allowances and post differentials under 5 U.S.C. 5941;

(6) Overseas allowances and differentials under 5 U.S.C. Chapter 59, Subchapter III, to the extent authorized by the Department of State;

(7) Recruitment, relocation, and retention incentives, supervisory differentials, and extended assignment

incentives under 5 U.S.C. Chapter 57, Subchapter IV, and 5 CFR part 575;

(8) Lump-sum payments for accumulated and accrued annual leave under 5 CFR 550, Subpart L;

(9) Determining whether an employee's rate of basic pay is reduced at the point of conversion or movement into or out of the NSPS pay system for the purpose of applying 5 U.S.C. Chapter 75, Subchapter II (dealing with adverse actions), consistent with §§ 9901.351(g), 9901.371(d), and 9901.372(f);

(10) Other payments and adjustments under other statutory or regulatory authority for which locality-based comparability payments under 5 U.S.C. 5304 are considered part of basic pay; and

(11) Any other provisions for which DoD local market supplements are expressly treated as basic pay by law or under this part.

§ 9901.332 Standard and targeted local market supplements.

(a) *General.* NSPS employees may receive standard or targeted local market supplements as described in paragraphs (b) and (c) of this section. Consistent with 5 U.S.C. 9902(e)(8), the full amount of standard and targeted local market supplements must be provided to employees who receive a rating of record above unacceptable (Level 1) or who do not have a rating of record for the most recently completed appraisal period. As provided in § 9901.334, an employee with an unacceptable rating of record may not receive an increase in a standard or targeted local market supplement. Standard local market supplements are designed to satisfy the requirements of 5 U.S.C. 9902(e)(8)(A), while targeted local market supplements are the ''other local market supplements'' referenced in 5 U.S.C. 9902(e)(8)(B).

(b) *Standard local market supplements.* Employees are entitled to standard local market supplements that are generally equivalent to locality payments under 5 U.S.C. 5304 and 5304a, subject to the following requirements:

(1) The percentage values of standard local market supplements must be identical to the percentage values of locality payments established under 5 U.S.C. 5304 and 5304a, except as provided in § 9901.334 with respect to employees with an unacceptable rating of record;

(2) The geographic areas in which standard local market supplements apply must be identical to the corresponding geographic areas established for locality payments under 5 U.S.C. 5304;

(3) An employee's entitlement to a standard local market supplement is based on whether the employee's official worksite (defined consistent with the requirements in 5 CFR 531.605) is located in the given local market area;

(4) The applicable standard local market supplement is paid on top of a retained rate (consistent with the NSPS modification of the pay retention rules);

(5) The cap on an adjusted salary rate that includes a standard local market supplement is the rate for level IV of the Executive Schedule plus 5 percent (consistent with the NSPS extension of the highest band base rate ranges by 5 percent), as provided in § 9901.312(b), except as otherwise provided under § 9901.312(d);

(6) A standard local market supplement does not apply if an employee is entitled to a higher targeted local market supplement; and

(7) Standard local market supplements are not applicable to physicians and dentists (in occupational series 0602 and 0680, respectively), since they receive higher base salary and adjusted salary rates (including any applicable targeted local market supplements) to achieve comparability with physicians and dentists paid under 38 U.S.C. chapter 74 and since their adjusted salary rates apply on a worldwide basis.

(c) *Targeted local market supplements.* Subject to § 9901.105, the Secretary may establish targeted local market supplements for specifically defined categories of employees, subject to the following:

(1) The conditions for coverage under a targeted local market supplement may be based on occupation, band, organizational unit, geographic location of official worksite, specializations, special skills or qualifications, or other appropriate factors;

(2) A targeted local market supplement applies to an employee eligible for a standard local market supplement only if the targeted local market supplement is a larger amount; and

(3) Except for physicians and dentists (in occupational series 0602 and 0680, respectively) or as otherwise provided under § 9901.312(d), an employee's adjusted salary that includes an applicable targeted local market supplement may not exceed the rate cap equal to the rate for Executive Level IV plus 5 percent, as provided in § 9901.312(b).

§ 9901.333 Setting and adjusting local market supplements.

(a) Standard local market supplements are set and adjusted consistent with the setting and adjusting of corresponding General Schedule locality payments under 5 U.S.C. 5304 and 5304a.

(b) Subject to § 9901.105, the Secretary may set and adjust targeted local market supplements. In determining the amounts of the supplements, the Secretary will consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, allowances and differentials under 5 U.S.C. Chapter 59, and any other relevant factors. The Secretary may determine the effective date of newly set or adjusted targeted local market supplements. Established supplements will be reviewed for possible adjustment at least annually in conjunction with rate range adjustments under § 9901.322.

§ 9901.334 Eligibility for pay increase associated with a supplement adjustment.

(a) When a local market supplement is adjusted under § 9901.333, employees to whom the supplement applies with current ratings of record above ''unacceptable'' (Level 1), and employees who do not have current ratings of record for the most recently completed appraisal period, are eligible to receive any pay increase resulting from that adjustment.

(b) An employee with a current rating of record of ''unacceptable'' will not receive a pay increase under this section (i.e., the employee's local market supplement percentage will not be increased). Once such an employee has a new rating of record above ''unacceptable,'' the employee is entitled to the full amount of any applicable local market supplement effective on the date of the first adjustment in that local market supplement occurring on or after the effective date of the new rating of record, or, if earlier, the effective date of an applicable general salary increase as described in § 9901.323(b).

Performance-Based Pay

§ 9901.341 General.

Sections 9901.342 through 9901.345 describe the performance-based pay that is part of the pay system established under this subpart. These provisions authorize payments to employees based on individual performance or contribution, or team or organizational performance, as a means of fostering a high-performance culture that supports mission accomplishment.

§ 9901.342 Performance payouts.

(a) *Overview.* (1) The NSPS pay system will be a performance-based pay system and will result in a distribution of available performance pay funds based upon individual performance, individual contribution, team or organizational performance, or a combination of those elements. The NSPS pay system will use a pay pool concept to manage, control, and distribute performance-based pay increases and bonuses. The performance payout is a function of the amount of money in the performance pay pool and the number of shares assigned to individual employees.

(2) The rating of record used as the basis for a performance pay increase is the one assigned for the most recently completed appraisal period. Unless otherwise provided in this section, if an employee is not eligible to have a rating of record for the current rating cycle for reasons other than those identified in paragraphs (i) through (l) of this section, such employee will not be eligible for a performance payout under this part.

(b) *Performance pay pools.* (1) Pay pools and pay pool oversight will be established and managed in accordance with implementing issuances published by the Secretary, in such a manner as to ensure employees are treated fairly and consistently, and in accordance with merit system principles.

(2) Consistent with paragraph (b)(1) of this section, pay pool composition will be based on organization structure, classification structure, function of work, location, and/or organization mission. The decision on pay pool composition will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by a DoD Component, unless there is no official at a higher level in the organization.

(3) Where determined appropriate, management may establish one or more subsets of a pay pool population (i.e., sub pay pools) for the purpose of reconciling ratings of record, share assignments, and payout determinations. Sub pay pools share in the common fund of the overall pay pool and operate within the requirements and guidelines established for the pay pool to which they belong.

(4) The Secretary may determine a percentage of pay to be included in pay pools and paid out in accordance with accompanying implementing issuances as—

(i) A performance-based pay increase;

(ii) A performance-based bonus; or

(iii) A combination of a performance-based pay increase and a performance-based bonus.

(5) The decision to apply a funding floor or ceiling to a pay pool, including the amount of such floor or ceiling, will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by a DoD Component, unless there is no official at a higher level in the organization.

(c) *Pay Pool Panel.* (1) Consistent with this section, the Pay Pool Panel—

(i) Reviews rating of record, share assignment, and payout distribution decisions;

(ii) Makes adjustments, which in the Panel's view would result in equity and consistency across the pay pool; and

(iii) Elevates any disagreement between the Pay Pool Panel and the employee's supervisory chain to the Pay Pool Manager or Performance Review Authority, as applicable, for resolution.

(2) The Pay Pool Panel members may not participate in payout deliberations or decisions that directly impact their own ratings of record or pay.

(d) *Pay Pool Manager.* The Pay Pool Manager—

(1) Provides oversight of the Pay Pool Panel;

(2) Consistent with this section, is the final approving authority for performance ratings; and

(3) May not participate in payout deliberations or decisions that directly impact his/her own rating of record or pay.

(e) *Performance Review Authority (PRA).* Consistent with this section, the PRA—

(1) Oversees the operation of pay pools established under NSPS;

(2) Ensures procedural and funding consistency among pay pools under NSPS; and

(3) May not participate in payout deliberations or decisions that directly impact his/her own rating of record or pay.

(f) *Performance shares.* (1) Performance shares will be used to determine performance pay increases and/or bonuses. The range of shares which may be assigned for each rating level is as follows:

PERFORMANCE SHARE RANGES TABLE

Rating of record	Share range available for assignment
Level 5	5 or 6 shares.
Level 4	3 or 4 shares.
Level 3	1 or 2 shares.
Level 2	No shares.
Level 1	No shares.

(2) The only factors that may be used in determining share assignment are complexity of the work, level of responsibility, compensation (*e.g.*, recent salary increases, current salary in relation to control points or pay band maximum, current salary in relation to labor market), overall contribution to the mission of the organization, organizational success, raw performance scores, and impact of contributing factors. Pay Pool Managers and/or Pay Pool Panels will review share assignment recommendations to ensure that factors are applied consistently across the pay pool and in accordance with the merit system principles.

(g) *Performance payout.* (1) A performance share is expressed as a percentage of an employee's rate of base salary and is a common value throughout the pay pool. The percent value of a performance share is calculated by dividing the pay pool fund (expressed in dollars) by the summation of the products of multiplying each employee's base salary times the number of shares earned by the employee.

[Share Value(%) = Pay Pool Fund($)/Σ(base salary of each pay pool member × shares assigned each pay pool member)]

(2) An employee's performance payout is calculated by multiplying the employee's base salary as of the end of the pay pool's appraisal period times the number of shares earned by the employee times the share value.

[Employee Performance Payout = Base Salary × Shares × Share Value]

(3) A performance payout may be an increase in base salary, a bonus, or a combination of the two. An increase in base salary may not cause the employee's rate of base salary to exceed the maximum rate or applicable control point of the employee's band rate range. The decision to pay a bonus, including the amount of such bonus, will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by a DoD Component, unless there is no official at a higher level in the organization.

(4) The factors management may consider in determining the amount to

be paid out as a bonus versus an increase in the rate of base salary are limited to the following:

(i) Current base salary in relation to appropriate rate range;

(ii) Current base salary, level of responsibility and complexity of work performed in comparison with others in similar work assignments;

(iii) Performance-based compensation received during the rating cycle associated with promotions, reassignments, or awards;

(iv) Salary levels of occupations in comparable labor markets;

(v) Attrition and retention rates of critical shortage skilled personnel;

(vi) Expectation of continued performance at that level; and

(vii) Overall contribution to the mission of the organization.

(5) When an employee's base salary is not increased based on a control point, a performance payout will be paid as a bonus in lieu of the increase to base salary.

(6) The effective date of an increase in base salary made under this section will be the first day of the first pay period beginning on or after January 1 of each year.

(7) Unless otherwise specified in this section, employees who are no longer covered by NSPS on the effective date of the payout or who moved out of NSPS on a permanent move after the end of their rating cycle but before the effective date of the payout are not entitled to a performance-based payout.

(8) For employees receiving a retained rate above the applicable pay band maximum, the entire performance payout must be in the form of a bonus payment. Any performance payout in the form of a bonus for a retained rate employee will be computed based on the maximum rate of the assigned pay band.

(h) *Proration of performance payouts.* The Secretary will issue implementing issuances regarding prorating of performance payouts for employees who, during the period between performance payouts, are—

(1) Hired, transferred, reassigned, or promoted into NSPS;

(2) In a leave-without-pay status (except as provided in paragraphs (i) and (j) of this section); or

(3) In other circumstances where prorating is considered appropriate.

(i) *Adjustments for employees returning after performing honorable service in the uniformed services.* The rate of base salary for an employee who leaves a DoD position to perform service in the uniformed services (in accordance with 38 U.S.C. 4301 *et seq.* and 5 CFR 353.102) and returns through the exercise of a reemployment right provided by law, Executive order, or regulation under which accrual of service for seniority-related benefits is protected (*e.g.*, 38 U.S.C. 4316) will be set prospectively. The Secretary will credit the employee with increases under § 9901.323 and increases to base salary under this section based on the employee's NSPS rating of record for the appraisal period upon which these adjustments are based. An employee who is eligible for a rating of record for the appraisal period upon which performance-based base salary increases are granted is also eligible for a performance-based pay pool bonus if otherwise eligible by share assignment and payout distribution. If an employee does not have an NSPS rating of record for the appraisal period serving as a basis for increases to base salary under this section, adjustments will be made prospectively based on the average base salary increase (expressed as a percentage) granted to other employees in the same pay pool, pay schedule, and pay band who received the same rating as the employee's last NSPS rating of record or the average base salary increase (expressed as a percentage) granted to employees who received the modal rating for the pay pool, whichever is most advantageous to the employee. In unusual cases where insufficient statistical information exists to determine the modal rating, the Secretary may establish alternative procedures for determining a base salary increase under this section. Proration in the case of employees covered by this paragraph is prohibited.

(j) *Adjustments for employees returning to duty after being in workers' compensation status.* The rate of base salary for an employee who returns to duty after a period of receiving injury compensation under 5 U.S.C. Chapter 81, Subchapter I (in a leave-without-pay status or as a separated employee), will be set prospectively. For the intervening period, the Secretary will credit the employee with increases under § 9901.323 and increases to base salary under this section based on the employee's NSPS rating of record for the appraisal period upon which these adjustments are based. An employee who is eligible for a rating of record for the appraisal period upon which performance-based base salary increases are granted is also eligible for a performance-based pay pool bonus if otherwise eligible by share assignment and payout distribution. If an employee does not have an NSPS rating of record for the appraisal period serving as a basis for increases to base salary under this section, adjustments will be made prospectively based on the average base salary increase (expressed as a percentage) granted to other employees in the same pay pool, pay schedule, and pay band who received the same rating as the employee's last NSPS rating of record or the average base salary increase (expressed as a percentage) granted to employees who received the modal rating for the pay pool, whichever is most advantageous to the employee. In unusual cases where insufficient statistical information exists to determine the modal rating, the Secretary may establish alternative procedures for determining a base salary increase under this section. Proration in the case of employees covered by this paragraph is prohibited.

(k) *Adjustments for employees in special circumstances.* The Secretary will adjust the rate of base salary for an employee who performs activities on ''official time'' (as defined in 5 U.S.C. 7131) or who is on extended approved paid leave. The Secretary will credit these employees with increases to base salary under this section based on the employee's NSPS rating of record for the appraisal period upon which these adjustments are based. An employee who is eligible for a rating of record for the appraisal period upon which performance-based base salary increases are granted is also eligible for a performance-based pay pool bonus if otherwise eligible by share assignment and payout distribution. If an employee does not have an NSPS rating of record for the appraisal period serving as a basis for increases to base salary under this section, such adjustments will be based on the average base salary increase (expressed as a percentage) granted to other employees in the same pay pool, pay schedule, and pay band who received the same rating as the employee's last NSPS rating of record or the average base salary increase (expressed as a percentage) granted to employees who received the modal rating for the pay pool, whichever is most advantageous to the employee. In unusual cases where insufficient statistical information exists to determine the modal rating, the Secretary may establish alternative procedures for determining a base salary increase under this section.

(l) *Adjustments for employees returning from temporary assignments outside of NSPS or returning to NSPS from long-term training for which no NSPS performance plan was assigned.* The Secretary will set the rate of base salary prospectively for an employee who returns from a temporary assignment (including a supervisory

probationary assignment) outside of NSPS or from long-term training (e.g., industry assignment) for which no NSPS performance plan was assigned. The Secretary will credit the employee with increases under § 9901.323 and increases to base salary under this section based on the employee's NSPS rating of record for the appraisal period upon which these adjustments are based. An employee who is eligible for a rating of record for the appraisal period upon which performance-based base salary increases are granted is also eligible for a performance-based pay pool bonus if otherwise eligible by share assignment and payout distribution. If an employee does not have an NSPS rating of record for the appraisal period serving as a basis for increases to base salary under this section, such adjustments will be made prospectively based on the average base salary increase (expressed as a percentage) granted to other employees in the same pay pool, pay schedule, and pay band who received the same rating as the employee's last NSPS rating of record or the average base salary increase (expressed as a percentage) granted to employees who received the modal rating for the pay pool, whichever is most advantageous to the employee. In unusual cases where insufficient statistical information exists to determine the modal rating, the Secretary may establish alternative procedures for determining a base salary increase under this section.

§ 9901.343 Pay reduction based on unacceptable performance and/or conduct.

An employee's rate of base salary may be reduced based on a determination of unacceptable performance, conduct, or both after applying applicable adverse action procedures. Such a reduction will be at least 5 percent of base salary and may not exceed 10 percent of base salary unless the employee has been changed to a lower pay band and a greater reduction is needed to set the employee's pay at the maximum rate of the pay band. (See also §§ 9901.353 and 9901.355.) An employee's rate of base salary may not be reduced more than once in a 12-month period based on unacceptable performance, conduct, or both.

§ 9901.344 Other performance payments.

(a) The decision to grant other performance payouts, including the amount of such payouts, will be reviewed and approved by an official of the employee's Component who is at a higher level than the official who made the initial decision, as determined by the DoD Component, unless there is no official at a higher level in the organization. In accordance with implementing issuances, authorized officials may make other performance payments to—

(1) Reward extraordinary individual performance, as described in paragraph (b) of this section;

(2) Recognize organizational or team achievement, as described in paragraph (c) of this section; and

(3) Provide for other special circumstances.

(b)(1) An Extraordinary Performance Recognition (EPR) is an increase to base salary, a bonus, or a combination of these intended to reward employees when the payout formula does not adequately compensate them for their extraordinary performance and results. The EPR payment is in addition to performance payouts under § 9901.342 and will usually be made effective at the time of those payouts. The future performance and contribution level exhibited by the employee will be expected to continue at an extraordinarily high level.

(2) Only employees who have achieved a Level 5 NSPS rating of record for the most recently completed appraisal period are eligible for an EPR.

(3) The amount of an EPR awarded in the form of an increase to base salary may not cause the employee's base salary to exceed the maximum rate of the employee's pay band or any applicable control point.

(c)(1) Organizational/Team Achievement Recognition (OAR) payments may be made in the form of an increase to base salary, a bonus, or a combination of these in order to recognize the members of a team, organization or branch whose performance and contributions have successfully and directly advanced organizational goals. The OAR payment is made in conjunction with the annual performance payout.

(2) To receive an OAR, an employee must have an NSPS rating of record of Level 3 or higher for the most recently completed appraisal period.

(3) The amount of the OAR payment provided in the form of an increase to base salary may not cause the employee's base salary to exceed the maximum rate of the employee's pay band or any applicable control point.

§ 9901.345 Accelerated Compensation for Developmental Positions (ACDP).

(a) Accelerated Compensation for Developmental Positions (ACDP) is an increase to base salary that may be provided to employees participating in Component training programs or in other developmental capacities as determined by Component policy. ACDP recognizes growth and development in the acquisition of job-related competencies combined with successful performance of job objectives.

(b) The use of ACDP is limited to employees in the lowest pay band of a nonsupervisory pay schedule who are in developmental or trainee level positions.

(c) Components choosing to provide ACDP increases must establish and document standards by which such employees will be identified and growth and development criteria by which additional pay increases will be determined.

(d) The amount of the ACDP increase generally will not exceed 20 percent of an employee's base salary. The decision to grant an ACDP exceeding 20 percent of an employee's base salary must be made on a case-by-case basis and approved by an official who is at a higher level than the official who made the initial decision, as determined by the DoD Component, unless there is no official at a higher level in the organization.

(e) The amount of the ACDP increase may not cause the employee's base salary to exceed the top of the employee's pay band or any applicable control point.

(f) To qualify for an ACDP, an employee must have a rating of record of Level 3 (or equivalent non-NSPS rating of record) or higher, consistent with § 9901.405. An ACDP may be awarded to an employee who does not have a rating of record if an authorizing official conducts a performance assessment and determines that the employee is performing at the equivalent of Level 3 or higher. This performance assessment does not constitute a rating of record.

(g) An ACDP increase may not be granted unless the employee is in a pay and duty status in an NSPS-covered position on the effective date of the increase.

(h) The Secretary may provide adjustments under this section in lieu of or in addition to adjustments under § 9901.342.

Pay Administration

§ 9901.351 General.

(a) *Introduction.* The pay administration provisions in §§ 9901.351 through 9901.356 are applied using base salary rates, except when specifically otherwise provided.

(b) *Geographic recalculation.* When an employee covered by a targeted local market supplement moves to a position

in a new location where a different local market supplement and/or pay schedule applies, the employee's adjusted salary before the move will be recalculated to reflect a local market supplement (standard or targeted, as appropriate) for the employee's existing position—as if that position were at the same location as the position to which the employee is moving, consistent with the geographic conversion principle described at 5 CFR 531.205. For employees moving from a non-NSPS position to an NSPS position in a different location covered by a different salary supplement, the employee's adjusted salary under the former system will be recalculated as if the former position were located in the new location, consistent with the geographic conversion principle described at 5 CFR 531.205.

(c) *Within-grade increase (WGI) adjustment equivalent.* (1) When an employee is permanently placed (not by conversion under § 9901.371) in an NSPS position from a GS position through a management-directed action, including a management-directed reassignment, realignment, movement into NSPS, or placement via the Priority Placement Program (PPP), Reemployment Priority List (RPL), or Interagency Career Transition Assistance Plan (ICTAP), the employee will receive an increase to base salary equivalent to the amount he or she would have received as a WGI adjustment if the employee had converted into NSPS with his or her organization, as provided in § 9901.371.

(2) An employee who is placed in an NSPS position from a GS position through an employee-initiated reassignment may, at the discretion of the authorized management official, receive this same WGI adjustment equivalent increase described in paragraph (c)(1) of this section. The decision to grant this increase will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by the DoD Component. At a minimum, the higher-level approval level may be no lower than one level above the authorized management official who approved the reassignment unless there is no official at a higher level in the organization.

(3) An increase provided under paragraphs (c)(1) and (c)(2) of this section occurs before any other increases provided under NSPS, may not cause the employee's base salary to exceed the maximum rate of the assigned pay band, and is in addition to any other discretionary increase the employee may be eligible to receive.

(d) *Minimum rate.* Except in the case of an employee who does not receive a pay increase under § 9901.323 because of an unacceptable rating of record, an employee's base salary may not be less than the minimum rate of the employee's pay band.

(e) *Maximum rate.* Except as provided in § 9901.356, an employee's base salary may not exceed the maximum rate of the employee's band rate range.

(f) *Pay periods and hourly rates.* The Secretary will follow the rules for establishing pay periods and computing rates of pay in 5 U.S.C. 5504 and 5505, as applicable. For employees covered by 5 U.S.C. 5504, annual rates of base salary will be converted to hourly rates of base salary in computing payments received by covered employees.

(g) *Rate comparisons upon movement to an NSPS position.* An employee who moves to an NSPS position from a non-NSPS position by management-directed action (excluding conversion under § 9901.371) will receive a rate of basic pay that is not less than the employee's rate of basic pay immediately before movement (after making adjustments consistent with those made under § 9901.371(e) for employees who convert to NSPS). For this purpose and for the purpose of applying 5 U.S.C. chapter 75, subchapter II (dealing with adverse actions), at the point of movement into NSPS, an employee's rate of basic pay includes any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent payment under other legal authority.

(h) *Adjustment of teacher annual rates.* When an individual leaves a teaching position as defined in 20 U.S.C. 901 and moves to a position becomes covered by NSPS, the individual's existing annual base salary rate for the teaching position may be adjusted for the purpose of setting pay under NSPS. The adjustment will take into account the shorter work year applicable to the teacher position. The adjustment may not exceed 20 percent of the existing annual base salary rate of the teaching position.

§ 9901.352 Setting an employee's starting pay.

(a) Subject to the requirements of this section, the Secretary may set the starting base salary rate for individuals who are newly appointed or reappointed to the Federal service anywhere within the rate range of the assigned pay band (subject to any applicable control points). Pay will be set based upon the following considerations:

(1) Labor market considerations (i.e., availability of candidates and labor market rates);

(2) Specialized skills, knowledge, and/or education possessed by the employee in relation to the requirements of the position;

(3) Critical mission or business requirement(s);

(4) Salaries of other employees in the organization performing similar work; and

(5) Current salary of the candidate.

(b) For the purposes of this section, ''newly appointed'' means those individuals who have not previously been employed in the Federal service—i.e., this is their first/initial Federal appointment. The term ''reappointed'' means those individuals who have been previously employed in the Federal service and have been separated from the Federal service for at least 1 full workday immediately before employment in an NSPS position. The term ''Federal service'' includes civilian service as an employee of any entity of the Federal Government, including the judicial branch, legislative branch, and executive branch (including Government corporations, the Postal Regulatory Commission, the U.S. Postal Service and any nonappropriated fund (NAF) instrumentality described in 5 U.S.C 2105(c)).

§ 9901.353 Setting pay upon reassignment.

(a)(1) A reassignment occurs when an employee moves, voluntarily or involuntarily, to a different position or set of duties within his/her pay band or to a position in a comparable pay band, or from a non-NSPS position to an NSPS position at a comparable level of work, on either a temporary or permanent basis. In NSPS, employees may be eligible for an increase or decrease to base salary upon temporary or permanent reassignment as described in this section.

(2) An employee who is reassigned through reduction-in-force (RIF) procedures is not eligible for an increase to base salary under this section (except as necessary to set the employee's rate at the band minimum). Such an employee's base salary will be protected by applying pay retention under § 9901.356.

(3) A decision to increase an employee's pay under this section will be based on one or more of the following factors:

(i) A determination that an employee's responsibilities will significantly increase;

(ii) Critical mission or business requirements;

(iii) Need to advance multi-functional competencies;

(iv) Labor market conditions (i.e., availability of candidates and labor market rates);

(v) Reassignment from non-supervisory to supervisory position;

(vi) Employee's past and anticipated performance and contribution;

(vii) Location of position;

(viii) Specialized skills, knowledge, or education possessed by the employee in relation to those required by the position; and

(ix) Salaries of other employees in the organization performing similar work.

(b)(1) Except as otherwise provided in paragraph (c) of this section, when an employee is voluntarily reassigned within his/her pay band or to a comparable pay band, an authorized management official may reduce the employee's base salary in any amount determined prior to the reassignment with the employee's agreement, as long as the employee's base salary does not drop below the minimum of the assigned rate range. In appropriate circumstances, an authorized management official may make approval of a reassignment contingent on the employee's acceptance of a reduced rate. Subject to paragraph (b)(2) of this section, an authorized management official may also increase the employee's current base salary by up to 5 percent (not to exceed the rate range maximum).

(2) The decision to grant a decrease or increase, including the amount of such decrease or increase, as applicable under paragraph (b)(1) of this section, will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by the DoD Component. At a minimum, the higher-level approval may be no lower than one level above the authorized management official who approved the reassignment unless there is no official at the higher level in the organization. There are no limits to the number of times an employee may be reassigned; however, an employee may only receive up to a total of a 5 percent cumulative increase to base salary in any 12-month period as the result of an employee-initiated action, unless an exception to the 12-month limitation is approved by an authorized management official. The increase will be calculated as a percentage of the employee's base salary at the time the increase takes effect.

(c)(1) Subject to paragraphs (b)(2) and (c)(2) through (c)(4) of this section, as applicable, when an employee is voluntarily reassigned from a position with a targeted local market supplement or from a non-NSPS position (e.g., General Schedule, Federal Wage System, Nonappropriated Fund), an authorized management official will set pay considering the employee's adjusted salary (including any applicable locality pay, special rate supplement, or other equivalent supplement) and any physicians' comparability allowance payable for the position held prior to the reassignment.

(2) An authorized management official may—

(i) Set the employee's new adjusted salary equal to the employee's current adjusted salary plus any physicians' comparability allowance, if applicable, received prior to the reassignment;

(ii) Decrease the employee's adjusted salary by any amount determined prior to the reassignment with the employee's agreement, as long as the employee's base salary does not drop below the minimum of the assigned rate range; or

(iii) Increase the employee's current adjusted salary plus any physicians' comparability allowance, if applicable, by up to 5 percent (subject to the limitation that the resulting base salary may not exceed the rate range maximum).

(3) If the NSPS adjusted salary is increased beyond the amount of the employee's current adjusted salary plus any physicians' comparability allowance, the percentage of the increase is counted toward the 12-month limitation under paragraph (b) of this section.

(4) When an employee covered by paragraph (c)(1) of this section moves geographically in conjunction with a voluntary reassignment, the employee's current adjusted salary must be recalculated in accordance with the rules at § 9901.351(b) before setting pay under paragraph (c)(2) of this section.

(d)(1) Except as otherwise provided in paragraphs (e) or (f) of this section, when an employee is reassigned via management-directed action within his/her current pay band or to a comparable pay band, an authorized management official will set pay at an amount no less than the employee's current base salary and may increase the employee's current base salary by up to 5 percent. (If the employee's current base salary exceeds the maximum of the new pay band, no increase is provided, and the employee's rate will be set at that maximum rate, or if the employee is eligible, converted to a retained rate as provided in § 9901.356.)

(2) The decision to grant an increase under paragraph (d)(1) of this section, including the amount of such increase, is discretionary and will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by a DoD Component, unless there is no official at a higher level in the organization. There is no limit to the number of times an employee may be reassigned by management, and the employee is eligible for an increase of up to 5 percent with each reassignment. Any increase associated with a management-directed reassignment does not count toward the 12-month limitation described in paragraph (b) of this section.

(e)(1) Subject to paragraph (d)(2), (e)(2), and (f) of this section, as applicable, when an employee is reassigned via management-directed action from a position with a targeted local market supplement or from a non-NSPS position (e.g., General Schedule, Federal Wage System, Nonappropriated Fund), an authorized management official will set the employee's new adjusted salary at no less than the employee's adjusted salary (including any applicable locality pay, special rate supplement, or equivalent supplement) plus any physicians' comparability allowance payable for the position held prior to the reassignment, provided the resulting base salary does not exceed the maximum rate of the new pay band. Subject to the same maximum limitation, an authorized management official may also increase the employee's adjusted salary by up to 5 percent.

(2) When an employee covered by paragraph (e)(1) of this section moves geographically in conjunction with a management-directed reassignment, the employee's current adjusted salary must be recalculated in accordance with the rules in § 9901.351(b) before setting pay under such paragraph (e)(1).

(3) For the purpose of determining whether an employee experienced a reduction in pay under 5 U.S.C. Chapter 75 when reassigned from a non-NSPS position under paragraph (e)(1) of this section, § 9901.351(g) applies.

(f) When an employee is involuntarily reduced in pay via reassignment to a comparable pay band through adverse action procedures (as a result of unacceptable performance and/or conduct), the authorized management official must reduce the employee's base salary by at least 5 percent, and may reduce it by up to 10 percent. However, the reduction may not cause an employee's base salary to fall below the minimum rate of the employee's assigned pay band. An employee's base salary may not be reduced more than once in a 12-month period based on unacceptable performance, conduct, or both. (See also § 9901.343.)

(g) When an employee returns to an NSPS position from a temporary reassignment to another NSPS position, the employee's current base salary rate must be reconstructed as if the employee had not been temporarily reassigned. For this purpose, the employee will be deemed to have received performance pay increases under § 9901.342 and other increases in base salary under §§ 9901.344 and 9901.345 equal to the percentage value of such increases actually received by the employee during the temporary reassignment. However, any such increases must be applied as if the employee were in the position and band held immediately before the temporary reassignment (i.e., using the rate range and any applicable control points for that band). The employee will also be credited with any general salary increases provided during the temporary reassignment that would have been applied to the employee if he or she had continued to hold the position held immediately before that temporary reassignment. A reassignment increase is not authorized when the employee returns to the position from which temporarily reassigned. (See § 9902.342(l) for rules governing pay setting for an employee who returns to an NSPS position after being temporarily assigned to a non-NSPS position.)

(h) When an employee is reassigned to an NSPS supervisory position but later returns to the NSPS position held before that reassignment (or comparable position) because of failure to complete an in-service (supervisory) probationary period, the employee's base salary rate must be reconstructed as if the employee had not been reassigned. For this purpose, the employee will be deemed to have received performance pay increases under § 9901.342 and other increases in base salary under §§ 9901.344 and 9901.345 equal to the percentage value of such increases actually received by the employee during the reassignment. However, any such increases must be applied as if the employee were in the position and band held immediately before the reassignment (i.e., using the rate range and any applicable control points for that band). The employee will also be credited with any general salary increases provided during the reassignment that would have been applied to the employee if he or she had continued to hold the position held immediately before that reassignment. A reassignment increase upon return to the previous position (or comparable position) under this paragraph is not authorized. (See § 9902.342(l) for rules governing pay setting for an employee who returns to an NSPS position after failure to complete a supervisory probationary period for a non-NSPS supervisory position.)

§ 9901.354 Setting pay upon promotion.

(a) Except as otherwise provided in this section, upon an employee's promotion, the employee will receive an increase in his or her base salary equal to at least 6 percent, but the resulting base salary rate may not be lower than the minimum rate or higher than the maximum rate of the new pay band. The decision to grant a promotion increase exceeding 12 percent must be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by the DoD Component, unless a higher increase is necessary to reach the minimum rate of the new pay band or there is no official at a higher level in the organization.

(b) The authorized management official may consider only the following criteria in determining the amount of the promotion increase:

(1) Critical mission or business requirements;

(2) Employee's past and anticipated performance and contribution;

(3) Specialized skills or knowledge possessed by the employee;

(4) Labor market conditions (including availability of candidates and the labor market rates for similar types of employees at the level represented by the pay band to which the employee is being promoted);

(5) Base salary rates paid to other employees in similar positions in the higher pay band; and

(6) Location of position.

(c)(1) If an employee's temporary promotion is made permanent without a break, the employee's base salary will remain unchanged. No additional promotion increase may be provided.

(2) When an employee returns from a temporary promotion to another NSPS position, the employee's current base salary rate must be reconstructed as if the employee had not been temporarily promoted. For this purpose, the employee will be deemed to have received performance pay increases under § 9901.342 and other increases in base salary under §§ 9901.344 and 9901.345 equal to the percentage value of such increases actually received by the employee during the temporary promotion. However, any such increases must be applied as if the employee were in the position and band held immediately before the temporary promotion (i.e., using the rate range and any applicable control points for that band). The employee will also be credited with any general salary increases provided during the temporary promotion that would have been applied to the employee if he or she had continued to hold the position held immediately before that temporary promotion. A reduction-in-band increase upon return to the previous position (or comparable position) under this paragraph is not authorized. (See § 9902.342(l) for rules governing pay setting for an employee who returns to an NSPS position after being temporarily assigned to a non-NSPS position.)

(d)(1) An employee on pay retention who is re-promoted to the pay band from which reduced (or a comparable band) is not automatically entitled to have his/her pay set in accordance with the promotion rules described in paragraphs (a) and (b) of this section. If the employee's retained rate falls within the rate range of the newly assigned pay band, the authorized management official may maintain the same base salary upon re-promotion, or increase the employee's base salary to a rate above his or her retained rate. However, the employee's new base salary may not exceed the rate that would be provided using the promotion rules described in paragraphs (a) and (b) of this section. The employee's retained rate will be used when calculating any increase approved by an authorized management official. If the employee's retained rate falls below the minimum rate of the newly assigned pay band, the employee's base salary must be set at least at the minimum rate of the band. If the employee's retained rate is higher than the maximum rate of the newly assigned pay band, pay retention will continue (subject to the requirements of § 9901.356).

(2) An employee who is promoted to a pay band higher than the one from which previously reduced in band will be covered by the promotion rules described in paragraphs (a) and (b) of this section. The employee's retained rate will be used when calculating the 6 percent (or higher) increase.

§ 9901.355 Setting pay upon reduction in band.

(a) *General.* When an employee is reduced in band, either voluntarily or involuntarily, the setting of the employee's base salary rate is subject to the rules in this section. As applicable, pay retention provisions established under § 9901.356 will apply. If pay retention does not apply, the employee's base salary may be reduced, subject to the requirements in paragraph (b) of this

section. The employee may be eligible for an increase to base salary, subject to the requirements in paragraph (c) of this section.

(b) *Pay reduction.* An employee's base salary may be reduced upon reduction in band, subject to the following requirements:

(1) No base salary reduction is made when pay retention is applicable, except under paragraph (b)(4) of this section.

(2) The reduction in base salary may not cause the rate to fall below the minimum rate of the employee's new band.

(3) The base salary must be reduced as necessary to ensure that the new base salary is no greater than the maximum rate of the employee's new band.

(4) Adverse action procedures in 5 U.S.C. Chapter 75 must be applied when an employee is involuntarily placed in a position in a lower pay band for unacceptable performance and/or conduct. In this circumstance, the authorized management official may reduce the employee's base salary. If such a reduction is made, it must be at least 5 percent, but no more than 10 percent, of an employee's base salary after applying adverse action procedures. However, a reduction in base salary under this paragraph may not cause an employee's base salary to fall below the minimum rate of the employee's new pay band, or be more than 10 percent unless a larger reduction is needed to place the employee at the maximum rate of the lower band. (See also § 9901.343.)

(5) If an employee held a position with a targeted local market supplement or a non-NSPS position prior to the reduction in band, the pay reduction is applied using adjusted salary rates, consistent with the reassignment rules in § 9901.353(c) (including, as appropriate, a geographic recalculation prior to applying the decrease, consistent with the provisions of § 9901.351(b)).

(c) *Pay increase.* An employee's base salary may be increased by an authorized management official upon reduction in band, subject to the following requirements:

(1) An employee who is reduced in band involuntarily—e.g., through reduction-in-force (RIF) procedures or by placement through the DoD Priority Placement Program (PPP) or Reemployment Priority List (RPL)—is not eligible for an increase to base salary (except if necessary to set the employee's base salary at the minimum rate of the new pay band).

(2) When an employee voluntarily moves to a lower pay band, the authorized management official may increase the employee's base salary, but must set the employee's base salary within the rate range for the employee's band. An increase in base salary may be up to 5 percent of the employee's current base salary (not to exceed the maximum of the rate range). This increase of up to 5 percent is deemed to be a ''reassignment increase'' for the purpose of applying the 12-month limitation in § 9901.353(b)(2). Also, in applying this increase, adjusted salary rates will be used when an employee held a position with a targeted local market supplement or a non-NSPS position prior to the reduction in band, consistent with the reassignment increase rules in § 9901.353(c) (including, as appropriate, a geographic recalculation prior to applying the increase, consistent with the provisions of § 9901.351(b)). This increase is subject to higher-level approval. At a minimum, the higher-level approval may be no lower than one level above the authorized management official who approved the reduction in band.

(3) A decision to increase an employee's pay under paragraph (c)(2) of this section will be based on—

(i) Critical mission or business requirements;

(ii) The need to advance multi-functional competencies;

(iii) The labor market conditions (i.e., availability of candidates, labor market rates for similar types of employees);

(iv) Reassignment from non-supervisory to supervisory position;

(v) Location of position;

(vi) Required specialized skills, knowledge, or education possessed by the employee;

(vii) Performance-based considerations; and

(viii) The base salary rates paid to other employees in similar positions in the lower pay band.

(d) *Termination of temporary promotion.* This section does not apply to a reduction in band associated with the termination of a temporary promotion. Instead, the rules in § 9901.354(c)(2) apply.

(e) *Failure to complete probationary period.* When an employee who fails to complete an in-service (e.g., supervisory) probationary period is reduced in band upon return to the position held before the probationary period (or a comparable position), the employee's current base salary rate must be reconstructed as if the employee had not been promoted. For this purpose, the employee will be deemed to have received performance pay increases under § 9901.342 and other increases in base salary under §§ 9901.344 and 9901.345 equal to the percentage value of such increases actually received by the employee during the promotion. However, any such increases must be applied as if the employee were in the position and band held immediately before the promotion (i.e., using the rate range and any applicable control points for that band). The employee will also be credited with any general salary increases provided during the promotion that would have been applied to the employee if he or she had remained in the position held immediately before that promotion. A reduction-in-band increase upon return to the previous position (or comparable position) under this paragraph is not authorized. (See § 9902.342(l) for rules governing pay setting for an employee who returns to an NSPS position after being temporarily assigned to a non-NSPS position.)

§ 9901.356 Pay retention.

(a) Pay retention prevents a reduction in base salary that would otherwise occur by preserving the former rate of base salary within the employee's new pay band or by establishing a retained rate that exceeds the maximum rate of the new pay band. Local market supplements are not considered part of base salary in applying pay retention.

(b) Pay retention will be based on the employee's rate of base salary in effect immediately before the action that would otherwise reduce the employee's rate. A retained rate will be compared to the range of rates of base salary applicable to the employee's position.

(c) Pay retention will be granted for a period of 104 weeks.

(d) Under NSPS, pay retention will be granted when an employee's base salary would otherwise be reduced in the following situations:

(1) As the result of reduction in force or reclassification;

(2) When an otherwise eligible employee is placed through the Priority Placement Program (PPP), including placement resulting from early registration, even though the employee does not have a specific reduction in force (RIF) notice;

(3) When an organization undergoes realignment or reduction, and

(i) An employee who would not be affected personally requests a reduction in band;

(ii) Management determines the employee's reduction in band results in placement in a more suitable position; and

(iii) That action lessens or avoids the impact of the RIF on other employees;

(4) When an employee accepts a position in a lower pay band designated in advance by the component as being

hard-to-fill using any of the following criteria:

(i) Rates of pay offered by non-Federal employers are significantly higher than those payable under NSPS for the area, location, occupational group, or other class of positions involved;

(ii) The remoteness of the area or location involved;

(iii) The undesirability of the working conditions or the nature of the work involved (including exposure to toxic substances or other occupational hazards); or

(iv) Any other circumstances the Component considers appropriate, subject to review and approval by an official who is at a higher level than the official who made the initial decision;

(5) When an employee is reduced in band on return from an overseas assignment under the terms of a pre-established agreement including—

(i) An employee released from a period of service specified in his or her current transportation agreement due to an involuntary, management-initiated action other than for unacceptable performance and/or misconduct;

(ii) An employee, who has completed more than one year of service under a current agreement, released from a transportation agreement for compelling humanitarian or compassionate reasons; and

(iii) A non-displaced overseas employee under no obligation to return to the United States who is otherwise eligible for PPP registration in accordance with DoD Directive 1400.20;

(6) When an employee declines an offer to transfer with his or her function to a location outside the commuting area, or is identified with such function but does not receive an offer at the gaining activity, and is placed in a position in a lower pay band at the losing activity or any other DoD activity;

(7) When an employee accepts a position in a lower pay band offered by an activity to accommodate a disabling medical condition similar to the circumstances described in 5 CFR 831.1203(a)(4);

(8) When an employee occupying a position under a Schedule C appointment (authorized under 5 CFR 213.3301) is placed, other than for unacceptable performance and/or misconduct or at the employee's request, in a position in a lower pay band in the competitive service or in another Schedule C position, provided that such action is not solely the result of a change in agency leadership (change in administration);

(9) When an employee occupying an Army or Air Force dual status military technician position lost, or is scheduled to lose, eligibility for dual status technician employment through no fault of his or her own and accepts placement without a break in service to a non-dual status technician position in a lower pay band;

(10) When an employee occupying a National Guard dual status technician position is involuntarily separated, through no fault of his or her own, and accepts placement, without a break in service, to a non-dual status technician position in a lower pay band;

(11) When an employee whose job is abolished declines an offer within the competitive area, but outside the commuting area, and is placed in a lower pay band position in the commuting area, provided the employee is not serving under a mobility agreement;

(12) When an employee's base salary is reduced as the result of the movement of his or her position from a DoD nonappropriated fund (NAF) instrumentality to coverage by the DoD civil service system without a break in service of more than three days; or

(13) When an employee's base salary would exceed the maximum of the rate range because the maximum of the rate range decreased or as a result of a management-directed reassignment.

(e) An authorized management official may grant pay retention for circumstances other than those detailed in paragraphs (d)(1) through (d)(13) of this section. This determination is discretionary, and appropriate use is subject to higher-level approval. At a minimum, the higher-level approval may be no lower than one level above the authorized management official who recommended the determination. These circumstances may be specified in advance or may be approved on a case-by-case basis. This authority applies to personnel actions initiated by management, not at the employee's request, and other than for unacceptable performance and/or misconduct, and only if those actions would further the agency's mission in accordance with applicable law and regulation.

(f) Pay retention will terminate—

(1) At the end of the 104-week period;

(2) When the employee moves to another position with a rate range that encompasses the employee's retained rate;

(3) When an increase in the maximum rate for the employee's pay band causes the maximum rate to equal or exceed his/her retained rate, or the employee's base salary is encompassed within his or her assigned rate range as a result of a pay reduction based on unacceptable performance and/or conduct, subject to adverse action procedures;

(4) When the employee is no longer covered by an NSPS position or has a break in service of 1 workday or more (which includes employees placed via PPP after separation), unless otherwise covered under another section of this regulation;

(5) When the employee is reduced in band for unacceptable performance and/or conduct; or

(6) When the employee is reduced in band at his or her request in circumstances other than stated in paragraph (d) of this section.

(g) An employee whose pay retention terminates at the end of the 104-week period will have his or her pay set at the maximum rate of the pay band in which he/she is currently assigned.

(h) Upon termination of pay retention, the employee immediately becomes eligible for any applicable general salary increase and performance payout which may include an increase to base salary, unless otherwise ineligible.

(i) Pay retention does not apply in the following circumstances:

(1) Declination of a position offer under RIF procedures set forth in 5 CFR part 351;

(2) Break in service of 1 workday or more (which includes employees placed via PPP after separation), unless otherwise covered under paragraph (d) of this section;

(3) Movement from a non-DoD position to an NSPS-covered position;

(4) Failure to satisfactorily complete an in-service probationary period;

(5) Return to an employee's former position at the end of a temporary promotion or temporary reassignment;

(6) Reassignment or reduction in band for unacceptable performance and/or conduct; or

(7) Reassignment or reduction in band at the employee's request in circumstances other than stated in paragraph (d) of this section.

(j) Employees entitled to a retained rate will receive any performance payouts in the form of bonuses, rather than base salary adjustments, as provided in § 9901.342(g)(8).

(k) An employee receiving a retained rate will receive any general salary increase under § 9901.323(a)(1), subject to the conditions in § 9901.323, and will receive any applicable local market supplement adjustment, subject to the conditions in § 9901.334.

(l) The 104-week time limit established under paragraphs (c) and (f)(1) of this section will be extended by a period of time equal to the length of time an employee is deployed away from his or her regular duty station in support of a contingency operation as defined in 10 U.S.C. 101, or an

emergency as determined in accordance with DoD Directive 1400.31, ''DoD Civilian Work Force Contingency and Emergency Planning and Execution'' (or any successor regulation).

(m) Any DoD employee with a preexisting entitlement to pay retention under 5 CFR part 536 immediately before becoming covered by NSPS, or who obtains entitlement to pay retention upon becoming covered by NSPS, will be entitled to a retained rate under this section without regard to the 104-week limit (as described in paragraphs (c) and (f)(1) of this section). Pay retention will terminate under the conditions in paragraphs (f)(2) through (f)(6) of this section.

Premium Pay

§ 9901.361 General provisions.

(a) *Introduction*. As provided in § 9901.303(a)(2), the provisions of 5 U.S.C. Chapter 55, Subchapter V, and related regulations are waived or modified as provided in paragraph (e) of this section and §§ 9901.362 through 9901.364 (except as provided in paragraph (b) of this section). To the extent that the provisions of 5 U.S.C. Chapter 55, Subchapter V, and related regulations are not waived or modified, NSPS employees and positions remain subject to those provisions. Sections 9901.363 and 9901.364 establish new types of premium payments in addition to those found in 5 U.S.C. Chapter 55, Subchapter V.

(b) *Provisions not waived or modified*. The following provisions of 5 U.S.C. chapter 55, subchapter V, are not waived or modified:

(1) 5 U.S.C. 5544 (relating to prevailing rate employees); and

(2) 5 U.S.C. 5545b (relating to firefighter pay).

(c) *Applicability of Fair Labor Standards Act*. The Fair Labor Standards Act of 1938 (FLSA), as amended (29 U.S.C. 201 *et seq.*) and OPM regulations in 5 CFR part 551 apply to NSPS employees. DoD must determine whether an employee is exempt or nonexempt under the FLSA minimum wage and overtime pay provisions in accordance with the FLSA and OPM regulations. In applying FLSA overtime pay provisions, local market supplements are treated the same as locality pay under 5 U.S.C. 5304 and are included in computing total remuneration, the hourly regular rate, and straight time rate under 5 CFR Part 551.

(d) *Applying regulations in 5 CFR Part 550, Subpart M*. In applying the regulations in 5 CFR part 550, subpart M (dealing with firefighter pay) to NSPS employees, the reference to ''locality pay'' in 5 CFR 550.1305(e) must be interpreted to be a reference to a local market supplement. Consistent with 5 CFR 550.1306(a), a firefighter compensated under 5 CFR part 550, subpart M, may not receive additional premium pay except for compensatory time off for travel under § 9901.362(j) or for religious observances under § 9901.362(k) and foreign language proficiency pay under § 9901.364.

(e) *Physicians and dentists*. Physicians and dentists (in occupational series 0602 and 0680, respectively) under NSPS are not eligible for premium pay except for compensatory time off for religious observances under § 9901.362(k).

(f) *Senior Executive Service*. Members of the Senior Executive Service under NSPS are not eligible for premium pay, except for compensatory time off for religious observances under § 9901.362(k).

§ 9901.362 Modification of standard provisions.

(a) *Premium pay limitations*. (1) An employee is covered by the premium pay limitations established under 5 U.S.C. 5547 and related regulations, except as provided in paragraph (a)(2) of this section. Notwithstanding the modification of various premium payments under this section, those payments are still considered to be payments in 5 U.S.C. Chapter 55, Subchapter V, for the purpose of applying 5 U.S.C. 5547 (including the purpose of determining the covered premium payments under 5 U.S.C. 5547(a)).

(2) Subject to § 9901.105, the Secretary may waive the limitations established by 5 U.S.C. 5547 and related regulations and instead apply an annual limitation equal to the rate payable under 3 U.S.C. 104 in the case of specified categories of employees and situations on a time-limited basis. Such a waiver may not apply with respect to additional compensation that is normally creditable as basic pay for retirement or any other purpose.

(b) *Overtime pay*. (1) An employee is covered by the overtime pay (including compensatory time off) provisions in 5 U.S.C. 5542 and 5543 and related regulations, subject to the requirements and modifications described in paragraphs (b)(2) through (b)(6) of this section.

(2) Consistent with 5 U.S.C. 5542(c), an employee who is subject to section 7 of the Fair Labor Standards Act of 1938 (FLSA), as amended, is covered by OPM's FLSA overtime regulations in 5 CFR part 551.

(3) Compensation for irregular or overtime work performed by National Guard Technicians is governed by 32 U.S.C. 709(h) and policies issued by the National Guard Bureau.

(4) Firefighters covered by 5 U.S.C. 5545b are subject to special overtime pay rules as described in that section and in 5 U.S.C. 5542(f) and in related regulations. (See also § 9901.361(d).)

(5) Compensatory time off earned under 5 U.S.C. 5543 must be used by the end of the 26th pay period after that in which it was earned. Compensatory time off not used within 26 pay periods will be paid at the overtime rate at which it was earned. Employees with unused compensatory time earned before June 8, 1997 (January 5, 1997, for Defense Logistics Agency employees), have had a separate ''old compensatory time'' account established for their use. Old compensatory time is charged only if the employee has insufficient current compensatory time (earned on or after June 8, 1997) to cover the compensatory time off requested. Within each category of compensatory time, the oldest will be charged first. When a DoD employee separates, moves to another DoD Component, or transfers to another Federal agency, any unused compensatory time off balance will be paid at the overtime rate at which it was earned. Also, when an employee moves to a pay system that does not provide for compensatory time off (e.g., Senior Executive Service), any unused compensatory time off balance will be paid at the overtime rate at which it was earned.

(6) The following modifications to 5 U.S.C. 5542 and 5543 and related regulations apply:

(i) The overtime hourly rate cap for FLSA-exempt employees based on the rate of basic pay for the minimum rate for GS–10 does not apply; instead, an FLSA-exempt employee is entitled to an overtime hourly rate equal to 1.5 times the employee's adjusted salary hourly rate unless the employee is in a pay band for which the overtime hourly rate is set equal to the employee's adjusted salary hourly rate based on a determination by the Secretary, subject to § 9901.105;

(ii) An FLSA-exempt employee will be compensated for overtime work (whether regular or irregular or occasional) using a quarter of an hour as the smallest fraction of an hour, with minutes rounded to the nearest full fraction of an hour;

(iii) An FLSA-exempt employee may not be credited with overtime hours of work for travel time unless that travel involves the performance of actual work while traveling; instead, any such

noncreditable travel hours may be credited as earned compensatory time off for travel, subject to the requirements in paragraph (j) of this section; and

(iv) An FLSA-exempt employee may be required to receive compensatory time off under 5 U.S.C. 5543 in lieu of overtime pay, regardless of the type of overtime work or the amount of the employee's adjusted salary rate.

(c) *Night pay.* An employee is covered by the night pay provisions in 5 U.S.C. 5545(a) and (b) and related regulations, except for the following modifications:

(1) Night pay is payable for irregular or occasional overtime work in the same manner it is payable for regularly scheduled work; and

(2) Night pay is not payable during paid absences, except for a period of court leave, military leave, time off awarded under 5 U.S.C. 4502(e), or compensatory time off during religious observances, or when excused from duty on a holiday.

(d) *Sunday pay.* An employee is covered by the Sunday pay provisions in 5 U.S.C. 5546 and related regulations, except for the following modifications:

(1) Work for which Sunday pay is payable (i.e., Sunday work) is limited to applicable hours of work that are actually performed on Sunday (i.e., the definition of ''Sunday work'' in 5 CFR 550.103 applies except that non-Sunday hours are excluded even if those hours are within a daily tour of duty that includes Sunday hours); and

(2) Consistent with section 624 of the Treasury and General Government Appropriations Act, 1999 (as found in section 101(h) of Division A of Public Law 105–277, October 21, 1998), Sunday pay is not payable unless an employee actually performed work during the time corresponding to such pay (i.e., no Sunday pay for periods of paid leave, compensatory time off, credit hours, paid excused absence, or other paid time off).

(e) *Pay for holiday work.* An employee is covered by the holiday premium pay provisions in 5 U.S.C. 5546 and related regulations, except for the following modifications:

(1) Holiday premium pay is paid at twice an employee's adjusted salary hourly rate for each hour (including overtime hours) an employee is ordered or approved to work on a holiday;

(2) For FLSA-exempt employees, the payment for overtime hours worked on a holiday has two components: Payment required under paragraph (b) of this section for overtime worked, and an additional amount under this paragraph (e) such that the total payment for each hour is twice the employee's adjusted salary hourly rate; and

(3) For FLSA-nonexempt employees, the payment for overtime hours worked on a holiday has two components: payment required under 5 CFR 551.512 for overtime worked, and an additional amount under this paragraph (e) such that the total payment for each hour is twice the employee's adjusted salary hourly rate.

(f) *Standby duty pay.* (1) An employee is covered by the standby duty pay provisions in 5 U.S.C. 5545(c)(1) and related regulations, subject to the requirements and modifications in paragraphs (f)(2) through (f)(6) of this section.

(2) Except as provided in paragraph (f)(3), eligibility for regularly scheduled standby duty is limited to firefighters classified to the 0081 occupation who are not eligible for coverage under 5 U.S.C. 5545b, and to emergency medical technicians not involved in fire protection activities who are required to perform standby duty.

(3) The Secretary may approve extending standby duty premium pay coverage to occupations other than those cited in paragraph (f)(2) of this section. Component proposals to extend coverage will explain why employees within the specified occupational group must regularly remain at the duty station longer than ordinary periods of duty, a substantial part of which involves remaining in a standby status rather than performing actual work, and must address how the criteria in 5 CFR 550.143 are met.

(4) The standby percentage is always multiplied by an employee's adjusted salary rate regardless of the amount.

(5) Standby pay attributable to use of an adjusted salary rate exceeding the applicable GS–10, step 1, rate limitation is not considered to be paid under 5 U.S.C. 5545(c)(1) and thus is not creditable basic pay for retirement purposes.

(6) No additional premium pay for hours of overtime work (whether regularly scheduled or irregular or occasional), including compensatory time off, is payable to an employee receiving standby duty pay.

(g) *Administratively uncontrollable overtime pay.* The administratively uncontrollable overtime pay provision in 5 U.S.C. 5545(c)(2) is waived and will not be applied to NSPS employees. Compensation for such work will be made under the applicable provisions of this section.

(h) *Law enforcement availability pay.* An employee is covered by the law enforcement availability pay provisions in 5 U.S.C. 5545a and related regulations, except that the reference to ''premium pay'' in 5 CFR 550.186 will be interpreted to refer to the applicable title 5 premium payments and to the corresponding modified provisions in this section. In addition, the reference to ''limitation on premium pay'' in 5 CFR 550.185(a)(2) will be construed to refer to the limitations under 5 U.S.C. 5547 and to the corresponding modified provision in paragraph (a) of this section.

(i) *Pay for duty involving physical hardship or hazard.* (1) An employee is covered by the hazardous duty pay provisions in 5 U.S.C. 5545(d) and related regulations, subject to the requirements and modifications described in paragraphs (i)(2) through (i)(6) of this section.

(2) In determining eligibility for hazardous duty pay, an authorized management official will apply occupational safety and health standards consistent with the permissible exposure limit promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 as published in Subtitle B, Chapter XVII, of title 29, United States Code, or, in the absence of a permissible exposure limit issued by the Secretary of Labor, other applicable standard promulgated by the Secretary.

(3) Subject to § 9901.105, the Secretary may establish new categories of hazardous duty pay in addition to those found in Appendix A to Subpart I of 5 CFR part 550. Components may request a new category of hazardous duty pay be established and must submit, with their request, the information required in 5 CFR 550.903(b).

(4) Except as provided in paragraph (i)(5) and (i)(6) of this section, an employee is paid a hazard pay differential when he or she is assigned to and performs a duty specified in Appendix A to Subpart I of 5 CFR part 550 or as provided under paragraph (i)(3) of this section.

(5) An employee will be eligible to receive hazardous duty pay when an authorized management official determines—

(i) One or more of the conditions requisite for such payment exist; and

(ii) Safety precautions, protective or mechanical devices, protective or safety clothing, protective or safety equipment, or other preventive measures have not reduced the element of hazard below the permissible exposure limits promulgated by the Secretary of Labor or any applicable standard promulgated by the Secretary, consistent with paragraph (i)(2) of this section.

(6) Hazard pay differentials are not payable to employees in occupations or jobs in which unusual physical risk is

an inherent characteristic of the occupation or job, such as police officer, emergency medical technician, test pilot, ordnance/explosives/incendiary inspector, and engineering technician performing inspection functions inside fuel storage tanks, tunnels, or shafts. The classification of the employee's position (i.e., determination of pay band level) includes a consideration of the hazardous duty or physical hardship. For the purposes of this paragraph, the phrase ''includes a consideration of the hazardous duty'' means that the duty is one element considered in determining the pay band level of the position—i.e., the knowledge, complexities, skills and abilities required to perform that duty are considered in the classification of the position. Such consideration does not require the hazardous duty or physical hardship to be pay band controlling.

(j) *Compensatory time off for travel.* (1) An employee is covered by the compensatory time off for travel provisions in 5 U.S.C. 5550b and related regulations, subject to the requirements and modifications described in paragraphs (j)(2) through (j)(6) of this section.

(2) The term ''official duty station'' as defined in the related regulations is not applicable; instead, the term ''official worksite'' is used to determine an employee's entitlement to compensatory time off for travel. The term ''official worksite'' has the meaning given in 5 CFR 531.605.

(3)(i) Time spent commuting between an employee's residence and the workplace (official or temporary worksite), or between an employee's residence and a transportation terminal, is not creditable for the purpose of compensatory time off for travel, except as provided in paragraph (j)(3)(ii) of this section.

(ii) If an employee is required to travel to a temporary worksite and if the one-way commuting time exceeds the employee's normal one-way commuting time by more than 1 hour, the commuting time beyond 1 hour may be credited.

(4) An employee earns compensatory time off for time spent in a travel status away from the official worksite when such time is not otherwise compensable.

(5) Employees must file requests for credit of compensatory time off for travel within 10 workdays after returning to the official duty station, or within 10 workdays of returning from temporary duty (TDY) assignment or approved leave which immediately follows the TDY during which the compensatory time off for travel was earned, by submitting a travel itinerary, or any other documentation acceptable to the employee's supervisor, in support of the request. If not submitted within 10 workdays, the employee will forfeit his or her claim to the compensatory time off for travel. Compensatory time off for travel will be credited in increments of 6 minutes or 15 minutes and will be tracked and managed separately from other forms of compensatory time off.

(6)(i) When an employee moves from an NSPS position to a non-NSPS position within the Department, in which the employee will be eligible for compensatory time off for travel under 5 CFR part 550, subpart N, he or she will retain unused compensatory time off for travel. The time elapsed from the end of the pay period in which the compensatory time off was earned through the date of conversion will count as elapsed time in applying the limit for usage in 5 CFR part 550, subpart N.

(ii) When an employee moves from a non-NSPS position to an NSPS position within the Department, he or she will retain unused compensatory time off for travel. The time elapsed from the end of the pay period in which the compensatory time off was earned through the date of conversion will count as elapsed time in applying the limit for usage established under 5 CFR 550.1407.

(k) *Compensatory time off for religious observances.* An employee is covered by the compensatory time off for religious observances provisions in 5 U.S.C. 5550a and related regulations, subject to the following requirements and modifications:

(1) An employee's request for time off should not be granted without simultaneously scheduling the hours during which the employee will work to make up the time (unless the employee earned the needed hours in advance); and

(2) An employee may not receive payment for any unused compensatory time off for religious observances under any circumstances. This prohibition against payment applies to surviving beneficiaries in the event of the individual's death.

(l) *Air traffic controller differential.* (1) The air traffic controller differential provisions in 5 U.S.C. 5546a are waived and not applicable to NSPS employees, except for subsections (a)(1) and (d) of that section.

(2) An employee is covered by the air traffic controller differential provisions in subsections (a)(1) and (d) of 5 U.S.C. 5546a(a), subject to the modification described in paragraph (l)(3) of this section.

(3) The reference to the grade levels of GS–9 and GS–11 in 5 U.S.C. 5546a(a)(1) must be construed to mean a comparable level of work as determined under the NSPS classification structure.

§ 9901.363 Premium pay for health care personnel.

(a) *Coverage.* (1) This section applies to DoD health care personnel covered under NSPS who may be eligible for premium pay, as described in paragraphs (b), (c), and (d) of this section. For the purpose of this section, *health care personnel* means employees providing direct patient care services or services incident to direct patient care services. Examples include employees in the following occupations: nurse, biomedical engineer, dietitian, dental hygienist, psychologist, and medical records technician.

(2) Premium pay under this section is not considered part of basic pay for any purpose, nor is it used in computing a lump-sum payment for leave under 5 U.S.C. 5551 or 5552.

(b) *On-call premium pay.* (1) When health care personnel are not otherwise compensated for on-call time, heads of DoD Components may authorize on-call premium pay under this section for officially scheduled ''on-call'' time which requires these employees to restrict their activities sufficiently to be available to return to the worksite promptly when it is necessary.

(2) To be paid on-call premium pay, an employee must be officially scheduled to be on-call outside their regular duty hours or during hours on a holiday when the employee is excused from regular duty.

(3) An employee may not be scheduled to be on-call unless it is essential for the employee to be immediately available to return to the worksite.

(4) An employee officially scheduled to be on-call will be paid 15 percent of his or her adjusted salary hourly rate for each hour of on-call status.

(5) An employee may not receive on-call pay during periods of actual work. When an employee on-call is required to return to work status, on-call pay will be suspended. When released from the requirement to perform actual work, the employee will return to the remaining scheduled on-call status.

(6) An employee may not be charged leave during periods of regularly scheduled on-call duty; nor may such an employee receive on-call premium pay when, because of leave or other authorized absence, the employee is not expected to be able to return to the worksite immediately.

(c) *Night pay for health care personnel.* (1) Health care personnel working a tour of duty, any part of which falls between 6 p.m. and 6 a.m., with 4 or more hours falling between 6 p.m. and 6 a.m., will be paid additional pay for each hour of work on such tour. When fewer than 4 hours of work fall between 6 p.m. and 6 a.m., health care personnel will be paid additional pay for each hour of work performed between 6 p.m. and 6 a.m. Night pay for health care personnel is 10 percent of the employee's hourly rate of adjusted salary. An employee receiving night pay under this section may not also receive night pay under § 9901.362(c).

(2) Health care personnel are entitled to pay for night duty for a period of paid absence only for a period of court leave, military leave, time off awards under 5 U.S.C. 4502(e), or compensatory time off for religious observances.

(3) When excused from work because of a holiday or in-lieu-of holiday, health care personnel are entitled to the night pay that would have applied had they not been excused from work.

(d) *Pay for weekend duty for health care personnel.* (1) Health care personnel who work a tour of duty, any part of which falls in the 2-day period between midnight Friday and midnight Sunday, will be paid additional pay for each hour of work during such tour. Health care personnel who have two separate tours of duty, each of which qualify as weekend duty, will be paid additional pay for each hour of both tours. Additional pay for weekend duty is 25 percent of the employee's hourly rate of adjusted salary. An employee receiving pay for weekend duty may not also receive pay for Sunday work under § 9901.362(d).

(2) When on court leave, military leave, time off awarded under 5 U.S.C. 4502(e), or compensatory time off for religious observances, health care personnel are entitled to pay for weekend duty they otherwise would have received.

§ 9901.364 Foreign language proficiency pay.

(a) *General provisions.* (1) This section applies to employees who may be paid Foreign Language Proficiency Pay (FLPP) if they are certified as proficient in a foreign language the Secretary has determined to be necessary for national security interests, and if they are not receiving FLPP as provided in 10 U.S.C. 1596 and 10 U.S.C. 1596a.

(2) The Secretary is authorized to publish an annual list of foreign languages necessary for national security interests and to establish overall policy for administration of the Defense Language Program.

(3) Employees may be certified as proficient in a necessary foreign language using criteria and procedures established by the Secretary and receive FLPP.

(b) *Approval procedures.* An authorized management official delegated the authority for approving payment must document that an employee meets eligibility criteria before authorizing FLPP. The documentation includes—

(1) Certification within the last 12 months of the employee's proficiency in a foreign language the Secretary has determined necessary for national security interests;

(2) Affirmation that the employee does not currently receive comparable pay under 10 U.S.C. 1596 or 1596a;

(3) Certification of the employee's foreign language proficiency level renewed annually; and

(4) Certification based on an annual test that is part of the Defense Language Proficiency Test System.

(c) *Amount and method of payment.* The decision to grant FLPP, including the amount, will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by the DoD Component, unless there is no official at a higher level in the organization. The amount of FLPP received by the employee, not to exceed $500 per pay period, will be determined based on the following considerations:

(1) The employee's measured proficiency level in the necessary language;

(2) The need for the employee's particular language skills;

(3) The difficulty of recruiting or retaining employees with the same proficiencies;

(4) The extent to which the employee performs tasks requiring proficiency;

(5) The number of necessary languages in which the employee is proficient; and

(6) Other considerations authorized by the Secretary.

(d) *Treatment for other purposes.* FLPP is not considered part of basic pay for any purpose and does not count towards retirement, insurance, or any other benefit related to basic pay. FLPP is not pay for purposes of a lump-sum payment for leave under 5 U.S.C. 5551 or 5552.

(e) *Termination.* The authorized management official as determined by the Component may reduce or terminate FLPP at any time when the official determines—(1) The need for the employee's language capability has been reduced or eliminated; or

(2) The employee no longer meets the certification requirements.

(f) *Miscellaneous.* (1) The minimum qualifying level may not be less than Interagency Language Roundtable Level 2 proficiency in at least two skills (listening, reading, speaking, or writing, as required).

(2) FLPP may be paid for proficiency in multiple languages; however, the total amount may not exceed $500 per pay period.

Conversion Provisions

§ 9901.371 Conversion into NSPS pay system.

(a) *Introduction.* This section describes the pay-setting provisions that apply when DoD employees are converted into the NSPS pay system established under this subpart. (See § 9901.231 for conversion rules related to determining an employee's career group, pay schedule, and band.) An affected employee may convert from the GS system, the SL/ST system, or the SES system (or such other systems designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902), as provided in § 9901.302. For the purpose of this part (except § 9901.372), the terms ''convert,'' ''converted,'' ''converting,'' and ''conversion'' refer to employees who become covered by the NSPS pay system without a change in position (as a result of a coverage determination made under § 9901.102(b)) and exclude employees who move from a noncovered position to a position already covered by the NSPS pay system.

(b) *Implementing issuances.* The Secretary will issue implementing issuances prescribing the policies and procedures necessary to implement these conversion provisions.

(c) *Bar on pay reduction.* Subject to paragraph (e) of this section, employees will be converted into the NSPS pay system without a reduction in their adjusted salary rate. (As defined in § 9901.304, the term ''adjusted salary'' means base salary plus any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent supplement under other legal authority.)

(d) *Rate comparison.* For the purpose of determining whether conversion into NSPS constitutes an adverse action for reduction of pay under 5 U.S.C. chapter 75, subchapter II (dealing with adverse actions), an employee's rate of basic pay includes any applicable locality

payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent supplement under other legal authority. The rate of basic pay immediately before conversion must be adjusted as described in paragraph (e) of this section before comparing that rate of basic pay to the initial NSPS rate of basic pay.

(e) *Simultaneous actions.* If another personnel action (e.g., promotion, geographic movement) takes effect on the same day as the effective date of an employee's conversion to the new pay system, the other action will be processed under the rules pertaining to the employee's former system before processing the conversion action.

(f) *Temporary promotion prior to conversion.* An employee on a temporary promotion at the time of conversion will be returned to his or her official position of record prior to processing the conversion (as provided in § 9901.231(c)), and pay will be set consistent with the pay-setting rules of the pay system that applies prior to conversion. For GS employees, pay in the permanent position of record must be reconstructed to reflect any increase that would have otherwise occurred if the employee had not been temporarily promoted, as provided in GS pay-setting regulations. If the employee is temporarily promoted immediately after the conversion, pay will be set under the rules for promotion increases under the NSPS pay system. (See also paragraph (k) of this section.)

(g) *Grade retention prior to conversion.* An employee on grade retention immediately before conversion must be converted to a pay band based on the grade of his or her assigned permanent position of record (not the retained grade), as provided in § 9901.231(d), but the employee's base and adjusted salary while in grade retention status will be used in applying this section (e.g., in setting the initial NSPS base and adjusted salary and in determining the amount of any within-grade increase adjustment). After conversion and any within-grade increase adjustment under paragraph (j) of this section, if the employee's base salary exceeds the rate range for the assigned pay band, the employee will be granted pay retention, subject to the conditions described in § 9901.356.

(h) *Pay retention prior to conversion.* For an employee on pay retention under 5 U.S.C. 5363 immediately before conversion, the employee's pay will be realigned so that the employee's NSPS adjusted salary (consisting of base salary plus any applicable local market supplement) equals the employee's retained rate before conversion. If the employee's base salary (after realignment) exceeds the rate range for the assigned pay band, the employee will be granted pay retention, subject to the conditions described in § 9901.356.

(i) *Conversion adjustments.* The only NSPS base salary adjustments that may be made in conjunction with an employee's conversion into NSPS are those identified in paragraphs (j) through (m) of this section.

(j) *Within-grade increase (WGI) adjustment.* (1) Upon conversion to NSPS, a General Schedule (GS) employee (regardless of work schedule) who would otherwise be eligible for a within-grade increase (WGI), and who is paid below the maximum rate for their grade, will receive a prorated WGI adjustment to his or her NSPS base salary rate to account for the time (measured in calendar days) since the employee's last equivalent pay increase.

(2) The WGI adjustment is calculated based on the number of calendar days between the effective date of the employee's last equivalent increase and the date of conversion into NSPS, regardless of the number of days in a non-pay status (if any). The maximum adjustment may not exceed a full WGI.

(3) For an employee on a temporary promotion immediately before conversion, the employee's GS pay entitlements must be determined as provided in paragraph (f) of this section before calculating the WGI adjustment.

(4) For an employee entitled to grade retention immediately before conversion, the WGI adjustment is determined using the employee's retained grade and step.

(5) The WGI adjustment is not applicable to an employee entitled to pay retention immediately before conversion.

(6) The WGI adjustment is not applicable to an employee whose performance has been determined to be below an acceptable level of competence under 5 CFR part 531, subpart D.

(7) The WGI adjustment is a one-time adjustment that is effective on the date of conversion. An employee who leaves NSPS and is subsequently again subject to the conversion process may not receive an additional WGI adjustment under this provision; however, such an employee may be eligible for a WGI adjustment equivalent in accordance with § 9901.351(c).

(k) *Special increase for employees on temporary promotion prior to conversion.* (1) *General.* If an employee had a temporary promotion immediately before conversion, and if the position to which the employee was temporarily promoted becomes covered by NSPS, an authorized management official may temporarily reassign or temporarily promote the employee back to that position, subject to the same terms and conditions as the initial temporary promotion (e.g., if the temporary promotion was not to exceed 5 years and the action is a temporary reassignment under NSPS, the temporary reassignment may not exceed 5 years). When the employee is temporarily placed back into the position immediately after conversion, the pay-setting rules in paragraphs (k)(2) and (k)(3) of this section apply.

(2) *Temporary reassignment.* If the post-conversion action would be a temporary reassignment, the authorized management official may provide the employee with a temporary base salary increase up to the same base salary rate the employee was receiving during the temporary promotion (prior to conversion) in lieu of setting pay under the reassignment rules under § 9901.353. This is a one-time exception to the limitations on reassignment increases imposed under § 9901.353. Upon expiration of the temporary reassignment, pay will be set as specified in § 9901.353(g) or paragraph (k)(4) of this section, as applicable.

(3) *Temporary promotion.* (i) If the post-conversion action would be a temporary promotion, the authorized management official may provide the employee with a temporary base salary increase up to the same base salary rate the employee was receiving during the temporary promotion (prior to conversion) or may set pay according to the promotion rules under § 9901.354 to provide a greater increase. Upon expiration of the temporary promotion, pay will be set as specified in § 9901.354(c) or paragraph (k)(4) of this section, as applicable.

(ii) The increase described in paragraph (k)(3)(i) of this section may also apply to an employee who is on a temporary promotion at the time that temporary promotion position converts to NSPS, even if the employee's permanent position of record has not yet converted. In this case, upon expiration of the temporary promotion, pay will be set under the rules of the applicable pay system.

(4) *Temporary placement becomes permanent.* If a temporary reassignment or promotion to an NSPS position under this paragraph (k) becomes permanent with no break, the employee's base salary will not change, but will continue at the rate received at the end of the temporary reassignment or promotion.

(l) *Special increases equivalent to GS promotion increase.* (1) During the first 12 months following conversion, employees who are not eligible for the Accelerated Compensation for Developmental Positions (ACDP) under § 9901.345 are eligible to receive (at the discretion of an authorized management official) a one-time base salary increase equivalent to a noncompetitive promotion increase the employee would have received but for conversion to NSPS. This paragraph may be applied only when the grade level of the promotion is encompassed within the same pay band, the employee's performance warrants the pay increase, and the promotion would have otherwise occurred during that period.

(2) An employee who is selected for a non-NSPS position that subsequently becomes covered by NSPS before the effective date of the employee's placement in the position is eligible to receive (at the discretion of an authorized management official) a one-time base salary increase equivalent to the increase the employee would have received had the placement been effected prior to the position becoming covered by NSPS. This paragraph may be applied only when the employee is not already in an NSPS-covered position on the effective date of the placement, and the effective date is within 12 months of the position becoming covered by NSPS. An employee who receives an increase under this paragraph is not eligible for the WGI adjustment described in paragraph (j) of this section.

(m) *Adjustment for physicians and dentists.* For a GS physician or dentist who was regularly receiving a physicians' comparability allowance or premium pay, the Component may increase the base salary after conversion to NSPS to account for the loss of such allowance or premium pay (since such payments are not authorized for physicians and dentists under NSPS). The Component must also consider the additional pay represented by any applicable targeted local market supplement in determining the rate at which the base salary should be set under this paragraph.

§ 9901.372 Conversion or movement out of NSPS pay system.

(a) *General.* (1) This section applies to the conversion or movement of employees out of the NSPS pay system to a different pay system. Under this section, when an NSPS employee is converted or moved to a GS position, a GS virtual grade and rate is established for the NSPS employee so that the employee may be treated as a GS employee in applying GS pay-setting rules.

(2) For the purpose of this section (unless otherwise specified)—

(i) The terms ''convert,'' ''converted,'' ''converting,'' and ''conversion'' refer to NSPS employees who become covered by a different pay system without a change in position (as a result of a determination made by the Secretary under § 9901.102(e) or as otherwise provided by law); and

(ii) The terms ''move,'' ''moved,'' ''moving,'' and ''movement'' refer to NSPS employees who become covered by a different pay system through a change in position, rather than by conversion.

(b) *Classification of converted position.* Prior to converting an employee out of NSPS, an authorized management official, as defined by the Component, will review the duties of the employee's current permanent position of record and classify the position's duties in accordance with Office of Personnel Management (OPM) classification guidance and/or other appropriate criteria to determine the appropriate title, series, and grade or pay band of the position in the new pay system. Employees occupying positions classified to DoD-unique occupational series at the time of conversion out cannot be retained in those series, but must be assigned to the series that most closely represents the employee's current duties.

(c) *Determining pay under new pay system.* When converting or moving an employee out of NSPS to another pay system, the pay-setting rules of the gaining system will apply. For the purpose of applying those rules, the employee's final pay under NSPS is determined based on the employee's NSPS permanent position of record, band, and pay as of the day immediately before the date of conversion or movement out of NSPS. An employee on a temporary reassignment or temporary promotion will be returned to his or her permanent position of record prior to conversion or movement. No personnel or pay action that, but for the conversion or movement out of NSPS, would have occurred under NSPS on the date of conversion or movement may be considered. Any personnel or pay action occurring on the date of conversion or movement must be processed under the rules of the gaining system. In the case of a conversion or movement to the General Schedule (GS) pay system, the supplemental rules in paragraph (d) of this section must be followed to determine a virtual GS grade and rate (as of the date before the employee's conversion or movement out of NSPS) that will be used in applying GS pay-setting rules.

(d) *Virtual GS grade and rate.* (1) *Virtual GS grade.* (i) Before an employee converts or moves out of NSPS under this paragraph, a virtual GS grade will be established for the purpose of applying GS pay-setting rules (*e.g.*, a promotion increase if the actual GS grade is higher than the virtual GS grade). This virtual GS grade will be based on a comparison of the NSPS employee's current adjusted salary to the highest applicable GS rate range that would apply to the employee's NSPS permanent position of record considering only those GS grade levels and associated range ranges that are included in the employee's assigned NSPS pay band. For the purpose of this section, a highest applicable GS rate range includes the following rate ranges: the GS locality rate schedule for the locality pay area in which the employee's NSPS official worksite is located; the special rate schedule based on the employee's position of record, official worksite, or other established conditions; the law enforcement officer special base rate schedule; or the GS base pay schedule. The grade-band conversion tables established in DoD's NSPS implementing issuances for the purpose of converting employees into NSPS must be used in determining which GS grades are covered by the employee's assigned NSPS pay band.

(ii) If the employee's pay band covers one GS grade, the employee's virtual grade will be that grade.

(iii) For an employee in a pay band encompassing more than one GS grade, if the employee's adjusted salary equals or exceeds the step 4 rate of the highest applicable GS rate range for the highest GS grade encompassed within his or her assigned NSPS pay band, the employee's virtual grade will be that grade. If the employee's adjusted salary is lower than the step 4 rate, the adjusted salary is compared with the step 4 rate of the highest applicable GS rate range for the second highest GS grade encompassed within the employee's pay band. If the employee's adjusted salary equals or exceeds the step 4 rate of the second highest grade, the employee's virtual grade will be that grade. This process is repeated for each successively lower grade encompassed within the assigned band until a grade is found at which the employee's adjusted salary equals or exceeds the step 4 rate of the highest applicable GS rate range for that grade.

(iv) Notwithstanding paragraph (d)(1)(iii) of this section, if the employee's adjusted salary exceeds the maximum rate of the highest applicable

GS rate range for the assigned GS grade determined under paragraph (d)(1)(iii) of this section but is a rate within the highest applicable GS rate range for the next higher applicable grade encompassed by the employee's pay band, then the employee's virtual GS grade will be that higher grade (even though the rate is below the applicable step 4 rate for that higher grade).

(v) Notwithstanding paragraph (d)(1)(iii) of this section, an employee's virtual GS grade may not be less than the permanently assigned GS grade the employee held upon conversion into NSPS (for an employee who was converted as described in § 9901.371), unless, since that time, the employee has undergone—

(A) a voluntary reduction in band or reduction in base salary;

(B) an involuntary reduction in band or reduction in base salary based on unacceptable performance and/or conduct; or

(C) a reduction in band based on a reduction in force (RIF) or classification action.

(vi) If the employee's adjusted salary exceeds the maximum rate of the highest applicable GS rate range for the highest grade encompassed by his or her assigned pay band, the employee's virtual grade will be that highest GS grade.

(vii) If the employee's adjusted salary is less than the step 4 rate of the highest applicable GS rate range for the lowest GS grade encompassed within his or her assigned NSPS pay band, the employee's virtual grade will be the lowest GS grade in the band.

(2) *Virtual GS rate.* (i) Once a virtual GS grade has been established, a virtual GS rate will be set (before any pay-related action that would take effect on the date of the employee's conversion or movement out of NSPS). As of the day before the date of conversion or movement out of NSPS, the employee's NSPS adjusted salary will be compared to the highest applicable GS rate range for the established virtual grade. If the employee's adjusted salary falls between two steps of the highest applicable GS rate range for the virtual GS grade, the virtual rate will be set at the higher step rate. If an employee's adjusted salary is less than the minimum rate of the highest applicable GS rate range for the virtual GS grade, his or her virtual rate will be set at the minimum step rate. If the employee's adjusted salary is greater than the maximum rate of the highest applicable GS rate range for the virtual GS grade, his or her virtual rate will be set at the maximum step rate or at a retained rate set using GS pay retention rules in 5 CFR part 536 (if the employee is eligible for pay retention under those rules).

(ii) If the virtual step rate derived under paragraph (d)(2)(i) of this section is an adjusted salary rate, an employee's virtual GS base salary rate will be derived based on that adjusted salary rate (i.e., GS base salary rate for the same step position).

(iii) The virtual GS grade and rates established under this paragraph (d) will be used in applying GS pay administration rules in setting pay in the new GS position (e.g., the GS promotion rules, pay retention rules, and the maximum payable rate rule). (Since the NSPS system did not continue coverage under the grade retention provision in 5 U.S.C. 5362, grade retention is not applicable to NSPS employees who convert or move to a GS position.) As required by paragraph (c) of this section, any pay action effective on the date of conversion or movement from NSPS to the GS pay system will be processed under GS pay administration rules.

(e) *GS within-grade increases.* Service under NSPS is creditable for within-grade increase purposes upon conversion or movement to a GS position under this section to the extent provided under 5 CFR part 531, subpart D.

(f) *Comparison of rates of basic pay.* For the purpose of determining whether the conversion or movement out of NSPS under this section is an adverse action for reduction of pay under 5 U.S.C. Chapter 75, Subchapter II (dealing with adverse actions), an employee's rate of basic pay includes any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent supplement under other legal authority. This comparison is made before any pay-related action (e.g., geographic movement) under the gaining system that takes effect on the date of conversion or movement.

Subpart D—Performance Management

§ 9901.401 Purpose.

(a) This subpart establishes a performance management system as authorized by 5 U.S.C. 9902.

(b) The performance management system established under this subpart is designed to promote and sustain a high-performance culture. The implementation and operation of the system will provide for the following elements:

(1) Adherence to merit principles set forth in 5 U.S.C. 2301;

(2) A fair, credible, and transparent employee performance appraisal system;

(3) A link between the performance management system and DoD's strategic plan;

(4) A means for ensuring employee involvement in the design and implementation of the system;

(5) Adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the performance management system;

(6) A process for ensuring ongoing performance feedback and dialogue among supervisors, managers, and employees throughout the appraisal period, and setting timetables for review;

(7) Effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance;

(8) A means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the performance management system; and

(9) A pay-for-performance evaluation system to better link individual pay to performance and provide an equitable method for appraising and compensating employees.

§ 9901.402 Coverage.

(a) This subpart applies to eligible employees and positions in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102.

(b) The following employees and positions in organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions that would otherwise be covered by 5 U.S.C. Chapter 43;

(2) Employees and positions excluded from Chapter 43 by OPM under 5 CFR 430.202(d) prior to the date of coverage of this subpart; and

(3) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

(c) Except as provided in § 9901.408, this subpart does not apply to employees who have been, or are expected to be, employed in an NSPS position for less than a minimum period (as described in § 9901.407) during a single 12-month period.

§ 9901.403 Waivers.

When a specified category or group of employees is covered by the performance management system established under this subpart, the provisions of 5 U.S.C. Chapter 43 are

waived with respect to that category of employees.

§ 9901.404 Definitions.

In this subpart—

Appraisal means the review and evaluation of an employee's performance.

Appraisal period has the meaning given that term in § 9901.103.

Competencies has the meaning given that term in § 9901.103.

Contribution has the meaning given that term in § 9901.103.

Minimum period means the period of time during which an employee will perform under one or more approved performance plans before receiving a rating of record.

Pay-for-performance evaluation system means the performance management system established under this subpart to link individual pay to performance and provide an equitable method for evaluating performance and compensating employees.

Pay Pool Manager has the meaning given that term in § 9901.103.

Pay Pool Panel has the meaning given that term in § 9901.103.

Performance has the meaning given that term in § 9901.103.

Performance expectations means the duties, responsibilities, and competencies required by, or objectives associated with, an employee's position and the contributions and demonstrated competencies management expects of an employee, as described in § 9901.406.

Performance management means applying the integrated processes of setting and communicating performance expectations, monitoring performance and providing feedback, developing performance and addressing poor performance, and rating and rewarding performance in support of the organization's goals and objectives.

Performance management system means the policies and requirements established under this subpart, as supplemented by implementing issuances, for setting and communicating employee performance expectations, monitoring performance and providing feedback, developing performance and addressing poor performance, and rating and rewarding performance. It incorporates and operationalizes the elements set forth in § 9901.401(b).

Performance Review Authority has the meaning given that term in § 9901.103.

Rating of record has the meaning given that term in § 9901.103.

Unacceptable performance has the meaning given that term in § 9901.103.

§ 9901.405 Performance management system requirements.

(a) The Secretary may issue implementing issuances further defining a performance management system for NSPS employees, subject to the requirements set forth in this subpart.

(b) The NSPS performance management system—

(1) Provides for the appraisal of the performance of each employee annually;

(2) Holds supervisors and managers accountable for effectively managing the performance of employees under their supervision as set forth in paragraph (c) of this section;

(3) Specifies procedures for setting and communicating performance expectations, monitoring performance and providing feedback, and developing, rating, and rewarding performance;

(4) Specifies the criteria and procedures to address the performance of employees who are detailed or transferred and for employees in other special circumstances; and

(5) Provides for multiple rating levels as follows:

Rating of record	Rating of record descriptor
Level 5	Role Model.
Level 4	Exceeds Expectations.
Level 3	Valued Performer.
Level 2	Fair.
Level 1	Unacceptable.

(c) In fulfilling the requirements of paragraph (b) of this section, supervisors and managers will—

(1) Clearly communicate performance expectations and hold employees responsible for accomplishing them;

(2) Make meaningful distinctions among employees based on performance and contribution;

(3) Foster and reward excellent performance;

(4) Address poor performance; and

(5) Assure that employees are assigned a rating of record.

§ 9901.406 Setting and communicating performance expectations.

(a) Performance expectations will support and align with the DoD mission and its strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance.

(b) Performance expectations will be communicated to the employee—

(1) In writing, including those that may affect an employee's retention in the job, and

(2) Prior to holding the employee accountable for them.

(c) Notwithstanding the requirements in paragraphs (d) through (g) of this section, employees are accountable for demonstrating professionalism and appropriate standards of conduct and behavior, such as civility and respect for others.

(d) Performance expectations for supervisors and managers will include assessment and measurement of how well supervisors and managers plan, monitor, develop, correct, and assess subordinate employees' performance.

(e) Performance expectations include—

(1) Goals or objectives that set general or specific performance targets at the individual, team, and/or organizational level;

(2) Organizational, occupational, or other work requirements, such as standard operating procedures, operating instructions, manuals, internal rules and directives, and/or other instructions that are generally applicable and available to the employee; and

(3) Competencies an employee is expected to demonstrate on the job, and/or the contributions an employee is expected to make.

(f) Performance expectations may be amplified through particular work assignments or other instructions (which may specify the quality, quantity, accuracy, timeliness, or other expected characteristics of the completed assignment, or some combination of such characteristics). Such assignments and instructions need not be in writing.

(g) Supervisors will involve employees, insofar as practicable, in the development of their performance expectations. However, final decisions regarding performance expectations are within the sole and exclusive discretion of management.

(h) Performance expectations are subject to higher- or second-level review to ensure consistency and fairness within and across organizations.

(i) Performance expectations that comprise a performance plan are considered to be approved when the supervisor has communicated the performance plan to the employee in writing.

§ 9901.407 Minimum period of performance.

(a) Only employees who have completed the minimum period under one or more approved performance plans may be issued a rating of record in accordance with the procedures prescribed by this subpart.

(b) The minimum period of performance is 90 calendar days.

(1) Periods during which an employee is in a leave status may not be applied toward the 90-day minimum.

(2) Unless an employee meets criteria specified in § 9901.342(i) through (l), if there is a break in NSPS-covered service (e.g., due to job change, resignation), the service performed prior to the break may not be used to satisfy the 90-day minimum period.

(c) Employees who have not completed the minimum period of performance during the applicable appraisal period will not be rated and will not be eligible for a performance payout unless otherwise provided in this part.

§ 9901.408 Employees on time limited appointments.

Employees who are appointed for less than 90 days—

(a) Will be given performance expectations that are linked to the organization's strategic plan, and

(b) May receive an evaluation which—

(1) Consists of a narrative description at the end of the appointment of employee performance, accomplishments and contributions during that appointment; and

(2) May serve as documentation and justification for recognition under 5 U.S.C. chapter 45.

§ 9901.409 Monitoring and developing performance.

(a) In applying the requirements of the performance management system and its implementing issuances and policies, supervisors will—

(1) Monitor the performance of their employees and their contribution to the organization;

(2) Provide ongoing (i.e., regular and timely) feedback to employees on their actual performance with respect to their performance expectations, including one or more interim performance reviews during each appraisal period; and

(3) Document at least one interim performance review. Documented interim reviews are not required for periods of performance of less than 180 days.

(b) Developing performance is integrated with the performance management process and is a shared responsibility of management and employees. Developing performance includes—

(1) Coaching and mentoring employees;

(2) Reinforcing strengths and addressing weaknesses; and

(3) Discussing employee development opportunities.

§ 9901.410 Addressing performance that does not meet expectations.

(a) If at any time during the appraisal period a supervisor determines that an employee's performance is not meeting expectations, the supervisor will—

(1) Identify and communicate to the employee the specific performance deficiencies that require improvement;

(2) Consider the range of options available to address the performance deficiency, including remedial training, improvement periods, reassignment, oral warnings, letters of counseling, written reprimands, or adverse action (including a reduction in rate of basic pay or pay band or a removal); and

(3) Take appropriate action to address the deficiency, taking into account the circumstances, including the nature and gravity of the unacceptable performance and its consequences.

(b) Adverse actions taken based on unacceptable performance and/or conduct will be taken in accordance with the provisions in 5 U.S.C. Chapter 75 or other appropriate procedures if not covered by Chapter 75, such as procedures for National Guard Technicians under 32 U.S.C. 709(f).

§ 9901.411 Appraisal period.

(a) Except as provided in paragraphs (a)(1) through (3) of this section, the appraisal period will be October 1 to September 30.

(1) The appraisal period may begin after October 1 and end after September 30 for newly converted groups of employees;

(2) The appraisal period may begin after October 1 for employees who move to an NSPS position from a non-NSPS position after that date; and

(3) The appraisal period may end between July 1 and September 30 for employees receiving early annual recommended ratings.

(b) If, by the end of the appraisal period, an employee has not met the minimum period of performance, management may extend the appraisal period provided such extensions do not—

(1) Delay the payout for the applicable pay pool; or

(2) Extend beyond the rating of record effective date.

(c) The effective date of ratings of record will be January 1, except for additional ratings of record as described in § 9901.412(b)(2).

§ 9901.412 Rating and rewarding performance.

(a) Forced distribution of ratings (setting pre-established limits for the percentage or number of ratings that may be assigned at any level) is prohibited.

(b) An appropriate rating official—

(1) Will prepare and issue a rating of record after the completion of the appraisal period; and

(2) May issue an additional rating of record following an unacceptable rating of record to reflect a substantial and sustained change in the employee's performance since the last rating of record. The new rating would be effective on the first day of the month after it is final, as described in paragraph (e) of this section.

(c) A rating of record will assess an employee's performance with respect to his or her performance expectations, as amplified through work assignments or other instructions, and/or relative contributions.

(d) If an employee engages in work-related misconduct and the nature or severity of that misconduct has an impact on the execution of his or her duties, that of the team, and/or that of the organization, the impact may be reflected in the employee's rating of record.

(e) Consistent with the requirements of merit system principles and this part, the Pay Pool Manager is the approving authority for Pay Pool Panel recommendations concerning ratings of record. A rating of record is considered final when issued to the employee with all appropriate reviews and signatures.

(f) An appropriate rating official will communicate the rating of record and number of shares to the employee.

(g) The rating of record of an employee may not be lowered based on an approved absence from work, including the absence of a disabled veteran to seek medical treatment as provided in Executive Order 5396.

(h) A rating of record issued under this subpart—

(1) Is an official rating of record for the purpose of any provision of this title, Code of Federal Regulations, for which an official rating of record is required;

(2) Will be transferred between subordinate organizations and to other Federal departments or agencies in accordance with implementing issuances; and

(3) Will be used as a basis for—

(i) A pay determination under any applicable pay rules;

(ii) Determining reduction-in-force retention standing; and

(iii) Such other action that the Secretary considers appropriate, as specified in implementing issuances.

(i) Employees who change pay pools after the last day of the appraisal period and before the effective date of the payout will—

(1) Be evaluated and assigned a rating of record by the rating official, Pay Pool

Panel and Pay Pool Manager associated with the pay pool of record on the last day of the appraisal period; and

(2) Have their payout calculated and paid based on the pay pool funding and share valuation of the gaining pay pool whose Pay Pool Manager will also determine the share assignment and payout distribution between salary increase and bonus.

(j) A supervisor or other rating official may prepare an additional performance appraisal for the purposes specified in implementing issuances (e.g., transfers and details) at any time after the completion of the minimum period. Such an appraisal is not a rating of record.

§ 9901.413 Reconsideration of ratings.

(a) *Nonbargaining unit employees.* (1) A rating of record or job objective rating may be challenged by a nonbargaining unit employee only through a reconsideration process specified in this subpart and implementing issuances. This process will be the sole and exclusive agency administrative process for all nonbargaining unit employees to challenge a rating of record.

(2) Consistent with this part, Pay Pool Managers will decide job objective rating and rating of record reconsiderations.

(3) If the Pay Pool Manager decision is challenged, consistent with this part, the Performance Review Authority will make a final decision.

(4) A share assignment determination, payout distribution determination, or any other payout matter will not be subject to the reconsideration process or any other agency administrative grievance system.

(b) *Bargaining unit employees.* (1) Negotiated grievance procedures are the exclusive administrative procedures for bargaining unit employees to challenge a rating of record or job objective rating as provided for in 5 U.S.C. 7121.

(2) If a negotiated grievance procedure is not available to a bargaining unit employee or challenging a rating of record or job objective rating is outside the scope of the employee's negotiated grievance procedure, a bargaining unit employee may challenge a rating of record or job objective rating in accordance with this subpart and implementing issuances.

(c) *Recalculation based on adjusted rating of record.* In the event a reconsideration or negotiated grievance decision results in an adjusted rating of record, the revised rating will be referred to the Pay Pool Manager for recalculation of the employee's general salary increase, adjustment to local market supplement, and the payout amount and distribution.

(1) Any adjustment to salary will be retroactive to the effective date of the performance payout.

(2) Decisions made through the reconsideration process or a negotiated grievance procedure will not result in recalculation of the payout made to other employees in the pay pool.

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Federal Register

Thursday,
May 22, 2008

Part IV

Office of Management and Budget

Standard Occupational Classification (SOC)—Policy Committee's Recommendations for the 2010 SOC; Notice

OFFICE OF MANAGEMENT AND BUDGET

Standard Occupational Classification (SOC)—Policy Committee's Recommendations for the 2010 SOC

AGENCY: Executive Office of the President, Office of Management and Budget.

ACTION: Notice of Standard Occupational Classification Policy Committee; Recommendations to OMB and Solicitation of Comments.

SUMMARY: Under the authority of the Budget and Accounting Procedures Act of 1950 (31 U.S.C. 1104(d)) and the Paperwork Reduction Act of 1995 (44 U.S.C. 3504(e)), the Office of Management and Budget (OMB) is seeking public comment on the Standard Occupational Classification Policy Committee's (SOCPC) recommendations presented in this notice for revising the 2000 Standard Occupational Classification (SOC) for 2010.

The SOC is designed to reflect the current occupational structure of the United States; it classifies all occupations in which work is performed for pay or profit. The SOC covers all jobs in the national economy, including occupations in the public, private, and military sectors. All Federal agencies that publish occupational data are required to use the SOC; State and local government agencies are strongly encouraged to use this national system to promote a common language for categorizing and analyzing occupations.

In a prior **Federal Register** notice (71 FR 28536, May 16, 2006), OMB and the SOCPC requested comments on: (1) The Standard Occupational Classification principles, (2) corrections to the 2000 SOC Manual, (3) the intention to retain the current SOC Major Group structure, (4) changes to the existing detailed occupations, and (5) new detailed occupations to be added to the revised 2010 SOC.

The classification principles, coding guidelines, and occupations recommended in this notice reflect the comments received in response to the May 16, 2006, notice and represent the SOCPC's final recommendations to OMB. OMB, in consultation with the SOCPC, will consider comments in response to this notice in making its final decisions for the 2010 SOC revision and will publish its decisions in the **Federal Register**. The SOCPC will then finish preparing the *2010 Standard Occupational Classification Manual* for publication, including finalizing occupational definitions, assigning associated job titles, and developing a crosswalk to the 2000 SOC.

Appendices: This notice includes three appendices in the **SUPPLEMENTARY INFORMATION** section below. Appendix A presents the SOCPC's recommended SOC Classification Principles and SOC Coding Guidelines. Appendix B provides a crosswalk between the occupation codes in the 2000 SOC and the recommended revised codes for the 2010 SOC. Appendix C provides a crosswalk between the recommended revised codes for the 2010 SOC and the 2000 SOC.

Request for Comments: In addition to general comments on the SOCPC's recommendations, OMB welcomes comments specifically addressing: (1) The SOC Classification Principles and SOC Coding Guidelines recommended by the SOCPC (Appendix A); (2) their recommended changes to titles and codes of occupations from the 2000 SOC (Appendix B); (3) the SOCPC's recommended changes to the hierarchical structure of the SOC, including changes to major, minor, broad, and detailed occupation groups (Appendix C); and (4) the titles, placement, and codes of new occupations that the SOCPC is recommending be added in the revised 2010 SOC (Appendix C). All comments submitted in response to this notice may be made available to the public, including by posting them on OMB's Web site. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information.

Electronic Availability: This document is available on the Internet from the Bureau of Labor Statistics at *http://www.bls.gov/soc/home.htm*. This Web page contains links to previous SOC **Federal Register** notices, and related documents, as well as the full SOCPC recommended 2010 SOC structure. To obtain this notice via e-mail, please send a message requesting the SOCPC recommendations **Federal Register** notice to *soc@bls.gov*.

DATES: To ensure consideration, all comments must be in writing and received on or before July 21, 2008.

ADDRESSES: *Comments may be sent to:* Katherine K. Wallman, Chief Statistician, Office of Management and Budget, 10201 New Executive Office Building, Washington, DC 20503, telephone number: (202) 395–3093, fax number: (202) 395–7245 or e-mailed to OMB at *soc@omb.eop.gov* with the subject 2010 SOC. Comments may also be sent via *http://www.regulations.gov*—a Federal E-Government Web site that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type ''2010 SOC'' (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments. Comments received with subject 2010 SOC by the date specified above will be included as part of the official record. Because of delays in the receipt of regular mail related to security screening, respondents are encouraged to use electronic communications.

FOR FURTHER INFORMATION CONTACT: Paul Bugg, Office of Information and Regulatory Affairs, OMB, 10201 New Executive Office Building, 725 17th Street, NW., Washington, DC 20503; e-mail: *pbugg@omb.eop.gov*; telephone number: (202) 395–3095; fax number: (202) 395–7245.

SUPPLEMENTARY INFORMATION:

History of the 2000 SOC Revision

The 2000 Standard Occupational Classification (SOC), which replaced the 1980 SOC, was developed in response to a growing need for a universal occupational classification system. Such a classification system allows government agencies and private industry to produce comparable data. Users of occupational data include government program managers, industrial and labor relations practitioners, job seekers, employers wishing to set salary scales or locate an establishment, academic and business researchers, and educational institutions—including teachers, guidance counselors, and students exploring careers and identifying career education and training alternatives.

In 1994, the Office of Management and Budget formed the SOC Revision Policy Committee (SOCRPC) with members from the Department of Labor's Bureau of Labor Statistics and Employment and Training Administration, the Department of Commerce's Census Bureau, the Department of Defense's Defense Manpower Data Center, the National Science Foundation, the National Occupational Information Coordinating Committee, the Office of Personnel Management, and the Office of Management and Budget , as well as participants from the Departments of Agriculture, Health and Human Services, and Transportation, and the Equal Employment Opportunity Commission. The 2000 SOC is the result of a cooperative effort by the major Federal agencies that use occupational classification systems to maximize the

usefulness of occupational information collected by the Federal Government and is the result of four years of research by the SOCRPC and work groups composed of members from more than fifteen government agencies.

The SOCRPC was charged with identifying the major statistical uses of occupational classifications and creating a classification system that reflected the current occupational structure in the United States. The SOCRPC used the Bureau of Labor Statistics' Occupational Employment Statistics (OES) classification system as the starting point for the new SOC framework.

In carrying out this charge, OMB and the committee issued several **Federal Register** notices. Based on comments in response to these notices, the SOCRPC and OMB developed and published the *2000 Standard Occupational Classification Manual* and established the Standard Occupational Classification Policy Committee (SOCPC) to monitor the implementation of the new SOC and carry out periodic revisions.

The 2010 SOC Revision

In 2005, the Office of Management and Budget met with the Standard Occupational Classification Policy Committee (SOCPC) to plan for the 2010 SOC revision. The SOCPC includes representatives from the Department of Labor's Bureau of Labor Statistics and Employment and Training Administration, the Department of Commerce's Census Bureau, the Department of Defense's Defense Manpower Data Center, the Department of Education, the Department of Health and Human Services, the Equal Employment Opportunity Commission, the National Science Foundation, the Office of Personnel Management, and, *ex officio*, the Office of Management and Budget.

To initiate the formal 2010 SOC revision process, OMB and the SOCPC requested public comment in a May 16, 2006, **Federal Register** notice (71 FR 28536) on: (1) The Standard Occupational Classification principles, (2) corrections to the *2000 SOC Manual*, (3) the intention to retain the current SOC Major Group structure, (4) changes to the existing detailed occupations, and (5) new detailed occupations to be added to the revised 2010 SOC.

To carry out the bulk of the revision effort, the committee created six work groups to examine occupations in the following major groups: Management, Professional, and Related Occupations (codes 11–29–0000); Service Occupations (codes 31–39–0000); Sales and Office Occupations (codes 41–43–0000); Natural Resources, Construction, and Maintenance Occupations (codes 45–49–0000); Production, Transportation, and Material Moving Occupations (codes 51–53–0000) and Military Specific Occupations (code 55–0000).

The work groups were charged with reviewing comments received in response to the May 16, 2006, **Federal Register** notice and providing recommendations to the SOCPC. Guided by the classification principles, the SOCPC reviewed the recommendations from the workgroups and reached decisions by consensus. This **Federal Register** notice presents the final recommendations of the SOCPC to OMB for the 2010 SOC revision and requests public comment on those recommendations.

SOCPC Recommended Changes

The SOCPC received and reviewed hundreds of comments in response to the May 16, 2006, **Federal Register** notice. The SOCPC has restructured the SOC Classification Principles by revising them and adding a new section on SOC Coding Guidelines in response to some of these comments; please see Appendix A for the results of these recommended changes together with an outline of their motivation. In response to other comments, the SOCPC created new occupations, revised occupational titles, and made changes to the structure and placement of individual occupations. Appendices B and C show these recommended revisions.

In addition to general comments on the SOCPC's recommendations, OMB welcomes comments specifically addressing: (1) The SOC Classification Principles and SOC Coding Guidelines recommended by the SOCPC (Appendix A); (2) their recommended changes to titles and codes of occupations from the 2000 SOC (Appendix B); (3) the SOCPC's recommended changes to the hierarchical structure of the SOC, including changes to major, minor, broad, and detailed occupation groups (Appendix C); and (4) the titles, placement, and codes of new occupations that the SOCPC is recommending be added in the revised 2010 SOC (Appendix C).

OMB, in consultation with the SOCPC, will consider comments in response to this notice in making its final decisions for the 2010 SOC revision and will publish its decisions in the **Federal Register**. The SOCPC will then finish preparing the *2010 Standard Occupational Classification Manual* for publication, including finalizing occupational definitions, assigning associated job titles, and developing a crosswalk to the 2000 SOC.

Susan E. Dudley,

Administrator, Office of Information and Regulatory Affairs.

Appendix A: Classification Principles and Coding Guidelines

In reviewing comments on the 2000 SOC Classification Principles, members of the SOCPC noted that some of the principles were actually guidelines intended to assist data coders and users in consistently assigning SOC codes and titles to survey responses and in other coding activities. Consequently, the SOCPC recommends restructuring the SOC Classification Principles by revising them and extracting the guideline elements to form a new set of SOC Coding Guidelines. Aside from this restructuring, the substantive changes recommended by the SOCPC include the removal of credentials from the list of criteria in Principle 2 and the development of a new principle on collectability presented as Principle 8.

The removal of credentials as a basis of classification was motivated by the instability in classification resulting from the difficulty of obtaining accurate, recent information on current credential requirements and certification status of incumbents as well as the lack of uniformity across the various State and local jurisdictions on the credentials they require. This variation in requirements and credential information prevents consistent occupational classification across data related to various jurisdictions, establishments, and occupations.

The recommendation to include a collectability principle was motivated by the agencies' experience with the 2000 SOC in which they found that some of the 2000 SOC occupations either could not be collected consistently or, once collected, could not be reported because of potential disclosure of confidential statistical information. This inability to collect consistently or to publish certain occupations needlessly imposed collection burden on respondents, used Federal data collection resources inefficiently, and undermined the consistency and accuracy of occupational data.

The SOCPC's recommended SOC Classification Principles and SOC Coding Guidelines are shown below.

SOC Classification Principles

The SOC Classification Principles form the basis on which the SOC system is structured.

1. The SOC Classification covers all occupations in which work is performed for pay or profit, including work performed in family-operated enterprises by family members who are not directly compensated. It excludes occupations unique to volunteers. Each occupation is assigned to only one occupational category at the lowest level of the classification.

2. Occupations are classified based on work performed and, in some cases, on the skills, education, and/or training needed to perform the work at a competent level.

3. Workers primarily engaged in planning and directing are classified in management occupations in Major Group 11–0000.

4. Supervisors of workers in Major Groups 13–0000 through 29–0000 usually have work experience and perform activities similar to those of the workers they supervise, and therefore are classified with the workers they supervise.

5. Workers in Major Groups 33–0000 through 53–0000 whose primary duty is supervising are classified in the appropriate first-line supervisor/manager category because their work activities are distinct from those of the workers they supervise.

6. Apprentices and trainees are classified with the occupations for which they are being trained, while helpers and aides are classified separately because they are not in training for the occupation they are helping.

7. If an occupation is not included as a distinct detailed occupation in the structure, it is classified in an appropriate ''All Other,'' or residual, occupation. ''All Other'' occupations are placed in the structure when it is determined that the detailed occupations comprising a broad occupation group do not account for all of the workers in the group. These occupations appear as the last occupation in the group with a code ending in ''9'' and are identified in their title by having ''All Other'' appear at the end.

8. The U.S. Bureau of Labor Statistics and the U.S. Census Bureau are charged with collecting and reporting data on total U.S. employment across the full spectrum of SOC major groups. Thus, for a detailed occupation to be included in the SOC, either the Bureau of Labor Statistics or the Census Bureau must be able to collect and report data on that occupation.

SOC Coding Guidelines

The SOC Coding Guidelines are intended to assist users in consistently assigning SOC codes and titles to survey responses and in other coding activities.

1. A worker should be assigned to an SOC occupation code based on work performed.

2. When workers in a single job could be coded in more than one occupation, they should be coded in the occupation that requires the highest level of skill. If there is no measurable difference in skill requirements, workers should be coded in the occupation in which they spend the most time. Workers whose job is to teach at different levels (e.g., elementary, middle, or secondary) should be coded in the occupation corresponding to the highest educational level they teach.

3. Data collection and reporting agencies should assign workers to the most detailed occupation possible. Different agencies may use different levels of aggregation, depending on their ability to collect data. For more information on data produced using the SOC, see the Frequently Asked Questions (FAQs) section. *[Please note: FAQs will be included in the published manual but are not included in this notice.]*

4. Workers who perform activities not described in any distinct detailed occupation in the SOC structure should be coded in an appropriate ''All Other'' or residual occupation. These residual occupational categories appear as the last occupation in a group with a code ending in ''9'' and are identified by having the words ''All Other'' appear at the end of the title.

5. Workers in Major Groups 33–0000 through 53–0000 who *spend 80 percent or more of their time performing supervisory activities* are coded in the appropriate first-line supervisor/manager category in the SOC. In these same Major Groups (33–0000 through 53–0000), persons with supervisory duties who *spend less than 80 percent of their time supervising* are coded with the workers they supervise.

6. Licensed and non-licensed workers performing the same work should be coded together in the same detailed occupation, except where specified otherwise in the SOC definition.

How to Read Appendix B and Appendix C

Appendix B is a table listing in the first column every detailed occupation from the 2000 SOC that has been revised (including changes to only the code or title) or replaced, with the corresponding recommended 2010 code(s) and title(s) appearing in the second column. An asterisk (*) after the occupation code and title in the second column means that the occupation in the first column only makes up part of the occupation in the second column; that is, the starred 2010 SOC occupation has been created from multiple 2000 SOC codes. Each occupation with the (*) notation appears multiple times in the table.

A new occupation may have been created by breaking out a group of workers previously classified in a 2000 SOC occupation, but the new occupation does not replace the 2000 SOC occupation. In this case, the 2000 occupation will indicate in italics which group or groups have been removed to create a new occupation.

Appendix C is a table listing in the first column every new or revised (including changes to only the code or title) detailed occupation that the SOCPC is recommending for the 2010 SOC. The corresponding 2000 SOC code(s) and title(s) appear in the second column. An asterisk (*) after the occupation code and title in the second column means that the occupation in the first column makes up only part of the occupation in the second column; that is, the starred 2000 SOC occupation has been divided into multiple new occupations. Each occupation with the (*) notation appears multiple times in the table.

Where a detailed occupation has been added or removed, the major group, minor group, and broad occupation codes for that occupation are also listed.

Appendix B: 2000 SOC Related to 2010 SOC Recommended Structure Changes

2000 SOC	2010 SOC
11–0000 Management Occupations:	
11–2031 Public Relations Managers	11–2031 Public Relations and Fundraising Managers.
11–3000 Operations Specialties Managers:	
11–3040 Human Resources Managers	11–3120 Human Resources Managers.
	11–3110 Compensation and Benefits Managers.
	11–3130 Training and Development Managers.
11–3049 Human Resources Managers, All Other	11–3121 Human Resources Managers.
11–3041 Compensation and Benefits Managers	11–3111 Compensation and Benefits Managers.
11–3042 Training and Development Managers	11–3131 Training and Development Managers.
11–9000 Other Management Occupations:	
11–9010 Agricultural Managers	11–9010 Farmers, Ranchers, and Other Agricultural Managers.
11–9011 Farm, Ranch, and Other Agricultural Managers	11–9013 Farmers, Ranchers, and Other Agricultural Managers *.
11–9012 Farmers and Ranchers	11–9013 Farmers, Ranchers, and Other Agricultural Managers *.
11–9031 Education Administrators, Preschool and Child Care Center/Program.	11–9031 Education Administrators, Preschool and Childcare Center/Program.
11–9041 Engineering Managers	11–9041 Architectural and Engineering Managers.
11–9061 Funeral Directors	11–9061 Funeral Service Managers *Except morticians and undertakers*.
	39–4031 Morticians, Undertakers, and Funeral Directors.
13–0000 Business and Financial Operations Occupations:	
13–1000 Business Operations Specialists.	
13–1021 Purchasing Agents and Buyers, Farm Products	13–1021 Buyers and Purchasing Agents, Farm Products.
13–1040 Compliance Officers, Except Agriculture, Construction, Health and Safety, and Transportation:	
13–1041 Compliance Officers, Except Agriculture, Construction, Health and Safety, and Transportation.	13–1041 Compliance Officers.

2000 SOC	2010 SOC
13–1060 Emergency Management Specialists:	
13–1061 Emergency Management Specialists	11–9161 Emergency Management Directors.
13–1070 Human Resources, Training, and Labor Relations Specialists.	13–1070 Human Resources Workers.
	13–1140 Compensation, Benefits, and Job Analysis Specialists.
	13–1150 Training and Development Specialists.
13–1071 Employment, Recruitment, and Placement Specialists	13–1071 Human Resources Specialists.
13–1072 Compensation, Benefits, and Job Analysis Specialists	13–1141 Compensation, Benefits, and Job Analysis Specialists.
13–1073 Training and Development Specialists	13–1151 Training and Development Specialists.
13–1079 Human Resources, Training, and Labor Relations Specialists, All Other.	13–1079 Human Resources Workers, All Other *.
13–2070 Loan Counselors and Officers	13–2070 Credit Counselors and Loan Officers.
13–2071 Loan Counselors	13–2071 Credit Counselors.
13–2081 Tax Examiners, Collectors, and Revenue Agents	13–2081 Tax Examiners and Collectors and Revenue Agents.
15–0000 Computer and Mathematical Science Occupations:	
15–1000 Computer Specialists	15–1100 Computer Occupations.
15–1110 Computer and Information Scientists, Research	15–1110 Computer and Information Research Scientists.
15–1011 Computer and Information Scientists, Research	15–1111 Computer and Information Research Scientists.
15–1020 Computer Programmers	15–1120 Software and Web Developers and Computer Analysts.
15–1021 Computer Programmers	15–1142 Applications Computer Programmers.
15–1031 Computer Software Engineers, Applications	15–1122 Software Developers *.
	15–1123 Web Developers *.
	15–1124 Information Security Analysts *.
15–1032 Computer Software Engineers, Systems Software	15–1122 Software Developers *.
15–1041 Computer Support Specialists	15–1141 Computer Support Specialists.
15–1051 Computer Systems Analysts	15–1121 Computer Systems Analysts.
15–1061 Database Administrators	15–1131 Database Administrators and Developers.
15–1071 Network and Computer Systems Administrators	15–1132 Network and Computer Systems Administrators.
	15–1143 Computer Network and Systems Technicians *.
15–1081 Network Systems and Data Communications Analysts	15–1123 Web Developers *.
	15–1124 Information Security Analysts *.
	15–1143 Computer Network and Systems Technicians *.
	15–1144 Web Technicians.
15–1090 Miscellaneous Computer Specialists	15–1190 Miscellaneous Computer Occupations.
15–1099 Computer Specialists, All Other	15–1199 Computer Occupations, All Other.
17–3000 Drafters, Engineering, and Mapping Technicians	17–3000 Drafters, Engineering Technicians, and Mapping Technicians.
19–0000 Life, Physical, and Social Science Occupations:	
19–3000 Social Scientists and Related Workers:	
19–3020 Market and Survey Researchers	19–3020 Survey Researchers.
	13–1160 Market Research Analysts and Marketing Specialists.
19–3021 Market Research Analysts	13–1161 Market Research Analysts and Marketing Specialists.
21–0000 Community and Social Services Occupations	21–0000 Community and Social Service Occupations.
21–1012 Educational, Vocational, and School Counselors	21–1012 Educational, Guidance, School and Vocational Counselors.
21–1022 Medical and Public Health Social Workers	21–1022 Health Care Social Workers.
21–1091 Health Educators	21–1091 Health Educators and Community Health Workers.
23–0000 Legal Occupations:	
23–1000 Lawyers, Judges, and Related Workers:	
23–1010 Lawyers	23–1010 Lawyers and Judicial Law Clerks.
23–2092 Law Clerks	23–1012 Judicial Law Clerks.
	23–2011 Paralegals and Legal Assistants.
25–0000 Education, Training, and Library Occupations:	
25–2000 Primary, Secondary, and Special Education School Teachers.	25–2000 Preschool, Primary, Secondary, and Special Education School Teachers.
25–2020 Elementary and Middle School Teachers:	
25–2022 Middle School Teachers, Except Special and Vocational Education.	25–2022 Middle School Teachers, Except Special and Career/Technical Education.
25–2023 Vocational Education Teachers, Middle School	25–2023 Career/Technical Education Teachers, Middle School.
25–2030 Secondary School Teachers:	
25–2031 Secondary School Teachers, Except Special and Vocational Education.	25–2031 Secondary School Teachers, Except Special and Career/Technical Education.
25–2032 Vocational Education Teachers, Secondary School	25–2032 Career/Technical Education Teachers, Secondary School.
25–2040 Special Education Teachers	25–2050 Special Education Teachers.
25–2041 Special Education Teachers, Preschool, Kindergarten, and Elementary School.	25–2051 Special Education Teachers, Preschool.
	25–2052 Special Education Teachers, Kindergarten and Elementary School.
25–2042 Special Education Teachers, Middle School	25–2053 Special Education Teachers, Middle School.
25–2043 Special Education Teachers, Secondary School	25–2054 Special Education Teachers, Secondary School.
25–3000 Other Teachers and Instructors:	
25–3011 Adult Literacy, Remedial Education, and GED Teachers and Instructors.	25–3011 Adult Basic and Secondary Education and Literacy Teachers and Instructors.
25–3090 Miscellaneous Teachers and Instructors:	

2000 SOC	2010 SOC
25–3099 Teachers and Instructors, All Other	25–3099 Teachers and Instructors, All Other *Except all other special education teachers*. 25–2059 Special Education Teachers, All Other.
25–9011 Audio-Visual Collections Specialists	25–9011 Audio-Visual and Multimedia Collections Specialists .
27–1014 Multi-Media Artists and Animators	27–1014 Multimedia Artists and Animators.
29–0000 Healthcare Practitioner and Technical Occupations:	
29–1000 Health Diagnosing and Treating Practitioners.	
29–1111 Registered Nurses	29–1111 Registered Nurses *Except nurse anesthetists, nurse practitioners, and nurse midwives*. 29–1141 Nurse Anesthetists. 29–1151 Nurse Practitioners. 29–1161 Nurse Midwives.
29–1120 Therapists:	
29–1121 Audiologists	29–1171 Audiologists.
29–1129 Therapists, All Other	29–1129 Therapists, All Other *Except exercise physiologists*. 29–1128 Exercise Physiologists.
29–2000 Health Technologists and Technicians:	
29–2030 Diagnosing Related Technologists and Technicians	29–2030 Diagnostic Related Technologists and Technicians.
29–2034 Radiologic Technologists and Technicians	29–2034 Radiologic Technologists and Technicians *Except magnetic resonance imaging technologists*. 29–2035 Magnetic Resonance Imaging Technologists.
29–2050 Health Diagnosing and Treating Practitioner Support Technicians.	29–2050 Health Practitioner Support Technologists and Technicians.
29–2090 Miscellaneous Health Technologists and Technicians:	
29–2099 Health Technologists and Technicians, All Other	29–2099 Health Technologists and Technicians, All Other *Except ophthalmic medical technicians*. 29–2057 Ophthalmic Medical Technicians.
31–0000 Healthcare Support Occupations:	
31–2011 Occupational Therapist Assistants	31–2011 Occupational Therapy Assistants.
31–2012 Occupational Therapist Aides	31–2012 Occupational Therapy Aides.
31–9000 Other Healthcare Support Occupations:	
31–9090 Miscellaneous Healthcare Support Occupations:	
31–9099 Healthcare Support Workers, All Other	31–9099 Healthcare Support Workers, All Other *Except phlebotomists*. 31–9097 Phlebotomists.
33–0000 Protective Service Occupations:	
33–2011 Fire Fighters	33–2011 Firefighters.
33–9000 Other Protective Service Workers:	
33–9090 Miscellaneous Protective Service Workers:	
33–9099 Protective Service Workers, All Other	33–9099 Protective Service Workers, All Other *Except transportation security screeners*. 33–9093 Transportation Security Screeners.
39–0000 Personal Care and Service Occupations:	
39–1012 Slot Key Persons	39–1012 Slot Supervisors.
39–5010 Barbers and Cosmetologists	39–5010 Barbers, Hairdressers, Hairstylists, and Cosmetologists.
39–5094 Skin Care Specialists	39–5094 Skincare Specialists.
39–9011 Child Care Workers	39–9011 Childcare Workers.
41–0000 Sales and Related Occupations:	
41–9000 Other Sales and Related Workers:	
41–9090 Miscellaneous Sales and Related Workers:	
41–9099 Sales and Related Workers, All Other	41–9099 Sales and Related Workers, All Other *Except fundraisers*. 13–1131 Fundraisers.
43–0000 Office and Administrative Support Occupations:	
43–3021 Billing and Posting Clerks and Machine Operators	43–3021 Billing and Posting Clerks.
43–6011 Executive Secretaries and Administrative Assistants	43–6011 Executive Secretaries and Executive Administrative Assistants.
43–6014 Secretaries, Except Legal, Medical, and Executive	43–6014 Secretaries and Administrative Assistants, Except Legal, Medical, and Executive.
43–9000 Other Office and Administrative Support Workers:	
43–9190 Miscellaneous Office and Administrative Support Workers:	
43–9199 Office and Administrative Support Workers, All Other	43–9199 Office and Administrative Support Workers, All Other *Except all other financial clerks*. 43–3099 Financial Clerks, All Other.
45–0000 Farming, Fishing, and Forestry Occupations:	
45–1010 First-Line Supervisors/Managers of Farming, Fishing, and Forestry Workers:	
45–1012 Farm Labor Contractors	13–1079 Human Resources Workers, All Other *. 45–1011 First-Line Supervisors/Managers of Farming, Fishing, and Forestry Workers *.
49–0000 Installation, Maintenance, and Repair Occupations:	
49–2021 Radio Mechanics	49–2021 Radio, Cellular and Tower Equipment, Installers and Repairers.
49–3041 Farm Equipment Mechanics	49–3041 Farm Equipment Mechanics and Service Technicians.
49–3051 Motorboat Mechanics	49–3051 Motorboat Mechanics and Service Technicians.

2000 SOC	2010 SOC
49–9000 Other Installation, Maintenance, and Repair Occupations	
49–9090 Miscellaneous Installation, Maintenance, and Repair Workers:	
49–9099 Installation, Maintenance, and Repair Workers, All Other.	49–9099 Installation, Maintenance, and Repair Workers, All Other *Except general maintenance and repair workers*.
	49–9071 Maintenance and Repair Workers, General.
51–0000 Production Workers:	
51–4012 Numerical Tool and Process Control Programmers	51–4012 Computer Numerically Controlled Machine Tool Programmers, Metal and Plastic.
51–4050 Metal Furnace and Kiln Operators and Tenders	51–4050 Metal Furnace Operators, Tenders, Pourers, and Casters.
51–4190 Miscellaneous Metalworkers and Plastic Workers	51–4190 Miscellaneous Metal Workers and Plastic Workers.
51–4192 Lay-Out Workers, Metal and Plastic	51–4192 Layout Workers, Metal and Plastic.
51–5000 Printing Workers:	
51–5010 Bookbinders and Bindery Workers	51–5110 Printing Workers*.
51–5011 Bindery Workers	51–5113 Print Finishing and Binding Workers*.
51–5012 Bookbinders	51–5113 Print Finishing and Binding Workers*.
51–5020 Printers	51–5110 Printing Workers*.
51–5021 Job Printers	51–5112 Printing Press Operators*.
	51–5113 Print Finishing and Binding Workers*.
51–5022 Prepress Technicians and Workers	51–5111 Prepress Technicians and Workers.
51–5023 Printing Machine Operators	51–5112 Printing Press Operators*.
51–8031 Water and Liquid Waste Treatment Plant and System Operators.	51–8031 Water and Wastewater Treatment Plant and System Operators.
51–9000 Other Production Occupations:	
51–9130 Photographic Process Workers and Processing Machine Operators:	
51–9131 Photographic Process Workers	51–9151 Photographic Process Workers and Processing Machine Operators*.
51–9132 Photographic Processing Machine Operators	51–9151 Photographic Process Workers and Processing Machine Operators*.
51–9191 Cementing and Gluing Machine Operators and Tenders	51–9191 Adhesive Bonding Machine Operators and Tenders.
51–9190 Miscellaneous Production Workers:	
51–9199 Production Workers, All Other	51–9199 Production Workers, All Other *Except all other food processing workers*.
	51–3099 Food Processing Workers, All Other.
53–3022 Bus Drivers, School	53–3022 Bus Drivers, School or Special Client.
53–3033 Truck Drivers, Light or Delivery Services	53–3033 Drivers, Light Vehicle or Delivery Services.
53–7111 Shuttle Car Operators	53–7111 Mine Shuttle Car Operators.

Appendix C: 2010 SOC Recommended Structure Changes Related to 2000 SOC

2010 SOC	2000 SOC
11–0000 Management Occupations:	
11–2030 Public Relations and Fundraising Managers:	
11–2031 Public Relations and Fundraising Managers	11–2031 Public Relations Managers.
11–3000 Operations Specialties Managers:	
11–3110 Compensation and Benefits Managers	11–3040 Human Resources Managers*.
11–3111 Compensation and Benefits Managers	11–3041 Compensation and Benefits Managers.
11–3120 Human Resources Managers	11–3040 Human Resources Managers*.
11–3121 Human Resources Managers	11–3049 Human Resources Managers, All Other.
11–3130 Training and Development Managers	11–3040 Human Resources Managers*.
11–3131 Training and Development Managers	11–3042 Training and Development Managers.
11–9000 Other Management Occupations:	
11–9010 Farmers, Ranchers, and Other Agricultural Managers	11–9010 Agricultural Managers.
11–9013 Farmers, Ranchers, and Other Agricultural Managers	11–9011 Farm, Ranch, and Other Agricultural Managers.
	11–9012 Farmers and Ranchers.
11–9031 Education Administrators, Preschool and Childcare Center/Program.	11–9031 Education Administrators, Preschool and Child Care Center/Program.
11–9040 Architectural and Engineering Managers:	
11–9041 Architectural and Engineering Managers	11–9041 Engineering Managers.
1–9060 Funeral Service Managers:	
11–9061 Funeral Service Managers *Except morticians, undertakers, and funeral directors*.	11–9061 Funeral Directors*.
11–9160 Emergency Management Directors.	
11–9161 Emergency Management Directors	13–1061 Emergency Management Specialists.
13–0000 Business and Financial Operations Occupations	
13–1000 Business Operations Specialists:	
13–1021 Buyers and Purchasing Agents, Farm Products	13–1021 Purchasing Agents and Buyers, Farm Products.
13–1040 Compliance Officers.	

2010 SOC	2000 SOC
13–1041 Compliance Officers	13–1041 Compliance Officers, Except Agriculture, Construction, Health and Safety, and Transportation.
13–1070 Human Resources Workers	13–1070 Human Resources, Training, and Labor Relations Specialists*.
13–1071 Human Resources Specialists	13–1071 Employment, Recruitment, and Placement Specialists.
13–1079 Human Resources Workers, All Other	13–1079 Human Resources, Training, and Labor Relations Specialists, All Other.
	45–1012 Farm Labor Contractors*.
13–1130 Fundraisers:	
13–1131 Fundraisers	41–9099 Sales and Related Workers, All Other*.
13–1140 Compensation, Benefits, and Job Analysis Specialists	13–1070 Human Resources, Training, and Labor Relations Specialists*.
13–1141 Compensation, Benefits, and Job Analysis Specialists	13–1072 Compensation, Benefits, and Job Analysis Specialists.
13–1150 Training and Development Specialists	13–1070 Human Resources, Training, and Labor Relations Specialists*.
13–1151 Training and Development Specialists	13–1073 Training and Development Specialists.
13–1160 Market Research Analysts and Marketing Specialists	19–3020 Market and Survey Researchers*.
13–1161 Market Research Analysts and Marketing Specialists	19–3021 Market Research Analysts.
13–2070 Credit Counselors and Loan Officers	13–2070 Loan Counselors and Officers.
13–2071 Credit Counselors	13–2071 Loan Counselors.
13–2080 Tax Examiners, Collectors and Preparers, and Revenue Agents:	
13–2081 Tax Examiners and Collectors, and Revenue Agents	13–2081 Tax Examiners, Collectors and Revenue Agents.
15–0000 Computer and Mathematical Occupations	15–0000 Computer and Mathematical Science Occupations.
15–1100 Computer Occupations	15–1000 Computer Specialists.
15–1110 Computer and Information Research Scientists	15–1010 Computer and Information Scientists, Research.
15–1111 Computer and Information Research Scientists	15–1011 Computer and Information Scientists, Research.
15–1120 Software and Web Developers and Computer Analysts:	
15–1121 Computer Systems Analysts	15–1051 Computer Systems Analysts.
15–1122 Software Developers	15–1031 Computer Software Engineers, Applications*.
	15–1032 Computer Software Engineers, Systems Software.
15–1123 Web Developers	15–1031 Computer Software Engineers, Applications*.
	15–1081 Network Systems and Data Communications Analysts*.
15–1124 Information Security Analysts	15–1031 Computer Software Engineers, Applications*.
	15–1081 Network Systems and Data Communications Analysts*.
15–1129 Software and Web Developers and Computer Analysts, All Other.	n/a new occupation.
15–1130 Database Specialists and Systems Administrators:	
15–1131 Database Administrators and Developers	15–1061 Database Administrators.
15–1132 Network and Computer Systems Administrators	15–1071 Network and Computer Systems Administrators*.
15–1140 Computer Programmers, Support Specialists and Technicians:	
15–1141 Computer Support Specialists	15–1041 Computer Support Specialists.
15–1142 Computer Programmers	15–1021 Computer Programmers.
15–1143 Computer Network and Systems Technicians	15–1071 Network and Computer Systems Administrators*.
	15–1081 Network Systems and Data Communications Analysts*.
15–1144 Web Technicians	15–1081 Network Systems and Data Communications Analysts*.
15–1190 Miscellaneous Computer Occupations:	
15–1199 Computer Occupations, All Other	15–1099 Computer Specialists, All Other.
17–3000 Drafters, Engineering Technicians, and Mapping Technicians.	17–3000 Drafters, Engineering, and Mapping Technicians.
19–0000 Life, Physical, and Social Science Occupations:	
19–3000 Social Scientists and Related Workers:	
19–3020 Survey Researchers	19–3020 Market and Survey Researchers*.
21–0000 Community and Social Service Occupations	21–0000 Community and Social Services Occupations.
21–1012 Educational, Guidance, School and Vocational Counselors.	21–1012 Educational, Vocational, and School Counselors.
21–1022 Health Care Social Workers	21–1022 Medical and Public Health Social Workers.
21–1091 Health Educators and Community Health Workers	21–1091 Health Educators.
23–0000 Legal Occupations:	
23–1010 Lawyers and Judicial Law Clerks	23–1010 Lawyers.
23–1012 Judicial Law Clerks	23–2092 Law Clerks*.
23–2000 Legal Support Workers:	
23–2011 Paralegals and Legal Assistants	23–2011 Paralegals and Legal Assistants.
	23–2092 Law Clerks* *Except judicial law clerks*.
25–0000 Education, Training, and Library Occupations:	
25–2000 Preschool, Primary, Secondary, and Special Education School Teachers.	25–2000 Primary, Secondary, and Special Education School Teachers.
25–2022 Middle School Teachers, Except Special and Career/Technical Education.	25–2022 Middle School Teachers, Except Special and Vocational Education.
25–2023 Career/Technical Education Teachers, Middle School	25–2023 Middle School Vocational Education Teachers.
25–2031 Secondary School Teachers, Except Special and Career/Technical Education.	25–2031 Secondary School Teachers, Except Special and Vocational Education.

2010 SOC	2000 SOC
25–2032 Career/Technical Education Teachers, Secondary School.	25–2032 Vocational Education Teachers, Secondary School.
25–2050 Special Education Teachers	25–2040 Special Education Teachers.
25–2051 Special Education Teachers, Preschool	25–2041 Special Education Teachers, Preschool, Kindergarten, and Elementary School*.
25–2052 Special Education Teachers, Kindergarten and Elementary School.	25–2041 Special Education Teachers, Preschool, Kindergarten, and Elementary School*.
25–2053 Special Education Teachers, Middle School	25–2042 Special Education Teachers, Middle School.
25–2054 Special Education Teachers, Secondary School	25–2043 Special Education Teachers, Secondary School.
25–2059 Special Education Teachers, All Other	25–3099 Teachers and Instructors, All Other*.
25–3000 Other Teachers and Instructors:	
25–3010 Adult Basic and Secondary Education and Literacy Teachers and Instructors:	
25–3011 Adult Basic and Secondary Education and Literacy Teachers and Instructors.	25–3011 Adult Literacy, Remedial Education, and GED Teachers and Instructors.
25–3090 Miscellaneous Teachers and Instructors *Except special education teachers, All other*.	25–3090 Miscellaneous Teachers and Instructors*.
25–3099 Teachers and Instructors, All Other *Except special education teachers, All other*.	25–3099 Teachers and Instructors, All Other*.
25–9000 Other Education, Training, and Library Occupations	
25–9010 Audio-Visual and Multimedia Collections Specialists:	
25–9011 Audio-Visual and Multimedia Collections Specialists	25–9011 Audio-Visual Collections Specialists.
27–0000 Arts, Design, Entertainment, Sports, and Media Occupations:	
27–1014 Multimedia Artists and Animators	27–1014 Multi-Media Artists and Animators.
29–0000 Healthcare Practitioner and Technical Occupations:	
29–1000 Health Diagnosing and Treating Practitioners:	
29–1111 Registered Nurses *Except nurse anesthetists, nurse practitioners, and nurse midwives*.	29–1111 Registered Nurses*.
29–1120 Therapists:	
29–1128 Exercise Physiologists	29–1129 Therapists, All Other*.
29–1129 Therapists, All Other *Except exercise physiologists*	29–1129 Therapists, All Other*.
29–1140 Nurse Anesthetists:	
29–1141 Nurse Anesthetists	29–1111 Registered Nurses*.
29–1150 Nurse Practitioners:	
29–1151 Nurse Practitioners	29–1111 Registered Nurses*.
29–1160 Nurse Midwives:	
29–1161 Nurse Midwives	29–1111 Registered Nurses*.
29–1170 Audiologists:	
29–1171 Audiologists	29–1121 Audiologists.
29–2000 Health Technologists and Technicians.	
29–2030 Diagnostic Related Technologists and Technicians:	
29–2034 Radiologic Technologists and Technicians *Except magnetic resonance imaging technologists*.	29–2034 Radiologic Technologists and Technicians*.
29–2035 Magnetic Resonance Imaging Technologists	29–2034 Radiologic Technologists and Technicians*.
29–2050 Health Practitioner Support Technologists and Technicians.	29–2050 Health Diagnosing and Treating Practitioner Support Technicians.
29–2057 Ophthalmic Medical Technicians	29–2099 Health Technologists and Technicians, All Other*.
29–2090 Miscellaneous Health Technologists and Technicians:	
29–2099 Health Technologists and Technicians, All Other *Except ophthalmic medical technicians*.	29–2099 Health Technologists and Technicians, All Other*.
31–0000 Healthcare Support Occupations:	
31–2000 Occupational Therapy and Physical Therapist Assistants and Aides.	31–2000 Occupational and Physical Therapist Assistants and Aides.
31–2010 Occupational Therapy Assistants and Aides	31–2010 Occupational Therapist Assistants and Aides.
31–2011 Occupational Therapy Assistants	31–2011 Occupational Therapist Assistants.
31–2012 Occupational Therapy Aides	31–2012 Occupational Therapist Aides.
31–9000 Other Healthcare Support Occupations.	
31–9090 Miscellaneous Healthcare Support Occupations:	
31–9097 Phlebotomists	31–9099 Healthcare Support Workers, All Other*.
31–9099 Healthcare Support Workers, All Other *Except phlebotomists*.	31–9099 Healthcare Support Workers, All Other*.
33–0000 Protective Service Occupations:	
33–2010 Firefighters	33–2010 Fire Fighters.
33–2011 Firefighters	33–2011 Fire Fighters.
33–9000 Other Protective Service Workers.	
33–9090 Miscellaneous Protective Service Workers:	
33–9093 Transportation Security Screeners	33–9099 Protective Service Workers, All Other*.
33–9099 Protective Service Workers, All Other *Except transportation security screeners*.	33–9099 Protective Service Workers, All Other*.
39–0000 Personal Care and Service Occupations:	
39–1012 Slot Supervisors	39–1012 Slot Key Persons.
39–4000 Funeral Service Workers.	
39–4030 Morticians, Undertakers, and Funeral Directors.	

2010 SOC	2000 SOC
39–4031 Morticians, Undertakers, and Funeral Directors	11–9061 Funeral Directors * *Except funeral service managers*.
39–5000 Personal Appearance Workers.	
39–5010 Barbers, Hairdressers, Hairstylists, and Cosmetologists	39–5010 Barbers and Cosmetologists.
39–5094 Skincare Specialists	39–5094 Skin Care Specialists.
39–9010 Childcare Workers	39–9010 Child Care Workers.
39–9011 Childcare Workers	39–9011 Child Care Workers.
41–0000 Sales and Related Occupations:	
41–9000 Other Sales and Related Workers.	
41–9090 Miscellaneous Sales and Related Workers.	
41–9099 Sales and Related Workers, All Other *Except Fundraisers*.	41–9099 Sales and Related Workers, All Other *.
43–0000 Office and Administrative Support Occupations	
43–3000 Financial Clerks	
43–3020 Billing and Posting Clerks	
43–3021 Billing and Posting Clerks	43–3021 Billing and Posting Clerks and Machine Operators.
43–3090 Miscellaneous Financial Clerks:	
43–3099 Financial Clerks, All Other	43–9199 Office and Administrative Support Workers, All Other *.
43–6011 Executive Secretaries and Executive Administrative Assistants.	43–6011 Executive Secretaries and Administrative Assistants.
43–6014 Secretaries and Administrative Assistants, Except Legal, Medical, and Executive.	43–6014 Secretaries, Except Legal, Medical, and Executive.
43–9000 Other Office and Administrative Support Workers	
43–9190 Miscellaneous Office and Administrative Support Workers:	
43–9199 Office and Administrative Support Workers, All Other *Except financial clerks, all other*.	43–9199 Office and Administrative Support Workers, All Other *.
49–0000 Installation, Maintenance, and Repair Occupations:	
49–2021 Radio, Cellular and Tower Equipment, Installers and Repairers.	49–2021 Radio Mechanics.
49–3041 Farm Equipment Mechanics and Service Technicians	49–3041 Farm Equipment Mechanics.
49–3051 Motorboat Mechanics and Service Technicians	49–3051 Motorboat Mechanics.
49–9000 Other Installation, Maintenance, and Repair Occupations:	
49–9070 Maintenance and Repair Workers, General:	
49–9071 Maintenance and Repair Workers, General	49–9099 Installation, Maintenance, and Repair Workers, All Other *.
49–9090 Miscellaneous Installation, Maintenance, and Repair Workers:	
49–9099 Installation, Maintenance, and Repair Workers, All Other *Except maintenance and repair workers, general*.	49–9099 Installation, Maintenance, and Repair Workers, All Other *.
51–0000 Production Occupations:	
51–3000 Food Processing Workers:	
51–3090 Miscellaneous Food Processing Workers:	
51–3099 Food Processing Workers, All Other	51–9199 Production Workers, All Other *.
51–4012 Computer Numerically Controlled Machine Tool Programmers, Metal and Plastic.	51–4012 Numerical Tool and Process Control Programmers.
51–4050 Metal Furnace Operators, Tenders, Pourers, and Casters.	51–4050 Metal Furnace and Kiln Operators and Tenders.
51–4190 Miscellaneous Metal Workers and Plastic Workers	51–4190 Miscellaneous Metalworkers and Plastic Workers.
51–4192 Layout Workers, Metal and Plastic	51–4192 Lay-Out Workers, Metal and Plastic.
51–5100 Printing Workers:	
51–5110 Printing Workers:	
51–5111 Prepress Technicians and Workers	51–5022 Prepress Technicians and Workers.
51–5112 Printing Press Operators	51–5021 Job Printers *. 51–5023 Printing Machine Operators.
51–5113 Print Finishing and Binding Workers	51–5011 Bindery Workers. 51–5012 Bookbinders. 51–5021 Job Printers *.
51–8030 Water and Wastewater Treatment Plant and System Operators:	
51–8031 Water and Wastewater Treatment Plant and System Operators.	51–8031 Water and Liquid Waste Treatment Plant and System Operators.
51–9000 Other Production Occupations:	
51–9150 Photographic Process Workers and Processing Machine Operators.	51–9130 Photographic Process Workers and Processing Machine Operators.
51–9151 Photographic Process Workers and Processing Machine Operators.	51–9131 Photographic Process Workers. 51–9132 Photographic Processing Machine Operators.
51–9191 Adhesive Bonding Machine Operators and Tenders	51–9191 Cementing and Gluing Machine Operators and Tenders.
51–9190 Miscellaneous Production Workers:	
51–9199 Production Workers, All Other *Except food processing workers, all other*.	51–9199 Production Workers, All Other *.
53–0000 Transportation and Material Moving Occupations:	
53–3000 Motor Vehicle Operators.	
53–3022 Bus Drivers, School or Special Client	53–3022 Bus Drivers, School.
53–3033 Drivers, Light Vehicle or Delivery Services	53–3033 Truck Drivers, Light or Delivery Services.
53–7110 Mine Shuttle Car Operators.	

2010 SOC	2000 SOC
53–7111 Mine Shuttle Car Operators	53–7111 Shuttle Car Operators .

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Part V

Department of Labor

Employment and Training Administration

20 CFR Parts 655 and 656

Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers), and Other Technical Changes; Proposed Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 655 and 656

RIN 1205–AB54

Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers), and Other Technical Changes

AGENCY: Employment and Training Administration, Labor, in concurrence with the Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Proposed rule; request for comments.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (DOL or the Department) are proposing changes to modernize procedures for the issuance of labor certifications issued in connection with H–2B nonimmigrants admitted to perform temporary nonagricultural labor or services, and procedures to enforce compliance with attestations made by sponsoring employers. Specifically, the proposed rule re-engineers the application filing and review process by centralizing processing and by enabling employers to conduct pre-filing United States (U.S.) worker recruitment activities. In addition, the proposed rule makes changes that will enhance the integrity of the program through the introduction of post-adjudication audits and procedures for penalizing employers who fail to meet the requirements of the H–2B Program. In addition, through this proposed rule technical changes are being made to both the H–1B and the permanent labor certification regulations to reflect operational changes stemming from this regulation. Finally, although Congress has vested the Department of Homeland Security (DHS) with the statutory authority to enforce the H–2B Program requirements and the Department possesses no independent authority for such enforcement, this proposed rule describes potential H–2B enforcement procedures the Department could institute in the event that DHS and the Department work out a mutually agreeable delegation of enforcement authority from DHS to the Department.

DATES: Interested persons are invited to submit written comments on the proposed rule. Such comments must be received on or before July 7, 2008. Interested persons are invited to submit comments on the proposed forms mentioned herein; such comments must be received on or before July 21, 2008.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1205–AB54, by only one of the following methods only:

- *Federal e-Rulemaking Portal www.regulations.gov*. Follow the Web site instructions for submitting comments.
- *Mail/Hand Delivery/Courier:* Please address all written comments (including disk and CD–ROM submissions) to Thomas Dowd, Administrator, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210.

Please submit your comments by only one method. The Department will post all comments received on *http://www.regulations.gov* without making any change to the comments, including any personal information provided. The *http://www.regulations.gov* Web site is the Federal e-rulemaking portal and all comments posted there will be available and accessible to the public. The Department cautions commenters not to include their personal information such as Social Security Numbers, personal addresses, telephone numbers, and e-mail addresses in their comments as such submitted information will become viewable by the public via the *http://www.regulations.gov* Web site. It is the responsibility of the commenter to safeguard his or her information. Comments submitted through *http://www.regulations.gov* will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

Postal delivery in Washington, DC, may be delayed due to security concerns. Therefore, the Department encourages the public to submit comments via the Web site indicated above.

Docket: For access to the docket to read background documents or comments received, go the Federal eRulemaking portal at *http://www.regulations.gov*. The Department will also make all the comments it receives available for public inspection during normal business hours at the Office of Policy Development and Research at the above address. If you need assistance to review the comments, the Department will provide you with appropriate aids such as readers or print magnifiers. The Department will make copies of the rule available, upon request, in large print and as electronic file on computer disk. The Department will consider providing the proposed rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the rule in an alternate format, contact the Office of Policy Development and Research at (202) 693–3700 (VOICE) (this is not a toll-free number) or 1–877–889–5627 (TTY/TDD).

FOR FURTHER INFORMATION CONTACT: For information on the H–2B labor certification process proposed in 20 CFR 655.1 to 655.35 contact Sherril Hurd, Acting Team Leader, Regulations Unit, Employment and Training, Administration (ETA), U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210; Telephone (202) 693–3700 (this is not a toll-free number).

For information on the H–2B enforcement process proposed in 20 CFR 655.50 to 655.80 contact Michael Ginley, Office of Enforcement Policy, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–3502, Washington, DC 20210. Telephone (202) 693–0745 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Standard and Current Department of Labor Regulations

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (INA or the Act) defines an H–2B worker as a nonimmigrant admitted to the U.S. on a temporary basis to perform temporary nonagricultural labor or services. 8 U.S.C. 1101(a)(15)(H)(ii)(b). The Department's role in the H–2B visa program stems from its obligation, outlined in the statute and the regulations of DHS, to certify—upon application and sufficient demonstration by a U.S. employer intending to petition DHS to allow it to hire H–2B workers—that there are not enough able and qualified U.S. workers available for the position sought to be filled and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 U.S.C. 1184(c)(1); see also 8 CFR 214.2(h)(6).

Section 214(c)(1) of the INA requires DHS to consult with appropriate

agencies of the Government before granting any H–2B visa petition submitted by an employer. 8 U.S.C. 1184(c)(1). The DHS regulations for the U.S. Citizenship and Immigration Services (USCIS), the agency in DHS charged with the adjudication of immigration benefits such as H–2B petitions, currently require, at 8 CFR 214.2(h)(6), that the intending employer (other than in the Territory of Guam) first apply for a temporary labor certification from the Secretary of Labor (the Secretary) advising USCIS whether U.S. workers capable of performing the services or labor are available, and whether the employment of the foreign worker(s) will adversely affect the wages and working conditions of similarly employed U.S. workers.

The Department's role in the H–2B process is currently advisory to DHS. 8 CFR 214.2(h)(6)(iii)(A). The INA and DHS regulations govern the H–2B petition process and set the broad parameters for labor certification pursuant to which the Department issues its own H–2B regulations and guidance. DHS H–2B regulations provide that an employer may not file a petition with DHS for an H–2B temporary worker unless it has received a labor certification from the Department (or the Governor of Guam, as appropriate), or received a notice from either that a certification cannot be issued. 8 CFR 214.2(h)(6)(iii)(C), (iv)(A), (vi)(A).

Currently, DOL regulations at 20 CFR Part 655, Subpart A, ''Labor Certification Process for Temporary Employment in Occupations other than Agriculture, Logging or Registered Nursing in the United States (H–2B Workers),'' govern the H–2B labor certification. Applications received by the Office of Foreign Labor Certification (OFLC) in the Department's ETA, the office to which the Secretary has delegated her advisory responsibilities described in the DHS H–2B regulations, are processed first through the State Workforce Agency (SWA) having jurisdiction over the area of intended employment.[1] The SWAs review the application and job offer, compare the wage offer against the prevailing wage for the position, supervise U.S. worker recruitment, and forward the completed applications to OFLC for further review and final determination.

To obtain a temporary labor certification, the employer must demonstrate their need for the temporary services or labor meets one of the regulatory standards of (1) a one-time occurrence, (2) a seasonal need, (3) a peakload need, or (4) an intermittent need. 8 CFR 214.2(h)(6)(ii)(B). The employer or its authorized representative must submit to the SWA a detailed statement of temporary need and supporting documentation with the application for H–2B labor certification. Such documentation provides a description of the employer's business activities and schedule of operations throughout the year, explains why the job opportunity and the number of workers requested reflects its temporary need, and demonstrates how the employer's need meets one of these four regulatory ''need'' standards. The petitioning employer must also establish that the temporary position is full-time, and the period of need is less than three years (although a labor market test and certification must be obtained each year).

Additionally, the requesting employer must adequately test the U.S. labor market to determine if a qualified U.S. worker is available for the position. In order to ensure an adequate test of the labor market, the employer must offer and subsequently pay for the entire period of employment a wage that is equal to or higher than the prevailing wage for the occupation at the skill level and in the area of intended employment, and provide terms and conditions of employment that are not less favorable than those offered to the foreign worker(s) or otherwise inhibit the effective recruitment and consideration of U.S. workers for the job.

Historically, the Department's review and adjudication took place through ETA's Regional Offices. However, in December 2004, the Department opened two new National Processing Centers (NPCs), one each located in Atlanta, Georgia, and Chicago, Illinois, to centralize processing of permanent and temporary foreign labor certification cases at the Federal level. The Department published a notice in the **Federal Register** at 70 FR 41430 (Jul. 19, 2005), clarifying that employers seeking H–2B certifications must file two originals of Form ETA 750, Part A, directly with the SWA serving the area of intended employment. Once the application is reviewed by the SWA and after the employer conducts its required recruitment, the SWA sends the complete application to the appropriate NPC. The NPC Certifying Officer (CO), on behalf of the Secretary, either issues a labor certification for temporary employment under the H–2B Program, denies the certification, or issues a notice that such certification cannot be made.

Currently, the Department has no enforcement authority or process to ensure H–2B workers are employed in compliance with the H–2B certification requirements. Congress vested DHS with that enforcement authority in 2005. 8 U.S.C. 1184, Public Law 109–13, 119 Stat. 231, 318. As described more fully below, the Department in this NPRM proposes an H–2B regulatory enforcement regime in the event that the Department and DHS are able, pursuant to 8 U.S.C. 1184(c)(14)(B), to work out a mutually agreeable delegation of enforcement authority from DHS to the Department.

B. Earlier Efforts To Reform the H–2B Regulatory Process

On January 27, 2005, DHS and the Department issued companion NPRMs to significantly alter H–2B procedures. 70 FR 3984, Jan. 27, 2005, 70 FR 3993, Jan. 27, 2005. As proposed, combined changes to both sets of regulations would have eliminated in whole the Department's adjudicatory role, ending the current labor certification process for most H–2B occupations and permitting employers to submit labor-related attestations directly to USCIS as part of a revised Supplement accompanying the H–2B petition. The Department's proposed rule would have authorized the Department to conduct random or selected audits of labor attestations approved by USCIS and to recommend debarment of employers from participation in the H–2B Program upon findings of misrepresentation or violations of those attestations. The Department would have established a new audit and debarment process at the Department, and USCIS would have established its own procedures to debar employers based on independent information. DHS regulations, as proposed in 2005, also would have required filing directly by employers, disallowing the filing of H–2B petitions by agents. *Id.*

The two agencies received numerous comments on the joint NPRMs. Most commenters opposed the proposals to move the program to a USCIS-based attestation system and to eliminate the Department's role in reviewing the need of employers and the recruitment of U.S. workers except in the context of a post-adjudication audit. These concerns focused in part on the loss of the Department's experience in adjudicating

[1] The SWAs comprise agencies of State Government that receive Federal Workforce Investment Act (WIA), Wagner-Peyser Act, and other funds to administer our nation's one-stop career system and, through those grants, perform certain activities on behalf of the Federal Government, such as administration of the job clearance system. With respect to this NPRM, they currently accept applications by employers for processing prior to their transmittal to the Department.

issues of temporary need and the potential adverse impact on U.S. workers. Based on the significant concerns posed in these comments, and after further deliberation within each agency, the Department and DHS have not pursued their original proposal to streamline the program in the manner suggested by the two companion NPRMs. Consequently, that NPRM published by the Department on January 27, 2005 (RIN 1205–AB36) was withdrawn in the Department of Labor Fall 2007 Regulatory Agenda. See *http://www.reginfo.gov/public/do/eAgendaViewRule?ruleID=221117*.

The Department has, however, continued to closely review its H–2B Program procedures in order to determine appropriate revisions to the H–2B labor certification process. This ongoing and systematic review has been accelerated in light of considerable workload increases for both the Department and the SWAs (an approximate 30 percent increase in applications in Fiscal Year (FY) 2007 over those received in FY 2006, and a comparable number during the first half of FY 2008) and limited appropriations. On April 4, 2007, ETA issued Training and Employment Guidance Letter (TEGL) No. 21–06, published in the **Federal Register**, Apr. 20, 2007, 72 FR 19961, to replace its previous guidance for the processing of H–2B applications (General Administration Letter No. 1–95, 60 FR 7216, Feb. 7, 1995) and updated procedures for SWAs and NPCs to use in the processing of temporary labor certification applications. The Department then held national briefing sessions in Chicago and Atlanta on May 1 and May 4, 2007, respectively, to inform employers and other stakeholders of the updated processing guidance contained in TEGL 21–06. Attendees at those briefing sessions raised important questions and concerns with regard to the effective implementation of TEGL 21–06 by the SWAs and NPCs. In response to the substantive concerns raised, the Department further refined the process of reviewing applications in TEGL 27–06 (June 12, 2007) providing special procedures for dealing with forestry related occupations, and TEGL No. 21–06, Change 1 (June 25, 2007) updating procedures by allowing the NPC CO to request additional information from employers to facilitate the processing of applications. 72 FR 36501, Jul. 3, 2007; 72 FR 38621, Jul. 13, 2007. Issues that were not addressed by these refinements, including those requiring regulatory changes, namely issues of increasing workload and processing delays, remain of concern to the Department.

C. Current Process Involving Temporary Labor Certifications and the Need for a Redesigned System

The process for obtaining a temporary labor certification has been described to the Department as complicated, time-consuming, inefficient, and dependent upon the expenditure of considerable resources by employers. In the H–2B Program, and particularly in recent years, the sequential process for filing a temporary labor certification first at the SWA, which reviews the application, compares the wage offer to the prevailing wage for the occupation, oversees the recruitment of U.S. workers, and then transfers the application to the applicable ETA NPC, has been criticized for its length, overlap of effort, and resulting delays. Application processing delays, regardless of origin, can lead to adverse results with serious repercussions for a business, especially given the cap on visas under this program, where any delay may prevent an employer from obtaining H–2B workers that year. This occurs because employer demand for the limited number of visas greatly exceeds their supply and all visas are typically allocated in the early weeks of availability. See 8 U.S.C. 1184(g)(1)(B) (setting H–2B annual visa cap at 66,000).

In addition, the Department's increasing workload poses a growing challenge to efficient and timely processing of applications. The H–2B foreign labor certification program continues to increase in popularity among employers. While the annual number of visas available is limited by statute, the number of certifications is not. The number of H–2B labor certification applications has increased 129 percent since FY 2000. In FY 2007, the Department experienced a nearly 30 percent increase in H–2B temporary labor certification application filings over the previous fiscal year. The INA does not authorize the Department to charge a fee to employers for processing H–2B applications [2]. At the same time, appropriated funds have not kept pace with the increased workload at the State or Federal level. This has resulted in disparities in processing rates—some significant—among SWAs receiving the initial H–2B employer applications. Some observers have noted these disparities among States unfairly advantage one set of employers (those in which the SWAs are able to timely process applications) over others (those in which SWAs experience delays because of backlogs, inadequate staffing or funding, or for other reasons).[3]

In light of these recurring experiences, the Department is proposing several significant measures to re-engineer our administration of the program. These changes do not alter, in any substantive way, the current obligations and requirements of employers who file an application for H–2B. Rather, these proposals are designed to improve the process by which employers obtain labor certification in areas where our program experience has demonstrated that such efficiencies will not impair the integrity of the process or the Department's role in protecting the job opportunities and wages of U.S. workers. These proposals will also provide greater accountability for employers through penalties, up to and including debarment, to further protect against program abuse.

The redesigned process will require employers to complete recruitment steps similar to those now required, but will enable them to do so prior to filing the application for labor certification. Once the recruitment is complete, the paper application will be submitted directly to ETA instead of being filed with a SWA. To appropriately test the labor market, employers will be required to first obtain a prevailing wage rate from the appropriate NPC that will be used as the wage to be offered in the recruitment of U.S. and foreign workers. The employer will then follow recruitment steps similar to those required under the current program. The employer will be required to attest to and enumerate its recruitment efforts, but need not submit the documentation supporting those efforts with its application. To ensure the integrity of the process, the employer will be expected to retain evidence of its recruitment, as well as other documentation specified in the regulations, for 5 years from the date of certification, and will be required to provide it in response to a request by the CO for additional information made

[2] The Department will be transmitting draft legislation to Congress that would amend the INA to provide the Department with authority to charge and retain a fee to recoup the costs of administering the H–2B program.

[3] The growth in the number of applications is explained in part by the increasing desire of employers for a legal temporary workforce and by legislation that permitted greater numbers of H–2B workers into the U.S. by exempting from the 66,000 annual cap any H–2B worker who had been counted against the numerical cap in previous years. See, e.g., Save Our Small and Seasonal Businesses Act of 2005 (SOSSBA), Public Law 109–13, Div. B, Title IV, 119 Stat. 318 (May 11, 2005); see also Public Law 108–287 § 14006, 118 Stat 951, 1014 (August 6, 2004) (exempting some fish roe occupations from the cap).

either prior to certification or, in the event the application is selected for audit or for investigation by the Wage and Hour Division (WHD), after a determination on the application has been issued.

Employers or their authorized representatives (attorneys or agents) will be required to submit applications by U.S. Mail using a new form designed to evidence the employer's compliance with the obligations of the H–2B Program. The application form will collect, in the form of attestations, information similar to that required by—and that in given cases may be exchanged with SWA or NPC staff as part of—the current H–2B labor certification process. As we modernize the process, these additional attestations will be required from the employer to ensure adherence to program requirements and firmly establish accountability. As with recruitment, employers will be required to keep records reflecting their compliance with all program requirements. Assuming an application is complete and therefore accepted by the NPC for processing, it will undergo substantive Federal review by the Department.

In order to further protect the integrity of the program in light of the elimination of SWA oversight of recruitment, specific verification steps, such as verifying the employer's Federal Employer Identification Number (FEIN) to ensure the employer is a bona fide business entity, will be collected during processing to ensure the accuracy of the information supplied by the employer and the employer's compliance with program requirements. If an application does not appear to be approvable on its face but requires additional information in order to be adjudicated, the NPC will issue a Request for Further Information (RFI), a process the program already employs. After full Departmental review, an application will be certified or denied.

The introduction of new post-adjudication audits will serve as both a quality control measure and as a means of ensuring program compliance, along with WHD investigations. Audits will be conducted on adjudicated applications that meet certain criteria, as well as on randomly-selected applications. In the event of an audit (or WHD investigation), employers will be required to provide information supporting the attestations made in the application. Failure to meet the required standards or to provide information in response to an audit (or investigation) may result in an adverse finding for the application in question, and that could lead either to Departmental supervised recruitment in future applications or WHD investigations or debarment from the program.[4]

The combination of modernized processing of applications, and replacement of the SWAs' current role in the recruitment and referral of U.S. workers with pre-filing recruitment by the employer and audits by the Department, should yield a considerable reduction in the overall average time needed to process H–2B labor certification applications. This process will reduce past processing times which have exceeded our historical 60-day combined State and Federal processing window timeframe.

D. Compliance Investigations and Remedies for Violations

Finally, this NPRM outlines a process to impose remedies for violations in the event that the Department and DHS are able to work out a mutually agreeable delegation of enforcement authority. The INA and its implementing regulations provide the Department no direct authority to enforce any conditions concerning the employment of H–2B workers, including the prevailing wage attestation. Consequently, current DOL H–2B regulations provide no substantive protections to ensure that employers fulfill their obligations concerning the terms and conditions of employment once the H–2B workers are employed.

Section 404 of Save Our Small and Seasonal Businesses Act of 2005, Public Law 109–13, 119 Stat. 231, 318, amended the INA to provide the Secretary of DHS with authority to impose certain sanctions when a sponsoring employer has been found, after notice and an opportunity for a hearing, to have committed ''a substantial failure to meet any of the conditions of the petition to admit or otherwise provide status to a nonimmigrant [H–2B] worker * * * or a willful misrepresentation of a material fact in such petition''. 8 U.S.C. 1184(c)(14)(A). When such violations are found, the Secretary of Homeland Security ''may, in addition to any other remedy authorized by law, impose such administrative remedies (including civil monetary penalties in an amount not to exceed $10,000 per violation) as the Secretary of DHS determines to be appropriate.'' *Id.* at 1184(c)(14)(A)(i). The statute provides that the ''highest penalties shall be reserved for willful failures to meet any of the conditions of the petition (which includes the labor certification) that involve harm to United States workers.'' *Id.* at 1184(c)(14)(C). In addition, the Secretary of DHS is authorized to ''deny petitions filed with respect to that employer under section 1154 of this title or paragraph (1) of this subsection during a period of at least 1 year but not more than 5 years for aliens to be employed by the employer.'' *Id.* at 1184(c)(14)(A)(ii). These enforcement provisions became effective October 1, 2005.

The authority given to the Secretary of DHS under 8 U.S.C. 1184(c)(14)(A)(i) may be delegated to the Secretary of the Department, with the agreement of the Secretary of the Department. *Id.* at 1184(c)(14)(B). In addition, the INA contains other authority for the Secretary of DHS to delegate these functions. Under 8 U.S.C. 1103(a)(1) and (a)(3) the Secretary of DHS is ''charged with the administration and enforcement of [INA] and all laws relating to the immigration and naturalization of aliens'' and is authorized to ''establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of [INA].'' The Secretary of DHS ''is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department * * * under whose jurisdiction the employee is serving, any powers, privileges, or duties conferred or imposed by [the INA] or regulations issued thereunder upon officers or

[4] Further sanctions may be imposed by DHS under 8 U.S.C. 1184(c)(14):

''(14)(A) If the Secretary of Homeland Security finds, after notice and an opportunity for a hearing, a substantial failure to meet any of the conditions of the petition to admit or otherwise provide status to a nonimmigrant worker under section 101(a)(15)(H)(ii)(b) or a willful misrepresentation of a material fact in such petition—

''(i) The Secretary of Homeland Security may, in addition to any other remedy authorized by law, impose such administrative remedies (including civil monetary penalties in an amount not to exceed $10,000 per violation) as the Secretary of Homeland Security determines to be appropriate; and

''(ii) the Secretary of Homeland Security may deny petitions filed with respect to that employer under section 204 or paragraph (1) of this subsection during a period of at least 1 year but not more than 5 years for aliens to be employed by the employer.

''(B) The Secretary of Homeland Security may delegate to the Secretary of Labor, with the agreement of the Secretary of Labor, any of the authority given to the Secretary of Homeland Security under subparagraph (A)(i).

''(C) In determining the level of penalties to be assessed under subparagraph (A), the highest penalties shall be reserved for willful failures to meet any of the conditions of the petition that involve harm to United States workers.

''(D) In this paragraph, the term 'substantial failure' means the willful failure to comply with the requirements of this section that constitutes a significant deviation from the terms and conditions of a petition.''

employees of the Service.'' *Id.* at 1103(a)(6).

Pursuant to authority in 8 U.S.C. 1103(a)(6) and 1184(c)(14)(B), the Department of Labor is currently in discussions with the Department of DHS regarding whether the two Departments can work out a mutually agreeable delegation of authority that would enable the Department to enforce the terms of an H–2B certification and petition. In the event such a delegation of authority can be worked out, the Department would like to be prepared to begin enforcement of the H–2B Program and accordingly this NPRM contains the Department's proposed regulations implementing the enforcement of employer's H–2B attestations, as well as the authority to impose appropriate sanctions. This NPRM proposes an enforcement process by which the Department will investigate employer compliance with H–2B attestations and impose remedies for violations that are found, if that delegation occurs.

As noted above, section 214(c)(14)(A) of the INA uses broad language in providing authority to impose ''such administrative remedies (including civil money penalties in an amount not to exceed $10,000 per violation) as the Secretary of Homeland Security determines to be appropriate * * *.'' The Department is considering the scope of remedies that may be assessed under this H–2B provision of the INA in the event a delegation is issued. For instance, although the assessment of back wage liability for the failure to pay the appropriate wage is a common remedy in Federal statutes that protect the rights of workers, *see, e.g.,* 29 U.S.C. 216 (Fair Labor Standards Act); 29 U.S.C. 1854(c) (Migrant and Seasonal Agricultural Worker Protection Act); 29 U.S.C. 2617 (Family and Medical Leave Act), the H–2B statutory provisions do not provide explicit authority to require the payment of back wages. It may be argued that an explicit statutory delegation of authority to award back pay is unnecessary where back pay is required to enforce the statute as Congress intended. *See Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 417–418 (1975) (back pay award consistent with purposes of, and a necessary component of remedy for violations of Title VII of the Civil Rights Act of 1964); *United States* v. *Duquesne Light Co.,* 423 F. Supp. 507, 509 (W.D. Pa. 1976) (back pay appropriate remedy under Executive Order 11,246). On the other hand, the H–1B provisions of the INA contain language that is nearly identical to the language found in H–2B,[5] and unlike the H–2B provisions, H–1B also contains explicit authorization for the assessment of back pay, *Id.* at 1182(n)(2)(D). It may be that where Congress intended the assessment of back wages under the INA, it said so explicitly and the lack of such explicit authority under the H–2B statute might preclude such an assessment. *See Beverly Enterprises* v. *Herman,* 119 F. Supp. 2d1 (D.D.C. 2000) (regulation requiring payment of prevailing wage in the absence of a statutory requirement found invalid). The Department solicits comments on the appropriateness of assessing back wages and other remedies under the H–2B provisions.

II. Proposed Redesign To Achieve a Modern Attestation-Based Program

A. Prevailing Wage Obtained Prior To Commencing Recruitment

In order for the Secretary to be able to certify that U.S. workers would not be adversely affected by the employment of H–2B workers, an adequate test of the labor market must be conducted. Such a test must include the employer offering and paying a wage that is equal to or higher than the available position's prevailing wage, where the terms, duties and conditions of employment are normal and promote the effective recruitment and consideration of U.S. workers.

For many years, the Department has required H–2B employers to submit their applications for certification to the SWAs. The SWA then filled in the applicable prevailing wage for the job opportunity. Department regulations at 20 CFR 656.40, which the Department applies to prevailing wage determinations (PWD) for occupations under its permanent and temporary non-agricultural foreign labor certification programs, instructs SWAs to apply wage rates from the Bureau of Labor Statistics (BLS), Occupational Employment Statistics (OES) Survey to determine the prevailing wage rate, unless superseded by a wage set by a collective bargaining agreement or other statute. The BLS OES Survey results of prevailing wages have for several years been available to the SWAs and the public on the Department's Web site at *http://www.foreignlaborcert.doleta.gov/.* Under current regulations and the Department's prevailing wage guidance, SWAs may also accept employer-provided alternatives from legitimate sources. See 20 CFR 656.40; see also *Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (May 9, 2005), at *http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.*

As part of the proposed reengineered process, employers will obtain the prevailing wage for the job opportunity directly from OFLC. The Department is proposing to allow employers to file prevailing wage requests no more than 90 days in advance of the recruitment process and to clarify the validity period for the wage determination. The OES database is updated annually for use in the foreign labor programs. Depending on the time of year that the PWD is obtained from the Department, relative to the date of the most recent update, the wage determination provided could be valid from several months up to 1 year.

Our program experience indicates that by federalizing the prevailing wage application component we can institute a high level of efficiency and consistency in the determination and provision of prevailing wages which has been a past problem. This increased efficiency and consistency will help ensure more accurate wage determinations, which result in improved protections for U.S. workers. The Department is especially interested in comments from employers who have utilized the program in the past on the efficacy of this proposed action.

The new system would federalize the issuance of prevailing wages, and delegate the authority for determining prevailing wage rates to the ETA NPCs. It is the Department's goal to eventually allow this activity to be performed electronically between the NPC and the employer. However, initially it will be a manual paper process.

Shifting wage determination activities to NPC staff would reduce the risk of job misclassification because of centralized staff experience and consistency, thereby not only strengthening program integrity, but also ensuring consistency in classification across States, resulting in improved protections for U.S. workers. Until the new process can be implemented, the SWAs would continue to be responsible for providing prevailing wage determinations (PWDs).

The Department has received numerous reports that in cases where job descriptions are complex and contain more than one different and definable job opportunity, some SWAs have made inconsistent classifications, thereby resulting in inconsistent PWDs.

[5] 8 U.S.C. 1182(n)(2)(C)(i)(I)(H–1B) (''the Secretary * * * may * * * impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per violation) as the Secretary determines to be appropriate * * *)

Furthermore, where H–2B workers need to work in several different geographic areas which may be in the jurisdiction of several different SWAs (examples include the New York, New Jersey, Connecticut ''Tri-state Region'' or the Washington, DC-Maryland-Virginia metropolitan area), questions have arisen about where to file a prevailing wage request and how that wage should be determined. Utilizing the federalized system discussed above would alleviate such confusion.

For consistency and greater efficiency across non-agricultural programs, the Department is proposing extending this new wage request processing model to the permanent labor certification program, as well as to the attestations required under the H–1B, H–1B1 and E–3 specialty occupation nonimmigrant programs. The new process will in no way alter the substantive requirements of foreign labor certification programs, and we anticipate that, at least in the foreseeable future, the methodology for determining an appropriate non-agricultural wage rate will remain much the same as it stands today; our intent is simply to modernize, centralize, and make more consistent the mechanics and analysis behind wage determination. Much as the SWAs do now, the NPCs will evaluate the particulars of the employer's job offer, such as the job duties and requirements for the position and the geographic area in which the job is located, to arrive at the correct PWD. In the near term, the Department will update and formalize its guidance for making prevailing wage determinations to confirm existing procedures. As our program experience administering the PWD process grows, the Department may revise its guidance to reflect improved processes or methodology.

To implement and standardize the new process, ETA has developed a new Prevailing Wage Determination Request (PWDR) form employers can use to make their respective requests regardless of program or job classification. The Department is considering means by which eventually—resources permitting—such a request could be submitted, and a prevailing wage provided, electronically.

For purposes of the permanent labor certification (PERM) program, the regulations at 20 CFR part 656 will be amended to reflect the transfer of prevailing wage determination functions from the SWAs to the NPCs. Currently, Department regulations governing permanent labor certification require an employer to obtain a PWD from the SWA before filing a labor certification application with the Department or an I–140 immigrant worker petition with DHS under Schedule A or for sheepherders. In addition to technical changes required in part 656—for example, we propose to change the definitions of ''prevailing wage determination'' and ''State Workforce Agency'' under § 656.3—Subpart D, ''Determination of Prevailing Wage'', to require that employers now seek a PWD directly from the NPC with jurisdiction over the area of intended employment and with which they will be filing their permanent labor certification application.

For purposes of the H–1B Program, the regulations at 20 CFR part 655 will be amended to reflect the transfer of PWD functions from the SWAs to the NPCs. Department regulations covering the H–1B Program (and by extension and reference both H–1B1 and E–3, which both utilize the filing and approval of a Labor Condition Application, or LCA) permit an employer to obtain a PWD from the SWA before filing an LCA with the Department in order to obtain a ''safe harbor'' from a determination of the validity of the prevailing wage. This proposal requires technical changes to § 655.731(a)(2) to permit employers to utilize a prevailing wage obtained from the NPC rather than the SWA. These changes would enable employers to seek a PWD directly from the NPC with jurisdiction over the area of intended employment and with which they will be filing their Labor Condition Application.

Under the new process, for purposes of H–2B job classifications, NPC staff will follow the requirements outlined under proposed §§ 655.10 and 655.11 when reviewing each position and determining the appropriate wage rate. These new regulatory sections are consistent with existing regulations at 20 CFR 656.40 and the Department's May 2005 *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs,* but would supersede current regulations and guidance for the H–2B Program to the extent there are any perceived inconsistencies.

In those cases where a job opportunity involves multiple worksites in an area of intended employment and crosses multiple counties or States and different prevailing wage rates exist because the worksites are located in different Metropolitan Statistical Areas (MSA), the NPC will analyze the different prevailing wage rates and determine the appropriate wage as the highest wage rate among all applicable MSAs. In these cases, the employer will not pay different wage rates depending on the location of the work. The U.S. worker and the foreign worker are both entitled to know and rely on the wage to be paid for the entire period of temporary employment, and that wage will be the highest among the application wages for the various locations of work.

The NPRM continues the Department's policy of permitting employers to provide an independent wage survey under certain guidelines delineated in the proposed rule. It also continues to provide for an appeal process in the event of a dispute over the applicable prevailing wage (but makes that process easier to use).

The Department welcomes comments, especially from potential users of the system, on the proposals being presented. We are particularly interested in comments regarding the required use of an online prevailing wage system and form for interaction with the NPC.

B. Direct Filing With the NPC

Under the NPRM, the Department will continue to administer the application process for H–2B temporary foreign labor certification. However, the Department proposes to eliminate the role of the SWAs in accepting and reviewing H–2B applications, overseeing recruitment, and forwarding completed applications to the appropriate NPC. Instead, as with the permanent labor certification process, the employer will file applications directly with the Chicago NPC, as the Department will be specializing its two centers effective June 1, 2008. However, each employer will still be required to place a job order with the appropriate SWA as part of the pre-filing recruitment, and we expect SWAs will continue to place H–2B associated job orders in their respective Employment Service systems.

This re-engineered filing process should reduce the time it takes to process each application to conclusion. Under the current H–2B process, employers initially file with the appropriate SWA, which subsequently reviews the application, determines the prevailing wage, and authorizes the employer to undertake recruitment of U.S. workers. The SWA also places a job order in its Employment Service system and makes referrals of interested U.S. workers to the employer. The SWA receives the recruitment report and reviews it, forwarding the completed application on to the NPC with an adjudication recommendation. This last process of review is then duplicated at the Federal level.

Given these current multiple levels of Government review, any delays early in the process can have a ripple effect resulting in delays at the NPCs. For example, due to differing and increasing workload levels, local filing cycles, and declining resources, SWAs vary considerably in the amount of time required, to review applications, tell employers to initiate recruitment, review recruitment results and, finally, forward the application to the NPC. Consequently, the State (or even SWA jurisdiction) in which an application is filed can significantly impact the application's processing time. Employers can be disadvantaged through no fault of their own simply based on their location, depending upon a SWA's workload and available resources.

The disparity between demand for program services and processing resources has increased in recent years, sometimes significantly, the amount of time required to process even the most basic of applications. In FY 2007, the average processing time for the SWA portion of an H–2B labor certification application was 64 days, as compared to an average of 31 days at the NPC level. As our recent program experience shows, these delays have serious repercussions at the Federal level. The NPCs must attempt to compensate for State delays by borrowing staff from other non-H–2B processing activities. Shifting these finite resources has created new backlogs in one or more of the other labor certification programs. This is exacerbated by statutorily-mandated processing times in some of the other programs.

By focusing the SWAs' role in the initial stages of processing H–2B labor certification applications to the placement of job orders and handling referrals, the Department anticipates being able to sustain the processing of all applications on a first-in, first-out basis and more effectively and efficiently oversee the adjudication of applications. As a result of this proposed modernized and more efficient application procedure, processing times will be significantly more uniform across work locations.

We expect that the time savings gained from a process that removes duplicative functions and ensures adjudication by the NPC will improve the total time an employer must wait to obtain a labor certification from the Federal Government. Moreover, the Department's centralization of application review in its NPCs will permit greater consistency of adjudication with respect to substantive issues. All major determinations made as part of the certification process will be consolidated from 53 agencies in the States and territories (except Guam) to one federally-run NPC, thereby gaining efficiency of scale and greater uniformity and accountability in training adjudicators and for consistently applying relevant law and policy.

C. Employer Conducted Pre-Filing Recruitment

This NPRM proposes, under new § 655.15, that employers be required to conduct recruitment for U.S. workers prior to filing the new form currently in development, to be styled on the *Application for Temporary Employment Certification.* The purpose of the recruitment process is to fulfill the Department's obligation to ensure an adequate test of the availability of qualified U.S. workers to perform the work and to ensure foreign workers are not employed under conditions that adversely affect the wages and working conditions of similarly employed U.S. workers. Employers will continue to be required to test the labor market for qualified U.S. workers, at prevailing wages and working conditions, no more than 120 days before the date the work must begin (''date of need''), thus ensuring these jobs are made available, with notice, to the U.S. workers who are most likely to qualify.

The Department further proposes that prevailing wages be obtained from the NPC in advance of recruitment. The NPCs will issue prevailing wages valid for the duration of the described need up to 1 year. The employer will be obligated to ensure that the prevailing wage is valid upon commencement of recruitment or on the date it files the application with the Chicago NPC and that the appropriate wage is listed in all recruitment documents. Obtaining the prevailing wage in advance of initiating recruitment will help enable employers to begin their recruitment obligations in a timely manner and will ensure that the job is advertised and offered to U.S. workers at the appropriate wage.

U.S. worker recruitment will continue to consist of prescribed steps designed to reflect what the Department has determined, based on program experience, are most appropriate to the occupations that are the usual subjects of H–2B applications. These steps, which are discussed in more detail below, will include the placement of a job order with the SWA serving the area of intended employment; the placement of three advertisements, one of which must be on a Sunday, in the newspaper most appropriate for the occupation and most likely to reach the U.S. workers who would apply and qualify for the job opportunity; and preparation of a recruitment report outlining the results of the recruitment to be submitted with the application. If the employer determines in good faith that use of a professional, trade or ethnic publication is more appropriate to the occupation, that qualified workers likely to apply for the job opportunity would be more likely to read that publication than a newspaper of general circulation, and that it is the most likely source to bring responses from qualified and available U.S. workers, the employer may use such a publication in place of two of the daily (but not Sunday) advertisements. This option would offer employers greater flexibility in meeting recruitment requirements for those jobs that are traditionally advertised in professional or trade journals (particularly for those unionized jobs for which publications are most likely to exist). In addition, in circumstances where it is appropriate for the occupation and customary to the industry, the use of union organizations as a recruitment source will continue to be required. Employers will have to attest under penalty of perjury that (1) they did, in fact, attempt to recruit U.S. workers in the manner described above, and (2) any potentially qualified U.S. workers that applied were rejected because in fact they were not qualified or for other lawful, job-related reasons.

These steps are very similar to those currently required under the current H–2B Program. The rule maintains the requirement that employers must conduct recruitment and consider potential U.S. workers. By having employers engage in these steps under their own direction rather than the SWA's, and by having the employer forward their recruitment report to the Department for review, we expect to improve application processing and consistency while ensuring protections for U.S. workers. Maintaining the Department's current requirement that recruitment take place no more than 120 days before the date of need continues to ensure jobs are advertised to U.S. workers with adequate notice given the temporary nature of the employment.

Employer recruitment efforts must be documented and preserved for production to the Department or other Federal agencies—for example, in the event of either a post-adjudication audit or a pre-adjudication RFI or an investigation by the WHD or another body. For purposes of this regulation, the recruitment documentation requirements will be satisfied by copies of the pages containing the advertisement from the newspapers in

which the job opportunity appeared and, if appropriate, correspondence signed by the employer demonstrating that labor or trade organizations were contacted and were either unable to refer qualified U.S. workers or non-responsive to the employer's request. Documentation of a SWA job order will be satisfied by copies of the job order downloaded from the Internet on the first and last day of the posting, or a copy of the job order provided by the SWA with the dates of posting listed.

Newspapers remain a potential recruitment source for U.S. workers likely to be affected by the introduction of H–2B labor. Permitting employers to place their own newspaper advertisements pursuant to the requirements outlined in the proposed regulation acknowledges industry practice and needs, while maintaining accountability and worker protection. One of the newspaper advertisements will be required to appear on a Sunday, unless the job opportunity is in an area in which the newspaper most likely to reach the most appropriate potential pool of U.S. workers does not have a Sunday edition. Employers will be required to list the specifics of the newspaper advertisement on the application but will not be required to submit tear sheets or other documentary evidence of that recruitment when the application is submitted. However, the employer will be required to maintain documentation of the actual advertisement(s) published and the results of the recruitment effort in the event of an audit or other review. Our recent program experience under the re-engineered PERM program has demonstrated the viability of this approach. See 20 CFR part 656.

At the same time, our program experience has shown that while most employers seek to comply with recruitment requirements, not all may do so. For example, the Department's experience has long demonstrated that there are employers who, if not provided with specific instructions, will seek to demonstrate apparent compliance with advertising requirements by placing the required newspaper advertisements in newspapers having low circulations and which are the least likely publications to be read by potentially available U.S. workers. In order for the employer's job opening to receive appropriate exposure to the widest pool of potentially available U.S. workers, the proposed regulation at new § 655.15(f) requires that the mandatory advertisements (now including a Sunday edition) appear in the newspaper of general circulation that the employer believes in good faith is most appropriate to the occupation in the area of intended employment and the most likely to be read by workers who will apply for the job opportunity in the area of intended employment.

Under proposed § 655.17, the advertisements must: (1) Identify the employer with sufficient clarity to identify the employer to the potential pool of U.S. workers (by legal and trade name, for example); (2) provide a specific job location or geographic area of employment with enough specificity to apprise applicants of travel or commuting requirements, if any, and where applicants will likely have to reside to perform the services or labor; (3) provide a description of the job with sufficient particularity to apprise U.S. workers of the duties or services to be performed and whether any overtime will be available; (4) list minimum education and experience requirements for the position, if any, or state that no experience is required; (5) list the benefits, if any, and the wage for the position, which must equal or exceed the applicable prevailing wage as provided by the NPC; (6) contain the word ''temporary'' to clearly identify the temporary nature of the position; (7) list the total number of job openings that are available, which must be no less than the number of openings the employer lists on the ETA application; and (8) provide clear contact information to enable U.S. workers to apply for the job opportunity. The advertisement cannot contain a job description or duties which are in addition to or exceed the duties listed on the PWDR or on the application, and must not contain terms and conditions of employment which are less favorable than those that would be offered to an H–2B worker.

If the job opportunity is in an industry, region and occupation in which union recruitment is customary, the appropriate union organization must be contacted. 72 FR 38621, 38624, Jul. 13, 2007. This is a continuation of the current practice under TEGL 21–06, Ch. 1. 72 FR 382621, 38624, Jul. 13, 2007. Employer diligence will be required to determine whether the job opportunity is one which has traditionally been the subject of collective bargaining and whether it is therefore appropriate and customary to contact the union. Some positions, such as welders and drillers, have had a long history of collective bargaining interaction. Others, such as landscapers, are not traditionally unionized and there simply may be no collective bargaining unit to contact. Those jobs in which union contact has been customary will continue to be so; those in which there is no applicable union to contact would fall outside of the job opportunities for which union contact is ''appropriate to the occupation and customary to the industry.'' The nature of the employment, not the employer, will be the primary guide. Employers with uncertainties are invited to request guidance from the Chicago NPC regarding the applicability of union contact to their occupation during the recruitment period.

The SWA will continue to play an active role in the recruitment process by posting an employer's job order. The employer will need to contact the SWA to place the job order in its job posting system, rather than rely on the SWA to place it in the course of adjudicating the application, as is the case now. The job order will provide the same information as the newspaper advertisements contemplated by this NPRM. Under proposed § 655.15(e), employers whose applications involve worksites in multiple SWAs will place the job order with the SWA having jurisdiction over the place where the work is contemplated to begin. That SWA will post the job order and ensure the job order is circulated to other SWAs covering other worksites as required.

The Department proposes to maintain the length of time the SWA keeps the job order open to its current 10 consecutive calendar days. We consider this amount of time the minimum necessary to provide sufficient local involvement in placement and referrals.

To strengthen the integrity of the Secretary's determination of the availability of U.S. workers, and to help bolster employers' confidence in their local SWAs and the larger H–2B Program, the proposed rule states that SWAs are required to verify the employment eligibility of prospective U.S. workers before referring them under an H–2B job order. That such a process is appropriate under the INA is evident from the contemplation in section 274A(a)(5) (8 U.S.C. 1324a(a)(5)) of the ability of an employer to rely upon the employment eligibility verification conducted by a state employment agency (e.g., the SWA), if that agency conducts the verification and provides to the employer a certification that the agency has complied with the procedures required for verification.

The INA clearly contemplates that workers who are competing for jobs with H–2B foreign workers must be eligible to be employed in such positions. The INA provisions governing admission of foreign workers under the H–2B Program make employment eligibility of U.S. workers a core element of their availability for such

jobs. By statute, the Secretary is consulted as to the availability of persons in the U.S. ''capable of performing such service or labor''. 8 U.S.C. 1101(a)(15)(H)(ii)(b). USCIS regulations require, at 8 CFR 214.2(h)(6), that the intending employer must first apply for a temporary labor certification from the Secretary demonstrating that U.S. workers capable of performing the services or labor are unavailable, and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. Employers are therefore not penalized for turning away U.S.-based applicants who are not authorized to work, and referred workers who are refused employment on the basis of not having work authorization are not counted as available for purposes of H–2B labor certification.

The Department notes that DHS regulations at 8 CFR 274a.6 provide the verification procedures for SWAs pursuant to INA section 274A(a)(5). The CIS regulations set out the procedures by which a SWA may verify and certify to the employer the employment eligibility of any referred worker. To confirm its continued eligibility to receive Alien Labor Certification grant funding, each State agency will be asked to submit proof of these procedures to the Department prior to the beginning of the 2009 fiscal year. The SWA's responsibility to perform threshold, pre-referral verification exists separate from each employer's independent obligation under the INA to verify the employment eligibility of every worker to whom it has extended a job offer. The INA provides that employers who accept referrals from SWAs that verify employment eligibility in compliance with the DHS process and provide referred employees with appropriate documentation certifying that employment eligibility verification has taken place are entitled to ''safe harbor'' in the event it is later discovered a referred worker was not authorized to work in the U.S. INA section 274A(a)(5); 8 U.S.C. 1324a(a)(5). To simplify the recruiting process and avoid unnecessary duplication of functions, SWAs are directed to provide all employers with adequate documentation that employment verification of a referred employee has taken place.

The Department is not insensitive to the resource and time constraints facing SWAs in their administration of H–2B activities and the difficulties inherent in making informed referrals on a population of workers that may be itinerant and difficult to contact. However, we do not believe that this requirement has resulted or will result in a significant workload increase or administrative burden. Further, the mechanisms available for verification—including the E–Verify Web-based system operated by DHS—allow SWA staff to perform this function relatively quickly after training. Further, the performance of this duty is an allowable activity under Wagner-Peyser funding each SWA receives from ETA.

E–Verify is a program administered by USCIS. E–Verify electronically verifies a person's employment eligibility after the Employment Eligibility Verification Form (Form I–9) has been completed. SWAs that choose to use E–Verify refer a job seeker to an H–2B-related job only after job seekers complete a Form I–9 and SWAs submit information via E–Verify. The SWA will be required to follow the terms and conditions in the Memorandum of Understanding (MOU) that must be signed by the SWA and USCIS in order to gain access to E–Verify. The SWA may not refuse to make a referral and the employer may not refuse to accept a referral because of an E–Verify tentative nonconfirmation (TNC) of the employee's employment eligibility, unless the job seeker decides not to contest the TNC. SWAs and employers may not take any adverse action, such as delaying a referral or start date, against a job seeker or referred worker based on the fact that E–Verify may not have generated a final confirmation of employment eligibility. The SWA will be required to advise the employer when E-verify generates a final confirmation or nonconfirmation.

The requirement that SWAs verify employment eligibility prior to referral is designed to strengthen the integrity of the temporary labor certification process, afford employers a legal pool of applicants, protect U.S. workers, and improve confidence in and use of the H–2B Program. The policy is fully consistent with the Secretary's statutory authority to administer H–2B labor certification and the SWA's statutory responsibility to refer only eligible individuals.

The NPRM also clarifies the amount of time that U.S. workers should be considered after the closing of the job order and the end of recruitment before an employer is permitted to file an application. Under the current program, SWAs differ considerably in their instructions to employers (based on local practices) as to when recruitment, particularly recruitment under the job order, may end. The NPRM will make consistent such periods by requiring an employer to wait at least 2 calendar days after the job order is closed and at least 5 calendar days after the last newspaper or journal advertisement to complete the recruitment process, and prepare a written recruitment report, listing the recruitment conducted, the applicants who came forward seeking the job opportunity, and the reasons for rejection, to be submitted with the application. By instituting a uniform time period for the consideration of referrals, the Department intends to permit employers an equitable time to complete their review of all referred U.S. workers and prepare the required recruitment report.

D. Form Submission

The Department proposes initially to require employers to submit applications on paper, through an information collection (form) to be modified significantly from the current form to reflect an attestation-based filing process. The use of a redesigned form would provide the necessary assurances for the Department to verify program compliance. The Department is considering, should resources become available, an eventual electronic submission system similar to that employed in other programs administered by the OFLC, such as the electronic-submission system in PERM.

The Department is proposing to eventually require electronic submission in explicit recognition of the fact that such a process will significantly modernize the application filing and review process. An electronic submission process will also improve the collection of key program data and better allow the Department to anticipate trends, investigate areas of concern, and focus on areas of needed program improvement. Improved data collection will also enable the Department to capture information regarding noncompliance and potential fraud that may lead to future administrative, civil, or criminal enforcement actions against unscrupulous or non-performing employers.

The Department recognizes that some H–2B employers may be concerned about their ability to comply with the requirements through use of an Internet-based submission process once it is implemented. The Department is committed to providing, based upon its previous experience and at the appropriate time, user-friendly electronic registration and filing processes that enable use by any employer with computer and Internet access. The Department invites comments, in particular from H–2B employers, on the concept of an electronic filing process.

E. Attestation-Based Process

The Department is proposing to require employers to submit the new application directly to the Department by U.S. Mail or private mail courier to the Chicago NPC. The application will contain certain attestations to confirm employers' adherence to their obligations under the H–2B Program. The employer will be required to retain documentation confirming the contents of the attestations for the Department's review in audits or investigations. An employer will be required to attest, under penalty of perjury, that it has conducted the required recruitment, it has not found sufficient qualified U.S. workers, and it meets all of the requirements and obligations of the program, including temporary need and payment of the prevailing wages.

1. Benefits From an Attestation-Based Process

The Department anticipates the shift to an attestation-based process will reduce processing times while maintaining program integrity. Employers will be expected to comply with all requirements and obligations of the program and maintain appropriate documentation evidencing their compliance. The Department retains for itself the right to request such documentation made either in the course of application consideration, after the adjudication of an application, or through other permitted investigative means such as an investigation by the WHD.[6] These attestations and other information required by the application form will elicit information similar to that required by the current H–2B labor certification process showing the employer has performed the necessary activities to establish eligibility for labor certification.

The proposed application form will require specific attestations from the employer consistent with new § 655.22 and similar to the attestations made on the Form ETA–750 currently in use. For example, the employer will have to attest that it is offering and will provide wages and working conditions normal to workers similarly employed in the area of intended employment; that it will offer and pay wages equal to or in excess of the higher of the prevailing and applicable minimum wages for the entire period of employment under the labor certification; there is no strike, lockout, displacement, or work stoppage in the course of a labor dispute in the occupational classification in the place of employment; and, during the period of certified employment, the employer will comply with all Federal, State and local laws applicable to the employment opportunity.

An employer seeking to employ H–2B workers will attest that the wage is not based on commission, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage for the duration of the certified employment.

Several attestations will be added to those found on the current form. As a companion to enabling employers to conduct recruitment prior to filing the application, an employer will have to attest that it conducted the required recruitment before filing the application and was unsuccessful in locating sufficient numbers of qualified U.S. applicants and, moreover, it has rejected any U.S. workers only for lawful, job-related reasons. In the event of an RFI or audit, a CO may review the employer's documentation regarding U.S. applicants and determine whether these applicants were rejected only for lawful, job-related reasons.

As an additional condition of program participation, an employer will be required to attest that, upon the separation from employment of H–2B worker(s) employed under the certification, if such separation is prior to the end date of the employment as listed on the proposed *Application for Temporary Employment Certification*, the employer will notify the Department and DHS in writing of the separation from employment not later than 48 hours after the separation occurs. The notification is also required if an H–2B worker absconds from the employment prior to the end date of the employment on the application. The rationale for such notice is to ensure that when the basis for the foreign worker's status terminates, both the Department and DHS can take appropriate action.

Employers will, moreover, be required to inform foreign workers that they too have responsibilities under the H–2B Program. While most of the responsibilities attached to a foreign worker's status in the U.S. fall within the purview of DHS, it is within the Department's authority to establish employer requirements related to information to be provided new workers. To that end, with respect to foreign workers being employed under the H–2B Program, we find it warranted that employees be informed that a separation from employment triggers the requirement of departure, absent possession by the employee of continued valid status consistent with DHS regulations. DHS will establish a new land-border exit system for H–2B and other foreign workers to help ensure that departure follows the end of work authorization, regardless of whether it flows from a premature end or from the end of the authorized labor certification.

In addition, under new §§ 655.21 and 655.22(j), an employer seeking to employ H–2B workers will be required to attest that the job opportunity is for a full-time, temporary position. The H–2B Program has always required that the positions being offered be temporary and full-time in nature. The Department recognizes that some industries, occupations and States have differing definitions of what constitutes full-time employment. For example, certain landscaping positions are often classified as full-time for a 35-hour work week. The Department under new § 655.4 has provided a basic definition of full-time employment, but will continue to use its considerable experience in determining whether work is full-time for foreign labor certification purposes, based upon the customary practice in the industry in any investigation of this attestation.

Under new § 655.22(k), an employer seeking to employ H–2B workers will attest that it is not displacing any similarly employed permanent U.S. worker(s) in the occupation in the area of intended employment within the period beginning 120 days before the date of need and throughout the entire employment of the H–2B worker(s). Again, this is a new attestation, but the Department has historically considered an employer's layoffs of permanent U.S. workers in determining the availability of workers in a given job opportunity. Considering the effect of a layoff in the area of intended employment, particularly in positions which require little or no experience and which are temporary (and thus could be filled on a transitional basis by a laid-off worker seeking new opportunities), is a long-standing practice in evaluating applications in the H–2B Program. The integrity of the program depends on legitimate employer need. An employer cannot lay off a permanent U.S. worker in an occupation and then attest with any truthfulness that it has a need for a foreign temporary worker for a position which the laid-off U.S. worker could possibly fill. If there has been a layoff by the employer in the area of intended employment within 120 days of the date of need (evidenced by the requested date for certification on the application), the employer must document, in writing, it has notified and considered each of its own laid-off U.S. workers in

[6] The ability for the WHD, rather the Department of Homeland Security, to investigate is contingent upon the Department and DHS agreeing on a delegation of enforcement authority.

the occupation and area of intended employment and the results of the notification and consideration. By requiring an employer to consider laid-off former employees in the area of intended employment and in the very occupation which the employer now seeks to fill, the Department considers this attestation requirement a necessary obligation for any employer seeking to hire workers under the H–2B Program. An employer may reject a U.S. worker, including potential workers from the pool of laid-off workers, but only for lawful, job-related reasons.

Under new § 655.22(m), an employer must attest that if it will place its employees at the job sites of other employers, it has made a bona fide inquiry into whether the other employer has displaced or intends to displace a similarly employed U.S. worker within the area of intended employment within the period beginning 120 days before and throughout the entire placement of the H–2B worker. In order to be able to honestly attest to this condition, the Department believes that the employer should inquire in writing to and receive a response in writing from the employer where the H–2B worker(s) will be placed. This can be done by exchange of correspondence or attested to by the secondary employer in the contract for labor services with the employer petitioning to bring in H–2B workers. This attestation at § 655.22(m) also requires the employer to attest that all worksites where the H–2B employee will work are listed on the *Application for Temporary Employment Certification.*

Under new § 655.22(l), an employer must attest that it has not and will not shift the costs of preparing or filing the application to the temporary worker, including the costs of domestic recruitment or attorneys' fees. The Department will continue to permit employers, consistent with the Fair Labor Standards Act (FLSA), to make reasonable housing and transportation deductions from a worker's pay for the reasonable cost of furnishing housing and transportation. The domestic recruitment, legal, and other costs associated with obtaining the labor certification are, however, business expenses necessary for or, in the case of legal fees, desired by, the employer to complete the labor certification application and labor market test. The employer's responsibility to pay these costs exists separate and apart from any benefit that may accrue to the foreign worker. Prohibiting the employer from passing these costs on to foreign workers allows the Department to protect the integrity of the process, protect the wage of the foreign worker from deterioration by deduction and protect the wages of U.S. workers from depression.

An employer seeking to employ H–2B workers will be required to attest that it will not place any H–2B workers employed pursuant to a certification outside the area of intended employment as listed on the proposed ETA *Application for Temporary Employment Certification.* The required testing of the availability of U.S. workers and the effect on their wages and working conditions would be rendered meaningless if an employer could move an H–2B worker to a new worksite outside the area of intended employment certified on the application. Employers may file H–2B applications based upon more than one worksite; in fact, applications listing multiple worksites are a common occurrence. However, moving an H–2B worker to a worksite outside the area of intended employment specified on the application negates the test of the labor market undertaken with respect to that job opportunity, leaving the U.S. workers in the area of employment without the benefit of the opportunity to apply for that position. Further, to the extent that such relocation is not provided for or is inconsistent with the terms of entry authorized by DHS and the Department of State (DOS)—terms built on the original labor certification—such activity calls into question the continued admissibility of the foreign worker.

As part of its role in H–2B labor certification determinations, the Department will continue to determine whether the employer has demonstrated that it has a need for foreign labor, and that the need is temporary. The employer will be required to attest and provide a short narrative demonstrating its temporary need. Congress has mandated the H–2B Program be used to fill only the temporary needs of employers where no unemployed U.S. workers capable of performing the work can be found. 8 U.S.C. 1101(a)(15)(H)(ii)(b). Therefore, job opportunities that are permanent in nature do not qualify for the H–2B Program. In this NPRM, the Department is proposing to consider a position to be temporary as long as the employer's need for the duties to be performed is temporary or finite, regardless of whether the underlying job is temporary or permanent in nature, as long as the temporary need is less than 3 years. The controlling factor is the employer's temporary need and not the nature of the job duties. *Matter of Artee Corp.,* 18 I&N Dec. 366 (Comm. 1982); Cf. *Global Horizons, Inc.* v. *DOL*, 2007–TLC–1 (November 30, 2006)(upheld the Department's position that a failure to prove a specific temporary need precludes acceptance of temporary H–2A application); see also 11 U.S. Op. Off. Legal Counsel 39 (1987).

Determining ''temporariness'' within the context of labor certification is fundamental to the Department's statutory function. DHS regulations make the temporary nature of the services or labor to be performed a threshold requirement for eligibility in the H–2B Program, and a core element in the definition each foreign worker must meet to be admissible under the visa. By definition, an H–2B worker must: (1) Be entering the U.S. temporarily to perform temporary services or labor; (2) not displace U.S. workers capable of performing such services or labor, and (3) not, by virtue of the employment, adversely affect the wages and working conditions of U.S. workers.

The definition of H–2B temporary need, as defined by DHS regulations, sets the general situational criteria and conditions under which an employer is permitted to seek a foreign worker. The employer may have only one of four types of temporary need: (1) A *one-time occurrence,* in which an employer demonstrates it has not had a need in the past for the labor or service and will not need it in the future, but needs it at the present time; (2) *seasonal need,* in which the employer establishes that the services or labor is recurring and is traditionally tied to a season of the year; (3) *peakload,* in which the employer needs to supplement its permanent staff on a temporary basis due to a short-term demand; or (4) an *intermittent need,* in which the employer demonstrates it occasionally or intermittently needs temporary workers to perform services or labor for short periods.

The proposed regulation leaves to the employer the ability to choose the documentation that best demonstrates its chosen standard of temporary need, to be retained by the employer and submitted in the event of an RFI, a post-adjudication audit or a WHD investigation. For most employers participating in the H–2B Program, demonstrating a seasonal or peakload temporary need can best be evidenced by summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers employed, the total hours worked, and total earnings received. Such reports, however, are not the only means by

which employers can choose to document their temporary need. The proposed regulation accordingly leaves it to the employer to retain other types of documentation, including but not limited to work contracts, invoices, client letters of intent, and other evidence that demonstrates that the job opportunity that is the subject of the application is temporary. Contracts and other documents used to demonstrate temporary need would be required to plainly show the finite nature of that need by clearly indicating an end date to the activity requested.

The proposed Department application form will be designed to require both a short narrative of the nature of the temporary need and responses to questions to determine the time of need and the basis for the need. The narrative will enable the employer to demonstrate in its own words the scope and basis of the need in a way that will enable the Department to confirm the need meets the regulatory standard, with additional questions on the form providing context and clarification. If further clarification is still required, the RFI process will be employed. The form will also contain an attestation that will be signed under penalty of perjury to confirm the employer's temporary H–2B need.

Employers should be wary, however, of using documents demonstrating a ''season'' in general terms (hotel occupancy rates, weather charts, newspaper accounts); in the Department's experience, such generalized statements fail to link a season to a specific position sought to be filled by the employer, which is required under the program. The Department also recognizes that conventional evidence such as payroll information may not be sufficient to demonstrate a one-time or intermittent need, or seasonal or peakload need in cases in which the employer's need has changed significantly from the previous year. In such cases, the employer should retain other kinds of documentation with the application that demonstrates the temporary need.

The Department has explored means to ensure the continuing validity of the labor market test in those situations in which an employer's need is temporary but may be longer than one year. We readily recognize the importance of protecting U.S. worker access to such jobs. We have examined a number of approaches to operationalize the retesting of labor markets and the impact not only on the Department's administration of the program but the effect across Government agencies. We propose in this NPRM to require those employers having multiple-year temporary needs (up to three years) to retest the labor market annually. We believe this is the best method by which to ensure U.S. worker access to these job opportunities while recognizing an employer's need, in some cases for workers to fill positions on a multi-year basis. However, we invite comment on whether an alternative approach that would not require annual retesting of the labor market in situations where an employer has a multi-year temporary need for labor, would be appropriate.

2. Retention of Supporting Documentation

Employers will be required to retain the documentation outlined in the proposed regulations for 5 years from the date of adjudication to demonstrate compliance with the requirements of the program and to provide it in the event of an RFI, post-adjudication audit, WHD investigation or other similar activity. The Department proposes a 5 year document retention requirement in the event a post-adjudication audit is necessary, or another agency (such as DHS) requires the documentation. The documents to be retained include proof of advertising and posting, PWD, resumes/applications received, contact made with applicants, and a copy of the written recruitment report submitted with the application with recruitment results and reasons for not hiring U.S. workers. The employer will also need to retain records to prove temporary need such as monthly payroll records, invoices, multi-year contracts, and other documents which can justify each month of the temporary need. It is to the benefit of the employer to retain the documents for a sufficient period to enable the employer to demonstrate full compliance in the program, but no less than 5 years.

The Department proposes to counteract potential fraud or abuse in the attestation-based process through a combination of approaches, including post-adjudication audit, supervised recruitment and/or debarment from future participation in the H–2B Program. All of these proposals are discussed below, as well as various other mechanisms for fraud detection and prevention, some of which are envisioned to be automated and some of which rely on human review. In addition, employers are reminded that any submission of materially false, fictitious, or fraudulent statements to any Federal Government agency constitutes a criminal violation under 18 U.S.C. 1001, subjecting anyone convicted of a violation to fines and/or imprisonment for up to 5 years.

F. The RFI Process

The Department shall continue to employ the use of RFIs with some adjustments. If an application is deficient or unclear or does not appear to comply with Departmental policy, the CO will issue an RFI. The RFI could be for something as simple as correction of typographical errors or as complex as substantiation of temporary need or recruitment results.

The RFI process is explained in TEGL 21–06, change 1. The Department recognizes an RFI requires additional effort and may cause a delay in the issuance of a certification, and therefore intends, to the extent feasible, to make any such requests within 14 days of receiving a fully completed application. After full review of the documentation received in response to the RFI, an application will be certified and returned to the employer, or denied for failure to overcome the identified deficiencies.

Given the nature of the program, the limited time frame in which employers must advertise in relation to their dates of need, and the limited number of H–2B visas available under the INA, employers are cautioned to review carefully the application before filing with the Department. The Department expects that the RFI process and other tools available to ETA will educate employers on the requirements of the H–2B temporary labor certification program, and deter fraud and abuse. The Department will strive to conduct such reviews in a timely manner, recognizing that time is of the essence in the H–2B application process. When necessary the CO may issue an additional RFI before issuing a Final Determination.

G. Appeals

In a separate H–2B rulemaking, USCIS may propose to no longer consider any H–2B petition filed without an approved labor certification application from the Department. Accordingly, the Department is amending its regulations to eliminate references to so-called ''non-determinations,'' or a finding from the Department that no finding of unavailability and adverse impact can be made with respect to a particular *Application for Temporary Labor Certification.* In addition, the Department is creating an appeal process whereby employers receiving application denials can file a request for review with the Department's Board of Alien Labor Certification Appeals (BALCA). The BALCA's determination will be based exclusively on the record available to the CO. No further evidence will be considered. In order to ensure

expeditious adjudication of appeals, the proposed regulation provides relatively short time frames for the various parts of the appeal process.

H. Amendments

The Department recognizes a need to be flexible with regard to minor amendments of submitted and even certified applications. Such flexibility, however, must be measured against an increasing tendency by some employers to apparently artificially realign their true date of need with visa availability. The Department has noted with some consternation the apparent movement of ''need'' dates in recent years to correspond more closely with Congressionally-imposed visa availability dates. This apparent shift, however well-intentioned on the part of the employer, does a substantial disservice to U.S. workers who might otherwise take positions but may not be available for what actually may be incorrect employment start dates. The Department's mandate in the H–2B process, which is to ensure the selection and admission of the H–2B worker does not adversely affect U.S. workers, cannot permit an artificial movement of an employer's actual date of need for workers in order to suit visa availability.

The Department therefore proposes in this NPRM to accommodate an employer's requests for amendments to labor certification applications, including minor adjustments to a date of need. Any such requests for an amendment must be approved by the Department. In other words, unilateral amendments by other Federal agencies to the representations on the labor certification form will no longer be permitted.

In order to maintain the integrity of the labor market test and the Secretary's mandate under the INA, substantial adjustments in the date of need specified on an Application will not be granted after the certification of the Application. To do so would invalidate the validity of the test of the availability of U.S. workers central to the Application, compromising the offer of the job opportunity to U.S. workers and calling into question the recruitment process. The Department invites comment on the appropriate window of time between ''minor'' and ''substantial'' adjustments to an employer's date of need that would allow changes for legitimate unforeseen circumstances while preventing the potential gaming of visa limits by proposing artificially early dates of need that are later changed to reflect actual dates of need.

III. Maintaining and Enhancing Program Integrity

A. The Use of Post-Adjudication Audits

The Department will, based upon various selection criteria, identify applications for audit review after the application has been adjudicated. The use of post-adjudication audits will permit the Department to ensure an employer's compliance with the terms and conditions of the H–2B Program and to fulfill the Department's statutory mandate to certify applications only where unemployed U.S. workers capable of performing such services cannot be found. INA section 101(15)(H)(ii)(b), 8 U.S.C. 1101(15)(H)(ii)(b). The attestations made by the employer and the information supplied on the form supporting the attestations will be the primary criteria used in the auditing program. Additionally, applications will also be randomly selected for audit without regard to any triggering criteria. The proposed rule will enable the Department to perform directed and random audits on any application after it has been adjudicated, regardless of whether the Department issued a certification or denial of the application. This model is based upon our successful program experience in administering the PERM Program, which was reengineered in 2005.

If an application is selected for audit, the employer will be notified in writing and required to submit, within 30 days, the documentation specified in the audit request to verify the information stated in or attested to on the application. Upon timely receipt of an employer's audit documentation, the audit information will be reviewed by the CO who will then determine whether the employer has complied with its obligations. Employers will be notified in writing of all outcomes.

If a completed audit reveals evidence of non-compliance with required attestations and/or other program requirements, the proposed rule provides the CO the authority to order supervised recruitment, initiate debarment proceedings, or refer the application to the Wage and Hour Division for investigation. In addition, other Government agencies may be notified, as appropriate, of the audit findings.

B. Supervised Recruitment

Supervised recruitment may be ordered for a specified period for future applications submitted by that employer or on its behalf as a sanction for prior violations of the H–2B Program. This could include cases previously selected for audit where a deficient response was provided, as well as cases where an employer's test of the labor market for the availability of U.S. workers is found to be deficient. Supervised recruitment will be applied in such cases to ensure that such employers accurately and adequately test the labor market to demonstrate a lack of U.S. workers capable of performing such services. INA section 101(15)(H)(ii)(b), 8 U.S.C. 1101(15)(H)(ii)(b). As proposed, advertising requirements under supervised recruitment will be similar to those for non-supervised recruitment. Under supervised recruitment, however, the advertisements will instruct applicants to send resumes or applications to the CO for referral to the employer, and will include an identification number and an address designated by the CO. The employer will notify the CO of the date when the advertisement will be published in accordance with the time frame established by the CO.

At the completion of the supervised recruitment efforts, the employer will be required to provide to the CO a written and signed report of the employer's supervised recruitment. The recruitment report must detail each recruitment source by name, the number of workers who responded to the employer's recruitment, each applicant's contact information, and an explanation, with specificity, of the lawful, job-related reasons for not hiring each U.S. worker who applied. Failure to provide the CO with the required recruitment report will result in denial of the application and possible subsequent supervised recruitment and/or program debarment.

C. Debarment

The Department is proposing a mechanism allowing it to debar an employer/attorney/agent from the H–2B Program for a period of up to 3 calendar years. Debarment from the program is a necessary and reasonable mechanism to enforce H–2B labor certification requirements and ensure compliance with the Secretary's statutory objectives. The proposed rule would permit the Department to debar an employer, attorney, and/or agent for a period of up to 3 calendar years for misrepresenting a material fact or to making a fraudulent statement on an H–2B application, for a material or substantial failure to comply with the terms of the attestations, for failure to cooperate with the audit process or ordered supervised recruitment, or if the employer/attorney/agent has been found by a court of law, WHD, DHS, or the DOS to have committed fraud or willful misrepresentation involving any OFLC

employment-based immigration program. The OFLC Administrator will notify the debarred employer/attorney/agent in writing and will state the reason for the debarment findings. The notification will also state the start and termination date of the debarment, and offer the employer/attorney/agent an opportunity to request review before BALCA.

The employer will be accorded 30 calendar days from the date of notice of debarment to file a request for review before BALCA. Upon request for review, the OFLC will assemble an indexed Appeal File and send a copy to BALCA. The BALCA will affirm, reverse, or modify the OFLC's debarment determination. The BALCA decision will be the final decision of the Department. After the appeal process is completed, if a debarment determination is affirmed, the Department will inform DHS of its findings, and add the debarred entity to a list available upon request for public review that contains the names and addresses of the debarred entities. A notification of debarment is not the same as a denial of an application.

The Department acknowledges that the proposed sanctions of supervised recruitment or debarment may not be proportionate to some violations, and accordingly, has authority to impose lesser sanctions (such as requirements to submit documentation) as appropriate. The Department encourages comments on this issue to be considered in the potential implementation of such additional sanctions in a final rule.

IV. Investigating Compliance With H–2B Attestations

A. Delegation of Enforcement Authority

The INA and its implementing regulations provide DOL no direct authority to enforce any conditions concerning the employment of H–2B workers, including the prevailing wage attestation. Pursuant to authority vested in the Secretary of Homeland Security under sections 103(a)(6) and 214(c)(14)(B) of the INA, 8 U.S.C.1103(a)(6), 1184(c)(14)(B), the Department and DHS are discussing whether to delegate authority to the Department to establish an enforcement process to investigate employers' compliance with H–2B requirements and to seek remedies for violations discovered by any resulting investigations.

Assuming such a delegation of enforcement could successfully be worked out between the agencies, the Department proposes here and seeks public comment on the enforcement regime that tracks the limited statutory enforcement authority Congress provided DHS. The Department notes, however, that DHS's statutory authority to enforce the terms and conditions of the H–2B Program is significantly narrower than the Department's authority to enforce the terms and conditions of other temporary worker programs such as H–2A and H–1B. Congressional action to change the limited statutory grant of authority currently provided to DHS, or to provide statutory authority to the Department, would be required in order for the Department to have investigative and remedial authority comparable to what the Department possesses with regard to the other temporary worker programs, such as H–1B.

B. Compliance With Application Attestations

DOL proposes a WHD enforcement program addressing an H–2B employer's compliance with employer attestations made as a condition of securing authorization to employ H–2B workers. Additionally, the proposed enforcement program will also cover statements made to DHS as part of the petition for an H–2B worker on the DHS Form I–129, Petition for a Nonimmigrant Worker. Compliance with attestations and the DHS petition are designed to protect U.S. workers and will be reviewed in WHD enforcement actions.

C. Remedies for Violations of H–2B Attestations

Assessment of civil money penalties. Under this proposed rule, the WHD may assess civil money penalties in an amount not to exceed $10,000 per violation for a willful failure to meet conditions of the H–2B labor condition application or of the DHS Form I–129, Petition for a Nonimmigrant Worker for an H–2B worker or for a willful misrepresentation of a material fact on the application or DHS petition, or a failure to cooperate with a Department of Labor audit or investigation.

Reinstatement of illegally displaced U.S. workers. The WHD will seek reinstatement of similarly employed, permanent U.S. workers who were illegally laid off by the employer in the area of intended employment. Such unlawful terminations are prohibited if they occur less than 120 days before the date of requested need for the H–2B workers or during the entire period of employment of the H–2B workers.

Other appropriate remedies. WHD may seek remedies under other laws that may be applicable to the work situation including, but not limited to, remedies available under the FLSA (29 U.S.C. 201 *et seq.*), the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1801, *et seq.*), and the McNamara-O'Hara Service Contract Act (41 U.S.C. 351 *et seq.*). WHD also may seek other appropriate remedies for violations as it determines to be necessary. As noted above, the Department requests public comments on what other remedies might be appropriate under the H–2B provisions including, for instance, back wages for failures to pay the prevailing wage rate.

E. Debarment

Under proposed § 655.80, the Wage and Hour Administrator will notify DHS and ETA of any final determination where the appropriate remedy is for the Department to recommend to DHS that it not approve petitions filed by an employer. The Wage and Hour Administrator's notification will address the type of violation committed by the employer and the appropriate statutory period for disqualification of the employer from approval of petitions. The Wage and Hour Administrator will notify DHS and ETA upon the earliest of the following events: (1) Where the Administrator determines that there is a basis for a finding of a violation by an employer, and no timely request for a hearing is made; (2) where, after a hearing, the administrative law judge issues a decision and order finding a violation by an employer, and no timely petition for review is filed with the Department's Administrative Review Board (Board); (3) where a timely petition for review is filed from an administrative law judge's decision finding a violation and the Board either declines within 30 days to entertain the appeal, or the Board reviews and affirms the administrative law judge's determination; or (4) where the administrative law judge finds that there was no violation by an employer, and the Board, upon review, issues a decision, holding that a violation was committed by an employer.

DHS, upon receipt of notification from the Administrator pursuant to this section, shall determine whether to deny petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) and, if so, the time period of such denials. Additionally, DHS may pursue additional investigations to determine if additional penalties within DHS jurisdiction are appropriate.

V. Other Regulatory Changes

A. Special Procedures

The proposed revisions to 20 CFR Part 655, Subpart A—the redesigned H–2B Program—do not apply to temporary employment in the Territory of Guam, because the Department does not certify to DHS the temporary employment of nonimmigrant foreign workers under H–2B visas in the Territory of Guam. Pursuant to regulations issued by DHS, that function is performed by the Governor of Guam, or the Governor's designated representative within the Territorial Government of Guam. Hence, the Department does not intend for these regulations to reach the H–2B Program as it exists in Guam. 8 CFR 214.2(h)(6)(iii).

There are other special longstanding situations where the Department recognizes that special procedures for H–2B labor certification are appropriate, specific to the industry and/or occupation. These include, for example, occupations in sports, logging[7], reforestation and entertainment, as well as certain international freight rail activities in northern New England, and employment in small U.S. exclaves. Accordingly, the Department reserves the right to, in its discretion, develop and implement special procedures for H–2B applications relating to specific occupations. Such special procedures will supplement the procedures herein described for all H–2B applications.

B. Definitions

We have added definitions of the terms used in Part 655, Subpart A, in an effort to ensure consistent use of terms in the H–2B Program. Many definitions in that section are similar to the definition of terms used throughout the labor certification process, specifically the H–1B, H–2A and PERM Programs.

The definition of ''agent'' has been historically used in the H–2B Program for those representatives of H–2B employers. It includes any person, other than the employer, representing and authorized by the employer to act on behalf of the employer during the H–2B processing of a labor certification application. The term ''agent'' specifically excludes associations or other organizations of employers.

The terms ''employed by an employer'' and ''employee'' are as defined under common law standards have the same meaning given them in section 203 of the FLSA. ''Employer'' has the same meaning provided in regulations pertaining to other OFLC programs, specifically those found at 20 CFR 656.3 regarding the PERM Program. The Department recognizes the distinct need for the employer filing the application to have an actual employment relationship with the H–2B employee, again to maximize protection to the U.S. workers who must first be recruited and considered by the employer for the job opportunity. In the past, job contractors' demonstration of this relationship to potential employees has been of concern to the Department. While many job contractors or consulting firms maintain a legitimate employment relationship with their H–2B employees, with other job contractors the employment relationship may all but disappear once the worker arrives at the worksite. A labor certification cannot be granted when filed on behalf of an independent contractor, rather than an employee, as that term is defined in the Internal Revenue Code.

The definition of ''job contractor'' proposed by the NPRM is the same that has been historically used throughout the H–2B Program. Job contractors, which typically supply labor to one or more clients under contract, may file applications as employers. However, the Department recognizes that job contracting entities may seek large numbers of H–2B workers without providing a defined temporary need for such workers. A job contractor will by definition have an ongoing need on behalf of all of its clients. Therefore, the Department's position continues to be that the temporary or permanent nature of the work of a job contractor will be determined by examining the job contractor's need for such workers, rather than the needs of its employer customers. A job contractor that has an ongoing need for workers in the occupation, spanning one or more contracts, most likely will be determined to have a permanent need, resulting in a denial of the H–2B labor certification application. A job contractor applying for certification for H–2B workers must demonstrate that the employment is not speculative, that is, it must demonstrate it has the need before it has the workers, by demonstrating its own need to supply such workers (by signed work contracts and other verification). The practice known in the industry as ''benching'' of workers will not be permitted. In other words, jobs must be real and available in a specified area of intended employment in order that a legitimate test of the labor market may be conducted.

''Job opportunity'' has been a term historically used throughout the H–2B Program. A job opportunity is considered temporary under the H–2B classification only if the employer's need for the duties to be performed is temporary, whether or not the underlying job is permanent or temporary. It is the nature of the employer's need, not the nature of the duties, which is controlling.

The definition of ''layoff'' has been a term historically used throughout the H–2B Program. A layoff shall be considered any involuntary separation of one or more employees without cause or prejudice. It has been the Department's traditional position that COs have the authority to consider the availability of laid-off workers under the employer's mandate to test the labor market for qualified U.S. workers. The proposed rule requires employers, if there has been a layoff by the employer in the occupation in area of intended employment within 120 days prior to the date of need for an H–2B worker, to attest to and document notification and consideration of potentially qualified U.S. workers involved in the layoff and the results of such notification.

The Department has defined in this rulemaking the term ''professional athlete'' to track the meaning given the term in the INA. The Department intends to issue guidance detailing the procedures to be followed in filing applications on behalf of foreign workers to be employed in professional team sports. Those positions that do not meet the definitional criteria of professional athletes will not be able to avail themselves of these special procedures.

C. Other Changes

The Department in this NPRM has also removed the requirement that DHS submit back to the Department copies of the submitted approved application or Schedule A occupations. These applications are handled by DHS rather than by the Department. We have been sent a copy of each application by DHS, pursuant to regulation. The Department no longer sees any justification for this duplication of effort and seeks to streamline the filing process for employers with this change.

V. Administrative Information

A. Executive Order 12866—Regulatory Planning and Review

The Department has determined that this rule is not an ''economically significant regulatory action'' within the

[7] A recent Notice of Proposed Rulemaking issued by the Department contemplates the effective transfer of logging activities from H–2B to H–2A by expanding the definition of agricultural activities. 73 FR 8538 (Feb. 13, 2008).

meaning of Executive Order 12866. The procedures for filing an *Application for Temporary Employment Certification* under the H–2B visa category on behalf of nonimmigrant temporary workers, as proposed under this regulation, will not have an economic impact of $100 million or more.

The direct incremental costs employers will incur because of this proposed rule, above and beyond the current costs required by the program as it is currently implemented, are not economically significant. The only additional costs on employers resulting from this proposed rule are those involved in the placement of a Sunday advertisement rather than one daily advertisement. The cost range for advertising and recruitment is taken from a recent (August 2007) sample of newspapers in various urban and rural U.S. cities, and reflects approximate costs for placing one 10-line advertisement in those newspapers. The increased cost of advertising in a Sunday paper instead of during the week is approximately $130. The additional total cost for the 12,000 employers utilizing the H–2B Program of one Sunday ad would average approximately $1,500,000 assuming that such ads would not have been placed by the business as part of its normal practices to recruit U.S. workers. Any additional record retention costs are minimal, as records will require a burden of approximately 10 minutes per year per application to retain an application and required supporting documentation in the 4 years following the 1 year mandated for companies already subject to such burdens. This will result in a total cumulative burden of 2,000 hours, at a total cost of $114,940.

The Department anticipates that the increase in recruitment and recordkeeping costs associated with the proposed rule will be offset by cost savings from eliminating the time employers currently spend working directly with SWAs to meet regulatory requirements. For example, the additional half hour spent by a human resources professional or office manager working with the SWA will be a quantifiable cost saving; based on the median hourly wage rate for a Human Resources Manager ($40.47), as published by the Department's Occupational Information Network, O*Net OnLine, and increased by a factor of 1.42 to account for employee benefits and other compensation, employers could expect to save approximately $344,880. Further, the expected reduction in average processing time for applications will lead to a reduction in the resources employers currently spend for expedited processing of applications with USCIS, and may eliminate, for most employers, the need to file petitions with USCIS with an additional expedite fee, for a savings of $9,120,000.[8]

Employers will also experience significant time savings as a result of the streamlining of the process. The Department estimates the average time savings to employers will be at least 28 days from the current process, based on the current average H–2B application processing time of 73 days in the last fiscal year. While the Department cannot estimate the cost savings as a result of this time saved, it acknowledges employers will experience a variety of economic benefits, including benefits from predictability of workforce size of given dates and workforce availability regardless of geographic area, as a result of this streamlining of the application process. These benefits could be partially offset, however, by the effect on employment due to the cap on H–2B visas being reached early in the season, which leaves employers requiring workers in the latter part of the season without needed access to H–2B foreign workers, except those who are present in the U.S. and who could be transferred pursuant to a new petition until the maximum stay is reached. The Department welcomes comments on the costs and benefits of this reengineered approach.

B. Regulatory Flexibility Analysis

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires the agency to prepare a regulatory flexibility analysis and make it available for public comment. The RFA must describe the impact of the proposed rule on small entities. (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have significant economic impact on a substantial number of small entities. ETA has notified the Chief Counsel for Advocacy, Small Business Administration (SBA), and certifies under the RFA at 5 U.S.C. 605(b), that this proposed rule will not have a significant economic impact on a substantial number of small entities.

The factual basis for such a certification is that, even though this proposed rule can and does affect a substantial number of small entities, there will not be a significant economic impact on them. The Department receives more than 10,000 applications a year under this program. In FY 2006 (October 1, 2005–September 30, 2006), ETA received from SWAs 11,267 applications from employers seeking temporary labor certification under the H–2B Program. According to the SBA, there were approximately 25.7 million small businesses in the U.S. in 2005. The Department does not maintain statistics on the size of the businesses requesting H–2B workers, therefore, for the purposes of this analysis the Department is willing to assume that all applicants are small businesses.[9]

The Department believes, however, that the costs incurred by employers under the proposed rule will not be substantially different from those incurred under the current application filing process. Employers seeking to hire foreign workers on a temporary basis under the H–2B Program must continue to establish to the Secretary's satisfaction that their recruitment attempts have not yielded enough qualified and available U.S. workers. Similar to the current process, employers under this proposed H–2B process will file a standardized application but will retain recruitment documentation, a recruitment report, and any supporting evidence or documentation justifying the temporary need for the services or labor to be performed. To estimate the cost of this reformed H–2B process on employers, the Department calculated each employer will likely pay in the range of $500 to $1,850 to meet the advertising and recruitment requirements for a job opportunity, and spend 2 hours and 40 minutes of staff time preparing the standardized application, narrative statement of temporary need, final

[8] USCIS has informed the Department, for example, approximately 76 percent of all employers filed H–2B petitions in FY 2007 using the USCIS premium processing option, at the additional cost of $1000 per petition.

[9] Even though the Department is assuming it is not required to perform the analysis, the Department is unable to classify the employers by industry or by the two methods used by the SBA to determine whether or not a business is a small entity as defined in 13 CFR 121.201. The RFA requires the Department to perform its RFA analysis based on the size standards defined in 13 CFR 121.201. The SBA utilizes annual revenue in some industries, while utilizing number of employees in others to determine whether or not a business is considered a small business. However, the Department has historically not collected information about an employer's industry classification, annual revenues, or number of employees currently on payroll in the H–2B Program, and therefore cannot accurately and comprehensively categorize each applicant-employer for the purpose of conducting the RFA analysis by industry and size standard. In lieu of the industry and size standard analysis, the Department based the estimated costs of the reformed H–2B process assuming all employers-applicants were small entities.

recruitment report, and retaining all other required documentation (e.g., newspaper ads, business necessity) for audit purposes. In estimating employer staff time costs, the Department used the median hourly wage rate for a Human Resources Manager ($40.47), as published by the Department's Occupational Information Network, O*Net OnLine, and increased by a factor of 1.42 to account for employee benefits and other compensation.

The overall costs of the H–2B program, which the Department estimates to average $1,200 for advertising and personnel, will rarely eliminate more than 10 percent of the businesses' profits; exceed one percent of the gross revenue of the entities in a particular sector; or exceed five percent of the labor costs of the entities in the sector. The Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act (SBREFA), which amended the RFA, require that an agency promulgating regulations segment and analyze industrial sectors into several appropriate size categories for the industry being regulated. However, the foreign labor certification programs are open to all industries. In this particular instance it is the H–2B Program that is being regulated, not a particular industry. Therefore, in analyzing the number of small businesses that might be affected, the Department looked at all small entities that had gross receipts of $120,000 or less and profits of $12,000 or less and determined that they do not make up a substantial number of small entities.

The Department acknowledges that there might be some extremely small businesses, such as bed & breakfast establishments, which may incur additional costs in order to file their application online as envisioned in the future by this rule. However, employers physically unable to file electronically (again in the envisioned future), who might face a greater cost to arrange electronic filing, will be able to request permission to engage in manual filings.

In summary, the total costs for any small entities affected by this program will be reduced or stay the same as the costs for participating in the current program. Even assuming that all entities who file H–2B labor certification applications qualify as small businesses, there will be no net negative economic effect.

The Department invites comments from members of the public who believe there will be a significant impact on a substantial number of small entities or who disagree with the size standard used by the Department in certifying that this rule will not have significant impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. This proposed rule has no ''Federal mandate,'' which is defined in 2 U.S.C. 658(6) to include either a ''Federal intergovernmental mandate'' or a ''Federal private sector mandate.'' A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector which is not voluntary. A decision by a private entity to obtain an H–2B worker is purely voluntary and is, therefore, excluded from any reporting requirement under the Act.

The SWAs will experience a direct impact on their foreign labor certification activities in the elimination of certain H–2B activities, which are proposed to be eliminated under the NPRM. These activities are currently funded by the Department pursuant to grants provided under the Wagner-Peyser Act. 29 U.S.C. 49 *et seq.* The net effect of this NPRM will likely be to reduce the amounts of such grants available to each State in an amount corresponding to its relative workload under the H–2B Program in the receipt, processing and monitoring of each application, to be reduced on a transitional basis upon implementation of a final rule. Such reduction will be offset by a reduction in the actual workload involved.

D. Small Business Regulatory Enforcement Fairness Act of 1996

The Department was not required to produce a Regulatory Flexibility analysis; therefore, it is also not required to produce any Compliance Guides for Small Entities as mandated by SBREFA (5 U.S.C. 801). The Department has similarly concluded that this rule is not a ''major rule'' requiring review by the Congress under SBREFA because it will 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.

E. Executive Order 13132—Federalism

This proposed rule will not have a substantial direct effect on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of Government as described by Executive Order 13132. Therefore, the Department has determined that this proposed rule will not have a sufficient federalism implication to warrant the preparation of a summary impact statement.

F. Assessment of Federal Regulations and Policies on Families

This proposed rule does not affect family well-being.

G. Executive Order 12630

The Department certifies that this proposed rule does not have property taking implications, i.e., eminent domain.

H. Executive Order 12988

This regulation has been drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The regulation has been written so as to minimize litigation and provide clear legal standards for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

I. Plain Language

The Department drafted this NPRM in plain language.

J. Paperwork Reduction Act

This NPRM proposes to significantly change the method of collecting information for the H–2B Program for which the current collection instruments do not suffice. Employers are currently required to file a Form ETA 750A (Office of Management and Budget (OMB) Control Number 1205–0015) when requesting a labor certification for temporary non-agricultural workers. Additionally, each SWA has its own form for its offered wage rate determinations. This proposed rule revises the current process for applying by requiring petitioners to file a revised form by U.S. Mail and envisions a future electronic filing requirement where employers will attest to certain terms, conditions, and obligations. These attestations are made to the U.S. Government in accordance with these proposed regulations streamlining the processing. To further

re-engineer the process, the proposed rule mandates the offered wage rate determination requests be filed with the Department instead of the individual SWAs. Under the Paperwork Reduction Act (PRA) of 1995, the Office of Management and Budget (OMB) considers the attestations and the wage rate determination requests an information collection requirement subject to review. Accordingly, this information collection in this proposed rule has been submitted to OMB for review under section 3507(d) of the PRA. Copies of the proposed information collection request (ICR) can be obtained by contacting the office listed below in the addressee section of this notice or at this Web site: *http://www.doleta.gov/OMBCN/OMBControlNumber.cfm* or *http://www.reginfo.gov/public/dol/pramain*. Written comments are encouraged and will be accepted until July 21, 2008.

When submitting comments on the two information collections, your comments should address one or more of the following four points.

Review Focus: The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

I. Overview of Information Collection Form Number 1

Type of Review: New.

Agency: Employment and Training Administration.

Title: Application for Temporary Employment Certification.

OMB Number: 1205–NEW1.

Agency Number(s): (Proposed) Form ETA 9142.

Recordkeeping: On occasion.

Affected Public: Individuals, households, businesses, farms, Federal, State, local and tribal governments.

Total Respondents: 12,000.

Estimated Total Burden Hours: 33,200.

Total Burden Cost (capital/startup): 0.

Total Burden Cost (operating/maintaining): 0.

II. Overview of Information Collection Form Number 2

Type of Review: New.

Agency: Employment and Training Administration.

Title: Job Offer and Required Wage Request Form.

OMB Number: 1205–NEW2.

Agency Number(s): (Proposed) Form ETA 9141.

Recordkeeping: On occasion.

Affected Public: Individuals, households, businesses, farms, Federal, State, local and tribal governments.

Total Respondents: 12,000.

Estimated Total Burden Hours: 9,675.

Total Burden Cost (capital/startup): 0.

Total Burden Cost (operating/maintaining): 0.

Comments submitted in response to this comment request will be summarized and/or included in the request for OMB approval of the ICR; they will also become a matter of public record.

All comments and suggestions or questions regarding additional information should be directed to the Federal e-Rulemaking Portal at: *http://www.regulations.gov* and a copy sent to the Office of Information and Regulatory Affairs of the Office of Management and Budget, Washington, DC 20503, Attention: Desk Officer for Employment and Training Administration, and to Darrin King, Departmental Clearance Officer, Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210 or e-mail: *King.Darrin@dol.gov*. The information collection aspects of the proposed rulemaking will not take effect until published in a final rule and approved by OMB. Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number as required in 5 CFR 1320.11(k)(1).

K. Catalog of Federal Domestic Assistance Number

This program is listed in the *Catalog of Federal Domestic Assistance* at Number 17–273, ''Temporary Labor Certification for Foreign Workers.''

List of Subjects

20 CFR Part 655

Administrative practice and procedure, Foreign workers, Employment, Employment and training, enforcement, Forest and forest products, Fraud, Health professions, Immigration, Labor, Longshore and harbor work, Migrant labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

20 CFR Part 656

Administrative practice and procedure, Agriculture, Aliens, Employment, Employment and training, Enforcement, Forest and forest products, Fraud, Guam, Health professions, Immigration, Labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Students, Unemployment, Wages, Working conditions.

For reasons stated in the preamble, the Department of Labor proposes that 20 CFR Parts 655 and 656 be amended as follows:

PART 655—[AMENDED]

1. The authority citation for part 655 is revised to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); § 3(c)(1), Public Law 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); § 221(a), Public Law 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); § 303(a)(8), Public Law 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); § 323(c), Public Law 103–206, 107 Stat. 2428; § 412(e), Public Law 105–277, 112 Stat. 2681; and 8 CFR 214.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart A issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c); and 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart C issued under 8 CFR 214.2(h).

Subparts D and E authority repealed.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); and § 323(c), Public Law 103–206, 107 Stat. 2428.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); § 303(a)(8), Public Law 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); § 412(e), Public Law 105–277, 112 Stat. 2681; and 8 CFR 214.2(h).

Subparts J and K issued under § 221(a), Public Law 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); § 2(d), Public Law 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Public Law 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

2. Revise the heading of Part 655 to read as follows:

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

3. Revise subpart A to read as follows:

Subpart A—Labor Certification Process and Enforcement of Attestations for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers)

Sec.
655.1 Purpose and scope of subpart A.
655.2 Territory of Guam.
655.3 Special procedures.
655.4 Definitions of terms used in this subpart.
655.5 [Reserved]
655.6 Temporary need.
655.7–655.9 [Reserved]
655.10 Determination of prevailing wage for temporary labor certification purposes.
655.11 Certifying officer review of prevailing wage determinations.
655.12–655.14 [Reserved]
655.15 Required pre-filing recruitment.
655.17 Advertising requirements.
655.18–655.19 [Reserved]
655.20 Applications for temporary employment certification.
655.21 Supporting evidence for temporary need.
655.22 Obligations of H–2B employers.
655.23 Receipt and processing of applications.
655.24 Audits.
655.25–655.29 [Reserved]
655.30 Supervised recruitment.
655.31 Debarment.
655.32 Labor certification determinations.
655.33 Administrative.
655.34 Validity of temporary labor certifications.
655.35 Required departure.
655.50 Enforcement process.
655.55 [Reserved]
655.60 Violations.
655.65 Remedies for violations.
655.70 Administrator's determination.
655.71 Request for hearing.
655.72 Hearing rules of practice.
655.73 Service of pleadings.
655.74 Conduct of proceedings.
655.75 Decision and order of administrative law judge.
655.76 Appeal of administrative law judge decision.
655.80 Notice to ETA and DHS.

Subpart A—Labor Certification Process and Enforcement of Attestations for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers)

§ 655.1 Purpose and scope of subpart A.

(a) Before granting the petition of an employer to import nonimmigrant workers on H–2B visas for temporary nonagricultural employment in the United States (U.S.), the Secretary of Homeland Security is required to consult with appropriate agencies regarding the availability of U.S. workers. Immigration and Nationality Act of 1952 (INA), as amended, sections 101(a)(15)(H)(ii)(b) and 214(c)(1), 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184(c)(1).

(b) Regulations of the Department of Homeland Security (DHS) for the U.S. Citizenship and Immigration Services (USCIS) at 8 CFR 214.2(h)(6) require that the petitioning H–2B employer attach to its visa petition a determination from the Secretary of Labor (Secretary) that:

(1) There are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time of application for a visa and admission into the U.S. and at the place where the foreign worker is to perform the work; and

(2) The employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(c)(1) The regulations under this subpart set forth the procedures through which employers may apply for H–2B labor certifications, how such applications are considered and how they are granted or denied. This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant foreign workers in the U.S. in occupations other than agriculture and registered nursing.

(2) Certain investigatory, inspection, and law enforcement functions to assure compliance with the terms and conditions of employment under the H–2B program have been delegated by the Secretary of DHS to the Secretary of Labor and re-delegated to the Employment Standards Administration (ESA) Wage and Hour Division (WHD). This subpart sets forth the Wage and Hour Division's investigation and enforcement actions.

§ 655.2 Territory of Guam.

Subpart A of this part does not apply to temporary employment in the Territory of Guam, and the Department of Labor (Department or DOL) does not certify to the USCIS of DHS the temporary employment of nonimmigrant foreign workers under H–2B visas in the Territory of Guam. Pursuant to DHS regulations, that function is performed by the Governor of Guam, or the Governor's designated representative.

§ 655.3 Special procedures.

(a) *Systematic process.* This subpart provides systematic and accessible procedures for the processing of applications from employers for the certification of non-agricultural employment of nonimmigrant workers on a temporary basis, usually in relation to certain classes of occupations within an industry.

(b) *Establishment of special procedures.* To provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the INA, while not deviating from statutory requirements to determine U.S. worker availability and make a determination as to adverse effect, the Administrator of the Office of Foreign Labor Certification (OFLC) has the authority to establish or to revise special procedures in the form of variances for processing certain H–2B applications when employers can demonstrate upon written application to and consultation with the OFLC Administrator that special procedures are necessary. Special procedures have been used to augment the filing of applications for H–2B foreign workers, for example, in certain tree planting and related reforestation activities, in professional athletics, for boilermakers coming to the U.S. on an emergency basis, and professional entertainers. Prior to making determinations under this section, the OFLC Administrator may consult with employer representatives and worker representatives.

(c) *Construction.* This section shall be construed to permit the OFLC Administrator, where the OFLC Administrator deems appropriate, to devise, continue, revise, or revoke special procedures where circumstances warrant. These include procedures previously in effect for the handling of applications for tree planting and related reforestation activities, sports and professional entertainment, cross-border freight rail transportation in northern New England, in small U.S. exclaves, and other programs.

§ 655.4 Definitions of terms used in this subpart.

For the purposes of this subpart:

Act means the Immigration and Nationality Act or INA, as amended, 8 U.S.C. 1101 et. seq.

Administrator, Office of Foreign Labor Certification (OFLC) means the primary official of the Office of Foreign Labor Certification, or the Administrator's designee.

Agent means a legal entity or person which is authorized to act on behalf of the employer for temporary agricultural labor certification purposes, and is not itself an employer as defined in this subpart. The term ''agent'' specifically excludes associations or other organizations of employers.

Applicant means a U.S. worker who is applying for a job opportunity for which an employer has filed an

Application for Temporary Employment Certification (Form ETA 9142).

Application for Temporary Employment Certification means the form submitted by an employer to secure a temporary non-agricultural labor certification determination from DOL.

Area of intended employment means the geographic area within normal commuting distance of the place (worksite address) of intended employment of the job opportunity for which the certification is sought. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, quality of regional transportation network, etc.). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (*e.g.*, near the border of) the MSA.

Attorney means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the U.S., or the District of Columbia, and who is not under suspension or disbarment from practice before any court or before DHS or the U.S. Department of Justice's Executive Office for Immigration Review. Such a person is permitted to act as an attorney or representative for an employer under this part; however, an attorney who acts as a representative must do so only in accordance with the definition of ''representative'' in this section.

Board of Alien Labor Certification Appeals (BALCA or Board) means the permanent Board established by Part 656 of this chapter, chaired by the Chief Administrative Law Judge, and consisting of Administrative Law Judges assigned to the Department and designated by the Chief Administrative Law Judge to be members of BALCA. The Board is located in Washington, DC, and reviews and decides appeals in Washington, DC.

Center Director means a DOL official to whom the Administrator has delegated his authority for purposes of National Processing Center (NPC) operations and functions.

Certifying Officer (CO) means the person designated by the Administrator, OFLC with making programmatic determinations on employer-filed applications under the H–2B Program.

Date of need means the first date the employer requires services of the H–2B workers.

Employ means to suffer or permit to work.

Employee means employee as defined under the general common law. Some of the factors relevant to the determination of employee status include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors should be considered and no one factor is dispositive.

Employer means

(1) A person, firm, corporation or other association or organization:

(i) Which has a physical location within the U.S. to which U.S. workers may be referred for employment;

(ii) Which has an employer relationship with respect to employees employed pursuant to the part as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee; and

(iii) Which possesses a valid Federal Employer Identification Number (FEIN).

(2) Where two or more employers each have the definitional indicia of employment with respect to an employee, those employers shall be considered to jointly employ that employee.

(3) Persons who are temporarily in the U.S., including but not limited to, foreign diplomats, intra-company transferees, students, and exchange visitors, visitors for business or pleasure, and representatives of foreign information media can not be employers for the purpose of obtaining a labor certification.

Employment and Training Administration or ETA means the agency within the Department which includes the OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the Act.

ETA National Processing Center (NPC) means a National Processing Center established under the OFLC for the processing of applications submitted in connection with the Department's mandate pursuant to the INA.

Full time, for purposes of temporary labor certification employment, means 35 or more hours per week, except where a State or an established practice in an industry has developed a definition of full-time employment for any occupation that is less than 35 hours per week, that definition shall have precedence.

Job Contractor means a person, association, firm, or a corporation that meets the definition of an employer and who contracts services or labor on a temporary basis to one or more employers unaffiliated with the job contractor as part of signed work contracts or labor services agreements. A job contractor may be responsible for hiring, paying, and firing the foreign worker but then places that worker with one or more unaffiliated employers.

Job opportunity means one or more job openings with the petitioning employer for temporary employment at a place in the U.S. to which U.S. workers can be referred. Job opportunities consisting solely of job duties that will be performed totally outside the U.S., its territories, possessions, or commonwealths cannot be the subject of an *Application for Temporary Employment Certification*.

Layoff means any involuntary separation of one or more U.S. employees without cause or prejudice.

Metropolitan Statistical Area (MSA) means those geographic entities defined by the U.S. Office of Management and Budget (OMB) for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A metro area contains a core urban area of 50,000 or more population, and a micro area contains an urban core of at least 10,000 (but less than 50,000) population. Each metro or micro area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

Offered wage means the highest of the prevailing wage, Federal minimum wage, the State minimum wage, and local minimum wage.

Office of Foreign Labor Certification (OFLC) means the organizational component within ETA that provides national leadership and policy guidance and develops regulations and procedures by which it carries out the responsibilities of the Secretary under the INA, as amended, concerning foreign workers seeking admission to the U.S. in order to work under section 101(a)(15)(H)(ii)(b) of the INA, as amended.

Occupational Employment Statistics Survey (OES) means that program under the jurisdiction of the Bureau of Labor Statistics (BLS) that provides annual

wage estimates for occupations at the state and MSA levels.

Prevailing Wage Determination (PWD) means the prevailing wage for the position that is the subject of the *Application for Temporary Employment Certification.*

Professional Athlete shall have the meaning ascribed to it in INA section 212(a)(5)(A)(iii)(II), which defines ''professional athlete'' as an individual who is employed as an athlete by—

(1) A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(2) Any minor league team that is affiliated with such an association.

Representative means the official employed by or authorized to act on behalf of the employer with respect to the recruitment activities entered into for and attestations made with respect to the *Application for Temporary Employment Certification.* In the case of an attorney who acts as the employer's representative and who interviews and/or considers U.S. workers for the job offered to the foreign worker, such individual must be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered in the application, but which do not involve labor certifications.

Secretary means the Secretary of Labor, the chief official of the U.S. Department of Labor (Department or DOL), or the Secretary's designee.

Secretary of Homeland Security means the chief official of the Department of Homeland Security or the Secretary of Homeland Security's designee.

Secretary of State means the chief official of the U.S. Department of State (DOS) or the Secretary of State's designee.

State Workforce Agency (SWA), formerly known as State Employment Security Agency, means the State government agency that receives funds pursuant to the Wagner-Peyser Act to administer the public labor exchange delivered through the State's one-stop delivery system in accordance with the Wagner-Peyser Act. 29 U.S.C. 49 *et. seq.*

United States, when used in a geographic sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.

United States worker means any worker who is:

(1) A U.S. citizen;

(2) A U.S. national;

(3) Lawfully admitted for permanent residence;

(4) Granted the status of an foreign worker lawfully admitted for temporary residence under 8 U.S.C. 1160(a) or 1255a(a)(1);

(5) Admitted as a refugee under 8 U.S.C. 1157; or

(6) Granted asylum under 8 U.S.C. 1158.

§ 655.5 [Reserved]

§ 655.6 Temporary need.

(a) To utilize the H–2B Program, the employer's need for non-agricultural services or labor described in an *Application for Temporary Employment Certification* must be temporary. Temporary employment is full-time employment that is not permanent in nature. A job opportunity is considered temporary under this subpart if the employer's need for the duties to be performed is temporary, regardless of whether the underlying job is permanent or temporary.

(b) The temporary need must be justified to the Secretary under one of the following standards:

(1) *One-Time Occurrence.* The employer must establish that either it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or it has an employment situation that is otherwise permanent, but a temporary event of less than 3 years in duration has created the need for a temporary worker(s);

(2) *Seasonal Need.* The employer must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees;

(3) *Peakload Need.* The employer must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand, and the temporary additions to staff will not become a part of the petitioner's regular operation; or

(4) *Intermittent Need.* The employer must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

(c) Except in the case of a One-Time Occurrence, an employer's need cannot exceed 10 months.

(d) The temporary nature of the work or services to be performed in applications filed by job contractors will be determined by examining the job contractor's own need for the services or labor to be performed, rather than the needs of each individual employer with whom the job contractor has agreed to provide workers as part of a signed work contract or labor services agreement.

(e) The employer filing the application must maintain documentation evidencing the temporary need and be prepared to submit this documentation in response to a Request for Further Information (RFI) from the CO prior to rendering a Final Determination or in the event of an audit examination. The documentation required in this section to be retained by the employer must be retained for a period of no less than 5 years from the date of the certification or, if such application was denied or the Department could not make a determination, no less than 5 years from the date of notification from the Department of such denial or no finding.

§§ 655.7–655.9 [Reserved]

§ 655.10 Determination of prevailing wage for temporary labor certification purposes.

(a) *Application process.* (1) The employer must request a prevailing wage determination from the Chicago NPC before commencing any recruitment under this part.

(2) The employer must obtain a prevailing wage determination that is valid either on the date recruitment begins or the date of filing the *Application for Temporary Employment Certification* with the Department.

(3) The employer must offer and advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPC.

(b) *Determinations.* The Chicago NPC shall determine the prevailing wage as follows:

(1) Except as provided in paragraph (e) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms' length between the union and the employer, the wage rate set forth in the CBA is considered as not adversely affecting the wages of U.S. workers, that is, it is considered the ''prevailing wage'' for labor certification purposes.

(2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided

in paragraph (b)(4) of this section, of the wages of workers similarly employed at the skill level in the area of intended employment. The wage component of the DOL Occupational Employment Statistics Survey (OES) shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey under paragraph (f) of this section. The wage shall be determined in accordance with section 212(t) of the INA.

(3) If the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist, i.e. multiple MSAs, the Chicago NPC will determine the prevailing wage based on the highest wage among all applicable MSAs.

(4) If the employer provides a survey acceptable under paragraph (f) of this section that provides a median but does not provide an arithmetic mean, the prevailing wage applicable to the employer's job opportunity shall be the median of the wages of U.S. workers similarly employed in the area of intended employment.

(5) The employer may utilize a current wage determination in the area determined under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.*

(6) The Chicago NPC must enter its wage determination on the form it uses for these purposes, indicate the source, and return the form with its endorsement to the employer. The employer must offer this wage (or higher) to both its U.S. and H–2B workers.

(c) *Similarly employed.* For purposes of this section, similarly employed means having substantially comparable jobs in the occupational category in the area of intended employment, except that, if a representative sample of workers in the occupational category cannot be obtained in the area of intended employment, similarly employed means:

(1) Having jobs requiring a substantially similar level of skills within the area of intended employment; or

(2) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(d) *Validity period.* The Chicago NPC must specify the validity period of the prevailing wage, which in no event may be more than 1 year and no less than 3 months from the determination date.

(e) *Professional athletes.* In computing the prevailing wage for a professional athlete (defined in section 212(a)(5)(A)(iii)(II) of the INA) when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations is considered the prevailing wage (see section 212(p)(2) of the INA).

(f) *Employer-provided wage information.* (1) If the job opportunity is not covered by a CBA, or by a professional sports league's rules or regulations, the Chicago NPC will consider wage information provided by the employer in making a PWD. An employer survey can be submitted either initially or after NPC issuance of a PWD derived from the OES survey.

(2) In each case where the employer submits a survey or other wage data for which it seeks acceptance, the employer must provide the Chicago NPC with enough information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow the Chicago NPC to make a determination about the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the ETA OFLC national office.

(3) The survey submitted to the Chicago NPC must be based upon recently collected data:

(i) The published survey must have been published within 24 months of the date of submission to the Chicago NPC, must be the most current edition of the survey, and the data upon which the survey is based must have been collected within 24 months of the publication date of the survey.

(ii) A survey conducted by the employer must be based on data collected within 24 months of the date it is submitted to the Chicago NPC.

(4) If the employer-provided survey is found not to be acceptable, the Chicago NPC must inform the employer in writing of the reasons the survey was not accepted.

(5) The employer, after receiving notification that the survey it provided for the Chicago NPC's consideration is not acceptable, may file supplemental information as provided in paragraph (g) of this section, file a new request for a PWD, appeal under § 655.11, or, if the initial PWD was requested prior to submission of the employer survey, acquiesce to the initial PWD.

(g) *Submission of supplemental information by employer.* (1) If the employer disagrees with the skill level assigned to its job opportunity, or if the Chicago NPC informs the employer its survey is not acceptable, or if there are other legitimate bases for such a review, the employer may submit supplemental information to the Chicago NPC.

(2) The Chicago NPC must consider one supplemental submission about the employer's survey or the skill level assigned to the job opportunity or any other legitimate basis for the employer to request such a review. If the Chicago NPC does not accept the employer's survey after considering the supplemental information, or affirms its determination concerning the skill level, it must inform the employer of the reasons for its decision.

(3) The employer may then apply for a new wage determination, appeal under § 655.11, or acquiesce to the initial PWD provided if one was requested prior to submission of the employer survey.

(h) *Wage cannot be lower than required by any other law.* No PWD for labor certification purposes made under this section permits an employer to pay a wage lower than the highest wage required by any applicable Federal, State, or local law.

(i) *Retention of Documentation.* The PWD shall be retained by the employer for 5 years and submitted to a CO in the event it is requested in the course of an RFI or an audit or a Wage and Hour representative in the event of a Wage and Hour investigation.

§ 655.11 Certifying officer review of prevailing wage determinations.

(a) *Review of NPC prevailing wage determinations.* Any employer desiring review of a Chicago NPC PWD must make a request for such review within 10 days of the date from when the PWD was issued. The request for review must be sent (postmarked) to the Chicago NPC no later than 10 days after determination, which begins with the date of issuance listed on the PWD; clearly identify the PWD for which review is sought; set forth the particular grounds for the request; and include all the materials pertaining to the PWD submitted to the Chicago NPC up to the date that the PWD was issued.

(b) *Transmission of request to processing center.* Upon the receipt of a request for review, the Chicago NPC prevailing wage unit must review the employer's request and accompanying documentation, and add any supplementary material submitted by the employer, including any material sent to the employer up to the date the PWD was issued

(c) *Designations.* The Director of the Chicago NPC will determine which CO will review the employer's request for review.

(d) *Review on the record.* The CO shall review the PWD solely on the basis

upon which the PWD was made and after review may:

(1) Affirm the PWD issued by the Chicago NPC; or

(2) Modify the PWD.

(e) *Request for review by BALCA.* Any employer desiring review of a Certifying Officer PWD must make a request for review of the determination by BALCA within 30 days of the date of the decision of the CO. The CO must receive the request for BALCA review no later than the 30th day after its final determination including the date of the final determination.

(1) The request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal arguments and only such evidence that was within the record upon which the affirmation of the PWD by the Chicago NPC was based.

(2) The request for review must be in writing and addressed to the CO who made the determination. Upon receipt of a request for a review, the CO must immediately assemble an indexed appeal file in reverse chronological order, with the index on top followed by the most recent document.

(3) The CO must send the Appeal File to the Office of Administrative Law Judges, Board of Alien Labor Certification Appeals, 800 K Street, NW., Suite 400–N, Washington, DC 20001–8002.

(4) The BALCA shall handle appeals in accordance with § 655.31 of this part.

§§ 655.12–655.14 [Reserved]

§ 655.15 Required Pre-filing Recruitment.

(a) *Time of Filing of Application.* An employer may not file an *Application for Temporary Employment Certification* before all of the pre-filing recruitment steps set forth in this section have been fully satisfied. The employer must conduct all required recruitment no more than 120 days before the date of its need for foreign workers.

(b) *General Attestation Obligation.* An employer must document recruitment efforts, must provide evidence of these efforts on the application form, and must attest to performing all necessary steps of the recruitment process as specified in this section and having rejected any eligible U.S. workers who have applied only for lawful reasons.

(c) *Retention of documentation.* The employer filing the *Application for Temporary Employment Certification* must maintain documentation of its advertising and recruitment efforts as required in this subpart and be prepared to submit this documentation in response to a RFI from the CO prior to rendering a Final Determination or in the event of an audit examination. The documentation required in this section to be retained by the employer must be retained for a period of no less than 5 years from the date of the certification or, if such application was denied no less than 5 years from the date of notification from the Department of such denial.

(d) *Recruitment Steps.* (1) An employer filing an application must:

(i) Post a job order with the SWA; and

(ii) Run three print advertisements on three separate days, except as indicated in paragraph (f)(4) (one of which must be on a Sunday, except as outlined in paragraph (f)(4)).

(iii) The start date of advertising for the steps outlined in (1) and (2) must be no more than 120 days before the date of need.

(2) The use of union organizations as a recruitment source is also required, in addition to the mandatory recruitment steps, if it is appropriate for the occupation and customary to the industry and area of intended employment.

(e) *SWA Posting.* (1) The employer shall place an active job order with the SWA serving the area of intended employment for a period of no less than 10 days. The job order cannot be placed more than 120 days before the date of need. Documentation of this step shall be satisfied by maintaining a copy of the SWA job order downloaded from the SWA Internet job listing site, a copy of the job order provided by the SWA, or other proof of publication from the SWA containing the text of the job order and the start and end dates of posting. If the job opportunity contains multiple work locations within the same area of intended employment and the area of intended employment is found in more than one State, the employer shall place a job order with the SWA having jurisdiction over the place where the work is contemplated to begin. Upon placing a job order, the SWA receiving the job offer under this paragraph shall promptly transmit, on behalf of the employer, a copy of its active job order to all States listed in the application as anticipated worksites.

(2) The job order contents submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in § 655.17(a). In the job order, the SWA shall disclose that only eligible workers shall be referred and list the name of the employer and location(s) of work with as much geographic specificity as possible to apprise U.S. workers of where the work will be performed and any travel requirements.

(3) SWAs shall refer for employment only those individuals whom they have verified are employment-eligible U.S. workers.

(f) *Newspaper Advertisements.*

(1) Within the same period of time the job order is actively posted by the SWA serving the area of intended employment, the employer shall place an advertisement on three separate days, which may be consecutive, one of which is to be a Sunday advertisement (except as provided in paragraph (g)(2) of this section), in a newspaper of general circulation serving the area of intended employment, which may be a daily local newspaper, that the employer believes in good faith is most appropriate to the occupation and the workers likely to apply for the job opportunity and most likely to bring responses from able, available, and qualified U.S. workers. The first newspaper advertisement must be printed no more than 120 days before the date of need.

(2) If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the employer shall use, in place of a Sunday edition advertisement, the regularly published edition with the widest circulation in the area of intended employment.

(3) The newspaper advertisements must satisfy the requirements under § 655.17(a) of this part. Documentation of this step shall be satisfied by maintaining copies of newspaper pages (with date of publication and full copy of ad), tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication containing the text of the printed advertisements furnished by the newspaper for each day in which the advertisement appeared.

(4) If the employer believes in good faith that the use of a professional, trade or ethnic publication is more appropriate to the occupation and the workers likely to apply for the job opportunity than the use of a general circulation newspaper and is the most likely source to bring responses from able, willing, qualified, and available U.S. workers, the employer may use a professional, trade or ethnic publication in place of two of the newspaper advertisements, but shall not replace the Sunday advertisement, or the substitute outlined in (f)(1), as appropriate.

(g) *Labor Organizations.* Within the same period of time the job order is actively posted by the SWA serving the area of intended employment and where the position typically or traditionally is represented by organized labor (union) in the area of intended employment, the

required union contact can be documented by providing copies of pages from newsletters or trade journals in which the job opportunity appeared or copies of official correspondence signed and dated by the employer demonstrating such organizations were contacted and either unable to refer a qualified U.S. worker or non-responsive to the employer's request.

(h) *Layoff.* If there has been a layoff of U.S. workers by the importing employer in the occupation in the area of intended employment within 120 days of the first date on which a foreign worker is needed as indicated on the submitted *Application for Temporary Employment Certification* and throughout the entire employment of the H–2B worker(s), the employer must document it has notified and considered, or will notify and consider, each laid-off worker of the job opportunity involved in the application and the result of the notification and consideration.

(i) *Recruitment Report.* No earlier than 2 calendar days after the last date on which the job order was posted and no earlier than 5 calendar days after the date on which the last newspaper or journal advertisement appeared, the employer must prepare, sign, and date a written recruitment report. The employer may not submit the application until the recruitment report is completed. The recruitment report must be submitted to the Department with the application. The employer must retain a copy of the recruitment report for a period of no les than 5 years and must provide that copy to the Department upon request. The CO may share the recruitment report with the Office of Special Counsel for Immigration-related Unfair Employment Practices of the Department of Justice Civil Rights Division, if there is any reason to believe that the employer has deterred eligible U.S. workers to apply for the position filled by an H–2B worker, or discriminated against the eligible U.S. worker in the hiring process. The recruitment report must:

(1) Identify each recruitment source (place where advertisement appeared) by name;

(2) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report for consideration by the employer, and the disposition of each U.S. worker who applied or was referred to the job opportunity;

(3) If applicable, explain the lawful job-related reason(s) for not hiring each U.S. worker.

(4) The employer shall retain resumes of and evidence of contact with each U.S. worker who applied or was referred to the job opportunity. Such documentation may be required in response to an RFI from the CO prior to rendering a Final Determination or in the event of an audit or a Wage and Hour investigation.

§ 655.17 Advertising requirements.

All advertising conducted to satisfy the required recruitment steps under § 655.15 before filing the *Application for Temporary Employment Certification* must:

(a) Identify the employer's name and appropriate contact information for applicants to report or send resumes directly to the employer;

(b) Indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements or whether transportation to work will be provided in order to perform the services or labor;

(c) Describe the job opportunity (including the job duties and responsibilities) with particularity to apprise U.S. workers of services or labor to be performed for which certification is sought and which do not exceed the duties listed on the *Application for Temporary Employment Certification;*

(d) State the employer's minimum education and experience requirements and whether or not on-the-job training will be available;

(e) State the work hours and days, and the start and end dates of employment as listed on the *Application for Temporary Employment Certification* and indicate whether or not overtime and/or benefits will be available;

(f) Offer a rate of pay that is no less than the prevailing wage, the Federal minimum wage, State minimum wage, or local minimum wage applicable throughout the duration of the certified employment;

(g) Indicate that the position is temporary and the total number of job openings the employer intends to fill as listed on the *Application for Temporary Employment Certification;*

(h) Contain benefits, terms and conditions of employment which are not less favorable than those offered to the foreign worker(s); and

(i) Contain no unduly restrictive job requirements.

§§ 655.18–655.19 [Reserved]

§ 655.20 Applications for temporary employment certification.

(a) An employer who desires to apply for certification of temporary employment of one or more nonimmigrant foreign workers may file a completed *Application for Temporary Employment Certification* form and send it by U.S. Mail or private mail courier to the Chicago NPC. The Department shall publish a Notice in the **Federal Register** identifying the address, and any future address changes, to which paper applications must be mailed, and shall also post these addresses on the DOL Internet Web site at *http://www.foreignlaborcert.doleta.gov/.* The form must bear the original signature of the employer (and that of the employer's authorized agent or representative) at the time it is submitted.

(b) Except where otherwise permitted under § 655.3, an association or other organization of employers is not permitted to file master applications on behalf of its membership under the H–2B Program.

(c) More than one foreign worker may be requested on the application as long as all foreign workers will perform the same services or labor on the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment. In circumstances where the job opportunity requires the services or labor to be performed at multiple work locations, the employer must include the names, physical addresses and appropriate periods of employment of each work location on the *Application for Temporary Employment Certification.*

(d) Except where otherwise permitted under § 655.3, only one Application may be filed for worksite(s) within one area of intended employment for each job opportunity.

§ 655.21 Supporting evidence for temporary need.

(a) Each *Application for Temporary Employment Certification* must include attestations regarding temporary need in the appropriate section of the *Application for Temporary Employment Certification.* The employer must include a detailed statement of temporary need, which must contain the following:

(1) A description of the employer's business history and activities (i.e., primary products or services) and schedule of operations throughout the year;

(2) An explanation regarding why the nature of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need; and

(3) An explanation regarding how the request for temporary labor certification meets one of the standards of a one-time occurrence, seasonal, peakload, or

intermittent need defined under § 655.6(b).

(b) *Supplemental information request.* In circumstances where the CO requests supplemental information through an RFI under § 655.23(c) to support a Final Determination, or notifies the employer that its application is to be audited under § 655.24, the employer must furnish the requested supplemental information or required supporting documentation. Such documentation becomes part of the record of the application.

(c) *Retention of documentation.* The documentation required in this section and any other supporting evidence justifying the temporary need required to be retained by the employer filing the *Application for Temporary Employment Certification* must be retained for a period of no less than 5 years from the date of the certification or, if such application was denied, the date of notification from the Department of such denial.

§ 655.22 Obligations of H–2B employers.

An employer seeking to employ H–2B foreign workers shall attest to the following:

(a) There are no U.S. workers available in the areas of intended employment capable of performing the temporary services or labor in the job opportunity.

(b) It is offering terms and working conditions normal to workers similarly employed in the area of intended employment and which are not less favorable than those offered to the foreign worker(s), and that it is offering a job that contains no unduly restrictive job requirements.

(c) There is not, at the time the labor certification application is filed, a strike, lockout, or work stoppage in the course of a labor dispute in the occupational classification at the place of employment.

(d) The job opportunity is clearly open to any U.S. worker and that it conducted the required recruitment prior to filing the labor certification application and was unsuccessful in locating qualified U.S. applicants for the job opportunity for which certification is sought and has rejected any U.S. worker applicants only for lawful, job-related reasons.

(e) During the entire period of employment that is the subject of the labor certification application, it will comply with all Federal, State or local laws applicable to the employment opportunity.

(f) Upon the separation from employment of any H–2B worker(s) employed under the labor certification application, if such separation occurs prior to the end date of the employment specified in the application, the employer will notify the Department and DHS in writing of the separation from employment not later than 48 hours after such separation is effective.

(g) The offered wage equals or exceeds the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and local minimum wage and the employer will pay the offered wage to the foreign worker(s) during the entire time the foreign worker is employed under the labor certification application. Failure to pay the offered wage will be considered a willful failure to comply with the requirements of the labor certification application and a deviation from the terms and conditions of the certification.

(h) The offered wage is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage. For purposes of this provision, the offered wage shall be held to exclude any deductions for reimbursement of the employer or any third party by the employee for expenses in connection with obtaining or maintaining the H–2B employment including but not limited to international recruitment, legal fees not otherwise prohibited by this section, visa fees, items such as tools of the trade, and other items not expressly permitted by law.

(i) The job opportunity is open to all qualified individuals regardless of race, creed, color, national origin, age, sex, religion, handicap, or citizenship.

(j) The job opportunity is a bona fide, full-time temporary position.

(k) The employer has not laid off and will not lay off any similarly employed U.S. worker(s) in the occupation that is the subject of the application in the area of intended employment within the period beginning 120 days before the date of requested need of the first H–2B worker(s) and throughout the entire employment of the H–2B worker(s), except that such layoff shall be permitted where the employer also attests that it offered the opportunity to the laid-off U.S. worker(s) and said U.S. worker(s) either refused the job opportunity or were rejected for the job opportunity for lawful, job-related reasons.

(l) The employer has not sought or received payment of any kind for any activity related to obtaining the labor certification, including payment of the employer's attorneys' fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in recruiting the foreign worker or in preparing or filing the application, from the employee or any other party. For purposes of this paragraph (l), payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor.

(m) If the employer is a job contractor, it will not place any H–2B workers employed pursuant to the labor certification application with any other employer or at another employer's worksite unless:

(1) The employer applicant first makes a bona fide inquiry as to whether the other employer has displaced or intends to displace a similarly employed U.S. worker within the area of intended employment within the period beginning 120 days before and throughout the entire placement of the H–2B worker, the other employer provides written confirmation that it has not so displaced and does not intend to displace such U.S. workers, and

(2) the worksite is listed on the certified *Application for Temporary Employment Certification.*

(n) It will not place any H–2B workers employed pursuant to this application outside the area of intended employment listed on the *Application for Temporary Employment Certification* unless the employer has obtained a new temporary labor certification from the Department.

(o) It will inform foreign workers of the requirement that they leave the U.S. at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required in § 655.35 and that if dismissed by the employer prior to the end of the period, the employer is liable for return transportation.

(p) The dates of temporary need, reason for temporary need, and number of workers needed have been truly and accurately stated on the application.

§ 655.23 Receipt and processing of applications.

(a) *Filing Date.* Applications received by U.S. Mail shall be considered filed when determined by the Chicago NPC to be complete. Incomplete applications shall not be accepted for processing or assigned a receipt date, but shall be returned to the employer or the employer's representative as incomplete.

(b) *Processing.* (1) The CO will review applications for completeness and for compliance with the requirements of the program.

(2) Each *Application for Temporary Employment Certification* shall be screened and will be certified or denied.

(c) *Request for Further Information.* (1) Upon review of the application, if the CO determines that the application appears ineligible for temporary labor certification because the employer's description of need for the services or labor to be performed is insufficient or because the employer did not comply with a specific DOL policy or procedure, the CO must issue an RFI to the employer. The CO will issue the RFI within 14 days of the receipt of the application.

(2) The RFI must:

(i) Specify the reason(s) why the application is not sufficient to grant temporary labor certification;

(ii) Indicate the specific DOL policy(ies) with which the employer does not appear to have complied;

(iii) Specify a date, no later than 14 calendar days from the date of the written RFI, by which the supplemental information and documentation must be received by the CO to be considered. Employers must provide all evidence on which they intend to rely in their response to the RFI, as their response will be their only opportunity to submit additional evidence; and

(iv) Advise that, upon receipt of a response to the written RFI, or expiration of the stated deadline for receipt of the response, the CO will review the existing application as well as any supplemental materials submitted by the employer and issue a Final Determination. If circumstances warrant, the CO may issue one or more additional RFIs prior to issuing a Final Determination.

(3) The CO should issue the Final Determination or the additional RFI within 14 days of receipt of the employer's response.

(4) Compliance with an RFI does not guarantee that the employer's application will be certified after submitting the information. The employer's documentation must justify its chosen standard of temporary need or otherwise overcome the stated deficiency in the application.

(d) Failure to comply with an RFI, including not providing documentation within the specified time period, will result in a denial of the application. Such failure to comply with an RFI may also result in a finding by the CO requiring supervised recruitment under § 655.30 in future filings of temporary labor certification applications.

§ 655.24 Audits.

(a) The Department may, in its discretion, conduct audits of temporary labor certification applications, regardless of whether the Department has issued a certification, denial or non-determination on the application.

(b) In circumstances where an application is selected for audit, the CO shall issue an audit letter. The audit letter will:

(1) State the documentation that must be submitted by the employer;

(2) Specify a date, no more than 30 days from the date of the audit letter, by which the required documentation must be received by the CO; and

(3) Advise that failure to comply with the audit process, including providing documentation within the specified time period, may result in a finding by the CO to (i) requiring the employer to conduct supervised recruitment under § 655.30 in future filings of H–2B temporary labor certification applications for a period of up to 2 years, or (ii) debarring the employer from future filings of H–2B temporary labor certification applications for a period of up to 3 years.

(c) During the course of the audit examination, the CO may request supplemental information and/or documentation from the employer to complete the audit.

(d) If, as a result of the audit or otherwise, the CO determines the employer failed to produce required documentation, or determines a material misrepresentation was made with respect to the application, or if the CO determines the employer failed to adequately conduct recruitment activities or failed to comply with any obligation required by this part, the employer may be required to conduct supervised recruitment under section § 655.30 in future filings of temporary labor certification applications for up to 2 years; may be subject to debarment pursuant to § 655.31 or other sanctions; or may be required to comply with other recruitment or documentation standards in filing future applications, including but not limited to additional advertising. The CO will provide the audit report and underlying documentation to DHS or another appropriate enforcement agency.

§§ 655.25–655.29 [Reserved]

§ 655.30 Supervised recruitment.

(a) *Supervised recruitment.* Where an employer is found to have been in violation of the program requirements in the previous year or years, or the employer failed to adequately conduct recruitment activities or failed in any obligation of this part, the CO may require pre-filing supervised recruitment.

(b) *Requirements.* Supervised recruitment shall consist of advertising for the job opportunity in accordance with the required recruitment steps outlined under § 655.15, except as otherwise provided below.

(1) The CO will direct where the advertisements are to be placed.

(2) The employer must supply a draft advertisement and job order to the CO for review and approval no less than 150 days before the date on which the foreign worker(s) will commence work unless notified by the CO of the need for Supervised Recruitment less than 150 days before the date of need, in which case the employer must supply the drafts within 30 days of receipt of such notification.

(3) Each advertisement must comport with the requirements of § 655.17(a).

(c) *Timing of advertisement.*

(1) The advertisement shall be placed in accordance with guidance provided by the CO.

(2) The employer will notify the CO when the advertisements are placed.

(d) *Additional recruitment.* The CO may require the employer to contact a union organization as an additional recruitment source if the CO determines it is appropriate for the occupation and customary in the industry in the geographical area. The employer will provide proof of correspondence and mailing by certified mail to the CO in the course of the supervised recruitment.

(e) *Recruitment report.* No earlier than 2 days after the last day of the posting of the job order and no earlier than 5 calendar days after the date on which the last newspaper or journal advertisement appeared, the employer must prepare a detailed written report of the employer's supervised recruitment, signed by the employer as outlined in § 655.15(i) of this part. The employer must submit the recruitment report to the CO as outlined in paragraph (f) below and must retain a copy for a period of no less than 5 years. The recruitment report must contain a copy of the advertisements placed and a copy of the job order, including the dates so placed.

(f) The employer shall supply the CO with the required documentation or information within 30 days of the date of the first advertisement. If the employer does not do so, the CO may deny any applications filed by this employer for the remainder of the Federal Government fiscal year for which the recruitment was being conducted. The CO shall share the recruitment report with the Office of Special Counsel for Immigration-related Unfair Employment Practices of the

Department of Justice Civil Rights Division, if there is any reason to believe that the employer has deterred eligible U.S. workers to apply for the position filled by an H–2B worker, or discriminated against the eligible U.S. worker in the hiring process.

§ 655.31 Debarment.

(a) *Findings.* (1) The Administrator, OFLC will notify the employer promptly after the discovery of a violation, but in no event later than 5 years from the date of the occurrence of the violation, that the Department has found it necessary to debar the employer, attorney or agent for a period of up to 3 years from filing H–2B temporary labor certification applications if the employer, attorney or agent is found to have engaged in any of the following:

(i) The willful provision or willful assistance in the provision of false or inaccurate information in applying for temporary labor certification;

(ii) A pattern or practice of a failure to comply with the terms of the *Application for Temporary Employment Certification;*

(iii) A pattern or practice of failure to comply with the audit process pursuant to § 655.24;

(iv) A pattern or practice of failure to comply with the supervised recruitment process pursuant to § 655.30; or

(v) Conduct resulting in a determination by a court, DHS, DOS, or Department of Justice of fraud or willful misrepresentation involving a temporary labor certification application or a violation of 8 U.S.C. 1324b.

(2) The Notice of Debarment shall be in writing; shall state the reason for the debarment finding, including a detailed explanation of how the employer, attorney or agent has participated in or facilitated one or more of the actions listed in paragraphs (a)(1)(i) through (v) of this section; shall state the start date and term of the debarment; and shall offer the employer an opportunity to request review before the BALCA. The notice shall state that to obtain such a review or hearing, the employer, within 30 calendar days of the date of the notice, shall file a written request to the Board of Alien Labor Certification Appeals, 800 K Street, NW., Suite 400–N, Washington, DC 20001–8002, and simultaneously serve a copy to the Administrator, OFLC. If such a review is requested, the hearing shall be conducted pursuant to the procedures set forth in 29 CFR Part 18.

(b) The debarment shall take effect on the start date identified in the Notice of Debarment unless a request for review is filed within the time permitted by this subpart. The timely filing of the request for review will stay the debarment pending the outcome of the review proceedings before BALCA.

(c) *False Statements.* To knowingly and willfully furnish any false information in the preparation of the *Application for Temporary Employment Certification* and any supporting documentation, or to aid, abet, or counsel another to do so, is a Federal offense, punishable by fine or imprisonment up to 5 years, or both, under 18 U.S.C. 2 and 1001. Other penalties apply as well to fraud or misuse of ETA immigration documents, including but not limited to *Applications for Temporary Labor Certification,* and to perjury with respect to such documents under 18 U.S.C. 1546 and 1621.

(d) *Appeal File.* Whenever an employer has requested an administrative review before the BALCA of a debarment finding, the Administrator, OFLC, shall:

(1) Assemble an indexed Appeal File; and

(2) Send a copy of the Appeal File to the BALCA.

(e) *Final Appeal.* The BALCA shall affirm, reverse, or modify the Administrator, OFLC's determination, and the Board's decision shall be provided to the employer, the Administrator, OFLC, and the DHS. The Board's decision shall be the final decision of the DOL.

(f) *Inter-Agency Reporting.* After completion of the appeal process, the DOL will inform the DHS and other appropriate enforcement agencies of the findings.

§ 655.32 Labor certification determinations.

(a) The Administrator, OFLC, is the Department's National CO. The Administrator and the CO(s) in the NPC(s) have the authority to certify or deny temporary labor certification applications. If the Administrator has directed that certain types of temporary labor certification applications or specific applications be handled by the National OFLC, or another OFLC NPC, the Director(s) of the ETA NPC(s) shall refer such applications to the Administrator who may then direct another NPC process the Application.

(b) A CO making a determination shall either grant or deny the temporary labor certification application on the basis of whether or not:

(1) The employer has complied with the requirements of this subpart.

(2) The nature of the employer's need is temporary and justified based on a one-time occurrence, seasonal, peakload, or intermittent basis. To determine this, the CO shall take into account, among other things, the duration of employment as listed on the application, the statement of temporary need contained therein, and any other documentation submitted to substantiate the chosen standard of temporary need, if requested in the course of reviewing the application.

(3) The job opportunity does not contain duties, requirements or other conditions that preclude consideration of U.S. workers or otherwise inhibit their effective recruitment for the temporary job opportunity. To determine this, the CO shall consider the following factors as attested to by the employer:

(i) The job opportunity is not vacant because the former occupant(s) is or are on strike or locked out in the course of a labor dispute involving a work stoppage or the job is at issue in a labor dispute involving a work stoppage;

(ii) The job opportunity's terms, conditions, and/or occupational environment are not contrary to Federal, State, or local law(s);

(iii) The employer has a physical location within the U.S. to which domestic workers can be referred and hired for employment;

(iv) The employer is paying the wage required by § 655.22(g) for the job to be performed for the duration of the approved certification; and

(v) The requirements of the job opportunity are not unduly restrictive or represent a combination of duties not normal to the occupation being requested for certification, unless the highest wage for the jobs being combined is being paid.

(4) There are not one or more U.S. workers who are capable and available for the temporary job opportunity. The total number of job openings that are available to U.S. workers must be no less than the number of openings the employer has listed on the application.

(5) The employment of the foreign worker will not otherwise adversely affect the wages and working conditions of similarly employed U.S. workers.

(c) The CO shall notify the employer in writing of the labor certification determination.

(d) If temporary labor certification is granted, the CO must send the certified application and a Final Determination letter to the employer, or, if appropriate, to the employer's agent or attorney, indicating the employer may file all the documents with the appropriate USCIS office.

(e) If temporary labor certification is denied, the Final Determination letter will:

(1) Detail the reason(s) why certification cannot be made;

(2) If applicable, address the availability of U.S. workers in the occupation as well as the prevailing wages and working conditions of similarly employed U.S. workers in the occupation;

(3) Indicate the specific DOL policy(ies) with which the employer should have, but does not appear to have, complied; and

(4) Advise the employer of the right to appeal the decision or to file a new application in accordance with specific instructions provided by the CO.

(f) *Partial Certification.* The CO may, in his/her discretion, issue a partial certification, reducing either the period of need or the number of foreign workers being requested for certification, limiting the certification to the actual need demonstrated by the employer, based upon information the CO receives in the course of processing the temporary labor certification application, an audit, or otherwise.

§ 655.33 Administrative review.

(a) *Request for review.* If a temporary labor certification is denied, in whole or in part, under § 655.32, the employer may request review of the denial by the BALCA. The request for review:

(1) Must be sent to the BALCA, with a copy simultaneously sent to the CO who denied the application, within 10 days of the date of determination;

(2) Must clearly identify the particular temporary labor certification determination for which review is sought;

(3) Must set forth the particular grounds for the request;

(4) Must include a copy of the Final Determination; and

(5) May contain only legal argument and such evidence as was actually submitted to the CO in support of the application.

(b) Upon the receipt of a request for review, the BALCA will issue a docketing statement to the employer, the CO, and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210. The docketing statement will set the briefing schedule for the review within the following timeframes:

(1) The CO must assemble and submit the Appeal File within 10 days of receipt of the docketing statement using means to ensure same day or overnight delivery;

(2) The employer's brief must be filed within 10 days after the day the Appeal File is submitted;

(3) The CO's brief must be filed within 10 days after the day the employer's brief is due; and

(4) Reply briefs are not permitted.

(c)(1) The Appeal File must be in chronological order, must have the index on top followed by the most recent document, and must have consecutively numbered pages. The Appeal File must contain the request for review, the complete application file, and copies of all the written material upon which the denial was based.

(2) The CO must send the Appeal File to the employer and the BALCA, Office of Administrative Law Judges.

(d) The Chief Administrative Law Judge may designate a single member or a three member panel of the BALCA to consider a particular case.

(e) The BALCA must review a denial of temporary labor certification only on the basis of the Appeal File, the request for review, and any Statements of Position or legal briefs submitted and must:

(1) Affirm the denial of the temporary labor certification; or

(2) Direct the CO to grant the certification; or

(3) Remand to the CO for further action,

(f) The BALCA should notify the employer, the CO, and the Solicitor of Labor of its decision within 20 days of the filing of the CO's brief.

§ 655.34 Validity of temporary labor certifications.

(a) *Validity Period.* A temporary labor certification shall be valid only for the duration of the job opportunity for which certification is being requested by the employer. The validity period shall be the beginning and ending dates of certified employment, as listed on the application. The beginning date of certified employment cannot be earlier than the date certification was granted by the CO.

(b) *Scope of Validity.* A temporary labor certification is valid only for the number of foreign workers, the area of intended employment, the specific occupation and duties, the beginning and ending dates of employment, and the employer specified on the application.

(c) *Amendments to Applications.*

(1) Applications may be amended to increase the number of workers requested in the initial application by not more than 20 percent (50 percent for employers of less than 10 workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved by the CO only when the request is submitted in writing, the need for additional workers could not have been foreseen, and the services or products will be in jeopardy prior to the expiration of an additional recruitment period.

(2) Applications may be amended to make minor changes in the period of employment, as stated in the application, including the job offer, only when a written request is submitted to the CO and approved in advance. In considering whether to approve the request, the CO shall review the reason(s) for the request, determine whether each reason is justified, and take into account the effect(s) of a decision to approve on the adequacy of the underlying test of the domestic labor market for the job opportunity.

(3) Other minor technical amendments to the application, including the job offer, may be requested if the CO determines the proposed amendment(s) are justified and will have no significant effect upon the CO's ability to make the labor certification determination required under this paragraph.

(4) An employer may not change the date of need without obtaining written approval of such amendment in accordance with this section.

(5) The CO may change the date of need to reflect an amended date when delay occurs in the adjudication of the Application, through no fault of the employer, and a certification would begin after the initial date of need.

§ 655.35 Required departure.

(a) *Limit to worker's stay.* As defined further in DHS regulations, a temporary labor certification shall limit the authorized period of stay for any H–2B worker whose admission is based upon it. 8 CFR 214.2(h). A foreign worker may not remain beyond the validity period of admission by DHS in H–2B status nor beyond separation from employment, whichever occurs first, absent any extension or change of such worker's status pursuant to DHS regulations.

(b) *Notice to worker.* Upon establishment of a program by DHS for registration of departure, an employer must notify any H–2B worker starting work at a job opportunity for which the employer has obtained labor certification that the H–2B worker, when departing the U.S. by land at the conclusion of employment as outlined in paragraph (a) of this section, must register such departure at the place and in the manner prescribed by DHS.

§ 655.50 Enforcement process.

(a) *Authority of the WHD Administrator.* The Administrator shall

perform all the Secretary's investigative and enforcement functions under sections 101(a)(15)(H)(ii)(b), 214(c) and (g) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(b), 1184(c) and (g)), pursuant to the delegation of authority from the Secretary of DHS to the Secretary of DOL.

(b) *Conduct of investigations.* The Administrator shall conduct such investigations as may, in the judgment of the Administrator, be appropriate and in connection therewith, enter and inspect such places and such records (and make transcriptions or copies thereof), question such persons and gather such information as deemed necessary by the Administrator to determine compliance regarding the matters which are the subject of investigation.

(c) *Employer cooperation/availability of records.* An employer shall at all times cooperate in administrative and enforcement proceedings. An employer being investigated shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No employer subject to the provisions of sections 101(a)(15)(H)(ii)(b) and 214(c) of the INA and/or of this subpart shall interfere with any official of the Department performing an investigation, inspection, or law enforcement function pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(b) or 1184(c). Any such interference shall be a violation of the labor certification application and of this part, and the Administrator may take such further actions as the Administrator considers appropriate. (Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 18 U.S.C. 1114.)

(d) *Confidentiality.* The Administrator shall, to the extent possible under existing law, protect the confidentiality of any person who provides information to the Department in confidence in the course of an investigation or otherwise under this subpart.

§ 655.55 [Reserved]

§ 655.60 Violations.

(a) The WHD Administrator, through investigation, shall determine whether an employer has—

(1) Filed a petition with ETA that willfully misrepresents a material fact.

(2) Substantially failed to meet any of the conditions of the labor certification application attested to, as listed in § 655.22, or any of the conditions of the DHS Form I–129, Petition for a Nonimmigrant Worker for an H–2B worker, listed in 8 CFR 214.2(h), including to provide working conditions normal to workers similarly employed in the area of intended employment and not less favorable than those offered to the foreign workers and that it is offering a job that contains no unduly restrictive job requirements. Such working conditions shall include, but are not limited to: hours; shifts; vacation periods; seniority-based preferences for training programs; and work schedules.

§ 655.65 Remedies for violations.

(a) Upon determining that an employer has willfully failed to pay wages, in violation of the attestation required by § 655.22(g) or willfully required employees to pay for fees or expenses prohibited by § 655.22(l), or willfully made impermissible deductions from pay as provided in § 655.22(h), the WHD Administrator shall assess civil money penalties equal to the difference between the amount that should have been paid and the amount that actually was paid to such nonimmigrant(s), not to exceed $10,000.

(b) Upon determining that an employer has terminated by layoff or otherwise any employee described in § 622.55(k), within the period described in that section, the Administrator shall assess civil money penalties equal to the wages that would have been earned but for the layoff at the H–2B rate for that period, not to exceed $10,000. No civil money penalty shall be assessed, however, if the employee refused the job opportunity, or was terminated for lawful, job-related reasons.

(c) The Administrator may assess civil money penalties in an amount not to exceed $10,000 per violation for any substantial failure to meet the conditions provided in the labor condition application or the DHS Form I–129, Petition for a Nonimmigrant Worker for an H–2B worker, or any willful misrepresentation in the application or petition, or a failure to cooperate with a Department audit or investigation.

(d) Substantial failure in (c) above shall mean a willful failure that constitutes a significant deviation from the terms and conditions of the labor condition application or the DHS Form I–129, Petition for a Nonimmigrant Worker for an H–2B worker.

(e) For purposes of this subpart, ''willful failure'' means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to section 214(c) of the INA, or this subpart. See *McLaughlin* v. *Richland Shoe Co.,* 486 U.S. 128 (1988); see also *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985).

(f) The provisions of this subpart become applicable upon the date that the employer's labor condition application is certified and/or upon the date employment commences, whichever is earlier. The employer's submission and signature on the labor certification application and DHS Form I–129, Petition for a Nonimmigrant Worker for an H–2B worker constitutes the employer's representation that the statements on the application are accurate and its acknowledgment and acceptance of the obligations of the program. The employer's acceptance of these obligations is re-affirmed by the employer's submission of the petition (Form I–129), supported by the labor certification.

(g) In determining the amount of the civil money penalty to be assessed pursuant to (c) above, the Administrator shall consider the type of violation committed and other relevant factors. In determining the level of penalties to be assessed, the highest penalties shall be reserved for willful failures to meet any of the conditions of the application that involve harm to U.S. workers. Other factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations, by the employer under the INA and this subpart, and 8 CFR 214.2;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made by the employer in good faith to comply with the INA and regulatory provisions of this subpart and at 8 CFR 214.2(h);

(5) The employer's explanation of the violation or violations;

(6) The employer's commitment to future compliance; and

(7) The extent to which the employer achieved a financial gain due to the violation, or the potential financial loss, potential injury or adverse effect with respect to other parties.

(h) *Disqualification from approval of petitions.* Where the Administrator finds a substantial failure to meet any conditions of the application or in a DHS Form I–129, Petition for a Nonimmigrant Worker for an H–2B worker or a willful misrepresentation of a material fact in an application or in a DHS Form I–129, the Administrator may recommend that DHS disqualify the employer from the approval of any petitions filed by, or on behalf of, the employer pursuant to sections 204 and 214(c) of the INA for a period of no less than 1 year, and no more than 5 years.

(i) If the Administrator finds a violation of the provisions specified in this subpart, the Administrator may impose such other administrative remedies as the Administrator determines to be appropriate, including but not limited to reinstatement of displaced U.S. workers or other appropriate legal or equitable remedies.

(j) The civil money penalties determined by the Administrator to be appropriate are immediately due for payment upon the assessment by the Administrator, or upon the decision by an administrative law judge where a hearing is timely requested, or upon the decision by the Secretary where review is granted. The employer shall remit the amount of the civil money penalty by certified check or money order made payable to the order of ''Wage and Hour Division, Labor.'' The remittance shall be delivered or mailed to the Wage and Hour Division office in the manner directed in the Administrator's notice of determination. The payment or performance of any other remedy prescribed by the Administrator shall follow procedures established by the Administrator.

(k) The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. 2461 note), requires that inflationary adjustments to civil money penalties in accordance with a specified cost-of-living formula be made, by regulation, at least every 4 years. The adjustments are to be based on changes in the Consumer Price Index for all Urban Consumers (CPI–U) for the U.S. City Average for All Items. The adjusted amounts will be published in the **Federal Register**. The amount of the penalty in a particular case will be based on the amount of the penalty in effect at the time the violation occurs.

§ 655.70 Administrator's determination.

(a) The WHD Administrator's determination shall be served on the employer by personal service or by certified mail at the employer's last known address. Where service by certified mail is not accepted by the employer, the Administrator may exercise discretion to serve the determination by regular mail.

(b) The Administrator shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the Administrator's determination.

(c) The Administrator's written determination shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefore, and in the case of a finding of violation(s) by an employer, prescribe the amount of any civil money penalties assessed and the reason therefore.

(2) Inform the employer that a hearing may be requested pursuant to § 655.71 of this part.

(3) Inform the employer that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable.

(4) Set forth the procedure for requesting a hearing, give the addresses of the Chief Administrative Law Judge (with whom the request must be filed) and the representative(s) of the Solicitor of DOL (upon whom copies of the request must be served).

(5) Where appropriate, inform the employer that the Administrator will notify ETA and the DHS of the occurrence of a violation by the employer.

§ 655.71 Request for hearing.

(a) An employer desiring review of a determination issued under § 655.70, including judicial review, shall make a request for such an administrative hearing in writing to the Chief Administrative Law Judge at the address stated in the notice of determination. If such a request for an administrative hearing is timely filed, the WHD Administrator's determination shall be inoperative unless and until the case is dismissed or the Administrative Law Judge issues an order affirming the decision.

(b) An employer may request a hearing where the Administrator determines, after investigation, that the employer has committed violation(s). In such a proceeding, the Administrator shall be the prosecuting party, and the employer shall be the respondent.

(c) No particular form is prescribed for any request for hearing permitted by this section. However, any such request shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination giving rise to such request;

(4) State the specific reason or reasons why the employer believes such determination is in error;

(5) Be signed by the employer making the request or by an authorized representative of such employer; and

(6) Include the address at which such employer or authorized representative desires to receive further communications relating thereto.

(d) The request for such hearing shall be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, no later than 15 calendar days after the date of the determination. An employer which fails to meet this 15-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge.

(e) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting employer's protection, if the request is by mail, it should be by certified mail. If the request is by facsimile transmission, the original of the request, signed by the employer or authorized representative, shall be filed within ten days.

(f) Copies of the request for a hearing shall be sent by the employer or authorized representative to the WHD official who issued the Administrator's notice of determination, to the representative(s) of the Solicitor of DOL identified in the notice of determination.

§ 655.72 Hearing rules of practice.

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the ''Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges'' established by the Secretary at 29 CFR Part 18 shall apply to administrative proceedings under this subpart.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR Part 18, Subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

§ 655.73 Service of pleadings.

(a) Under this subpart, a party may serve any pleading or document by regular mail. Service on a party is complete upon mailing to the last known address. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the administrative law judge may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the WHD

Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–2716, Washington, DC 20210, and one copy shall be served on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day.

§ 655.74 Conduct of proceedings.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 655.71 of this subpart, the Chief Administrative Law Judge shall promptly appoint an administrative law judge to hear the case.

(b) The administrative law judge shall notify all parties of the date, time and place of the hearing. All parties shall be given at least 14 calendar days notice of such hearing.

(c) The administrative law judge may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party. Post-hearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served on each other party.

§ 655.75 Decision and order of administrative law judge.

(a) The administrative law judge shall issue a decision. If any party desires review of the decision, including judicial review, a petition for Secretary's review thereof shall be filed as provided in § 655.76 of this subpart. If a petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Secretary issues an order affirming the decision, or, unless and until 30 calendar days have passed after the Secretary's receipt of the petition for review and the Secretary has not issued notice to the parties that the Secretary will review the administrative law judge's decision.

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefore, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator; the reason or reasons for such order shall be stated in the decision.

(c) In the event that the Administrator assesses civil money penalties for wage violation(s) of §§ 655.22(g), 655.22(l), or 655.22(h) based upon a PWD obtained by the Administrator from ETA during the investigation and the administrative law judge determines that the Administrator's request was not warranted, the administrative law judge shall remand the matter to the Administrator for further proceedings on the Administrator's determination. If there is no such determination and remand by the administrative law judge, the administrative law judge shall accept as final and accurate the wage determination obtained from ETA or, in the event the employer filed a timely complaint through the Employment Service complaint system, the final wage determination resulting from that process. Under no circumstances shall the administrative law judge determine the validity of the wage determination or require submission into evidence or disclosure of source data or the names of establishments contacted in developing the survey which is the basis for the PWD.

(d) The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

(e) The decision shall be served on all parties in person or by certified or regular mail.

§ 655.76 Appeal of administrative law judge decision.

(a) The WHD Administrator or an employer desiring review of the decision and order of an administrative law judge, including judicial review, shall petition the Department's Administrative Review Board (Board) to review the decision and order. To be effective, such petition shall be received by the Board within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.

(b) No particular form is prescribed for any petition for the Board's review permitted by this subpart. However, any such petition shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;

(4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Board in determining whether review is warranted.

(c) Whenever the Board determines to review the decision and order of an administrative law judge, a notice of the Board's determination shall be served upon the administrative law judge, upon the Office of Administrative Law Judges, and upon all parties to the proceeding within 30 calendar days after the Board's receipt of the petition for review. If the Board determines that it will review the decision and order, the order shall be inoperative unless and until the Board issues an order affirming the decision and order.

(d) Upon receipt of the Board's notice, the Office of Administrative Law Judges shall within 15 calendar days forward the complete hearing record to the Board.

(e) The Board's notice shall specify:

(1) The issue or issues to be reviewed;

(2) The form in which submissions shall be made by the parties (e.g., briefs);

(3) The time within which such submissions shall be made.

(f) All documents submitted to the Board shall be filed with the Administrative Review Board, Room S–4309, U.S. Department of Labor, Washington, DC 20210. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Board until actually received by the Board. All documents, including documents filed by mail, shall be received by the Board either on or before the due date.

(g) Copies of all documents filed with the Board shall be served upon all other parties involved in the proceeding.

(h) The Board's final decision shall be served upon all parties and the administrative law judge.

§ 655.80 Notice to the ETA and DHS.

(a) The WHD Administrator shall notify the DHS and ETA of the final determination of any violation recommending that DHS not approve

petitions filed by an employer. The Administrator's notification will address the type of violation committed by the employer and the appropriate statutory period for disqualification of the employer from approval of petitions.

(b) The Administrator shall notify the DHS and ETA upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an employer, and no timely request for hearing is made; or

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an employer, and no timely petition for review is filed with the Department's Administrative Review Board (Board); or

(3) Where a timely petition for review is filed from an administrative law judge's decision finding a violation and the Board either declines within 30 days to entertain the appeal, pursuant to or the Board reviews and affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by an employer, and the Board, upon review, issues a decision, holding that a violation was committed by an employer.

(c) DHS, upon receipt of notification from the Administrator pursuant to paragraph (a) of this section, shall determine whether to deny petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) and, in the event such petitions are denied, the time period of such denials.

4. Amend 655.715 by adding a definition for the ''Center Director'' to read as follows:

§ 655.715 Definitions.

* * * * *

Center Director means a DOL official to whom the Administrator has delegated his authority for purposes of NPC operations and functions.

* * * * *

5. Amend § 655.731 to revise paragraphs (a)(2) introductory text and (a)(2)(ii) to read as follows:

§ 655.731 What is the first LCA requirement regarding wages?

* * * * *

(a) * * *

(2) The prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information available as of the time of filing the application. Except as provided in this section, the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a wage obtained from an ETA NPC, an independent authoritative source, or other legitimate sources of wage data. One of the following sources shall be used to establish the prevailing wage:

* * * * *

(ii) If the job opportunity is in an occupation, which is not covered by paragraph (a)(2)(i) of this section, the prevailing wage shall be the arithmetic mean of the wages of workers similarly employed, except that the prevailing wage shall be the median when provided by paragraphs (a)(2)(ii)(A), (b)(3)(iii)(B)(*2*), and (b)(3)(iii)(C)(*2*) of this section. The prevailing wage rate shall be based on the best information available. The Department believes the following prevailing wage sources are, in order of priority, the most accurate and reliable:

(A) *ETA National Processing Center (NPC) determination.* Upon receipt of a written request for a PWD, the NPC will determine whether the occupation is covered by a collective bargaining agreement, which was negotiated at arms length, and, if not, determine the arithmetic mean of wages of workers similarly employed in the area of intended employment. The wage component of the Bureau of Labor Statistics Occupational Employment Statistics survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey. The NPC shall determine the wage in accordance with section 212(t) of the INA. If an acceptable employer-provided wage survey provides a median and does not provide an arithmetic mean, the median shall be the prevailing wage applicable to the employer's job opportunity. In making a PWD, the Chicago NPC will follow § 656.40 of this chapter and other administrative guidelines or regulations issued by ETA. The Chicago NPC shall specify the validity period of the PWD, which in no event shall be for less than 90 days or more than 1 year from the date of the determination.

(*1*) An employer who chooses to utilize an NPC PWD shall file the labor condition application within the validity period of the prevailing wage as specified in the PWD. Any employer desiring review of an NPC PWD, including judicial review, shall follow the appeal procedures at § 656.41 of this chapter. Employers which challenge an NPC PWD under § 656.41 must obtain a ruling prior to filing an LCA. In any challenge, the Department and the NPC shall not divulge any employer wage data, which were collected under the promise of confidentiality. Once an employer obtains a PWD from the Chicago NPC and files an LCA supported by that PWD, the employer is deemed to have accepted the PWD (as to the amount of the wage) and thereafter may not contest the legitimacy of the PWD by filing an appeal with the CO (see § 656.41 of this chapter) or in an investigation or enforcement action.

(*2*) If the employer is unable to wait for the Chicago NPC to produce the requested prevailing wage for the occupation in question, or for the CO and/or the BALCA to issue a decision, the employer may rely on other legitimate sources of available wage information as set forth in paragraphs (a)(2)(ii)(B) and (C) of this section. If the employer later discovers, upon receipt of the PWD from the Chicago NPC, that the information relied upon produced a wage below the prevailing wage for the occupation in the area of intended employment and the employer was paying below the NPC-determined wage, no wage violation will be found if the employer retroactively compensates the H–1B nonimmigrant(s) for the difference between wage paid and the prevailing wage, within 30 days of the employer's receipt of the PWD.

(*3*) In all situations where the employer obtains the PWD from the Chicago NPC, the Department will deem that PWD as correct (as to the amount of the wage). Nevertheless, the employer must maintain a copy of the NPC PWD. A complaint alleging inaccuracy of an NPC PWD, in such cases, will not be investigated.

(B) *An independent authoritative source.* The employer may use an independent authoritative wage source in lieu of an NPC PWD. The independent authoritative source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(B) of this section.

* * * * *

6. Amend paragraph 655.731 to revise paragraph (b)(3)(iii) to read as follows:

§ 655.731 What is the first LCA requirement, regarding wages?

* * * * *

(b) * * *

(3) * * *

(iii) * * *

(A) A copy of the prevailing wage finding from the NPC for the occupation within the area of intended employment.

* * * * *

7. Amend § 655.731 to revise paragraph (d)(2) and (d)(3) to read as follows:

§ 655.731 What is the first LCA requirement, regarding wages?

* * * * *

(d) * * *

(2) In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, and the employer desires review, including judicial review, the employer shall challenge the ETA prevailing wage only by filing a request for review under § 656.41 of this chapter within 30 days of the employer's receipt of the PWD from the Administrator. If the request is timely filed, the decision of ETA is suspended until the Center Director issues a determination on the employer's appeal. If the employer desires review, including judicial review, of the decision of the NPC Center Director, the employer shall make a request for review of the determination by the Board of Alien Labor Certification Appeals (BALCA) under § 656.41(e) of this chapter within 30 days of the receipt of the decision of the Center Director. If a request for review is timely filed with the BALCA, the determination by the Center Director is suspended until the BALCA issues a determination on the employer's appeal. In any challenge to the wage determination, neither ETA nor the NPC shall divulge any employer wage data which was collected under the promise of confidentiality.

(i) Where an employer timely challenges an ETA PWD obtained by the Administrator, the 30-day investigative period shall be suspended until the employer obtains a final ruling. Upon such a final ruling, the investigation and any subsequent enforcement proceeding shall continue, with ETA's PWD serving as the conclusive determination for all purposes.

(ii) [Reserved]

(3) For purposes of this paragraph (d), ETA may consult with the appropriate NPC to ascertain the prevailing wage applicable under the circumstances of the particular complaint.

PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

8. The authority citation continues to read as follows:

Authority: 8 U.S.C. 1182(a)(5)(A), 1189(p)(1); section 122, Public Law 101–649, 109 Stat. 4978; and Title IV, Public Law 105–277, 112 Stat. 2681.

9. Amend § 656.3 by revising the definitions of ''Prevailing wage determination (PWD)'' and ''State Workforce Agency (SWA)'' to read as follows:

§ 656.3 Definitions, for purposes of this part, of terms used in this part.

* * * * *

Prevailing wage determination (PWD) means the prevailing wage provided or approved by an ETA National Processing Center (NPC), in accordance with ETA guidance governing foreign labor certification programs. This includes PWD requests processed for purposes of employer petitions filed with DHS under Schedule A or for sheepherders.

* * * * *

State Workforce Agency (SWA), formerly known as *State Employment Security Agency (SESA),* means the state agency that receives funds under the Wagner-Peyser Act to provide employment-related services to U.S. workers and employers and/or administers the public labor exchange delivered through the state's one-stop delivery system in accordance with the Wagner-Peyser Act.

* * * * *

§ 656.15 [Amended]

10. Amend § 656.15 as follows:

A. Amend paragraph (a) by removing the words ''in duplicate''.

B. Remove paragraph (f) and redesignate paragraph (g) as paragraph (f).

11. Amend § 656.40 by revising paragraphs (a), (b) introductory text, (c), (g), (h) and (i) to read as follows:

§ 656.40 Determination of prevailing wage for labor certification purposes.

(a) *Application process.* The employer must request a PWD from the ETA NPC having jurisdiction over the proposed area of intended employment, on a form or in a manner prescribed by ETA. The NPC will provide the employer with an appropriate prevailing wage rate. The NPC shall determine the wage in accordance with section 212(t) of the INA. Unless the employer chooses to appeal the center's PWD under § 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with the processing center of jurisdiction and maintains the PWD in its files. The determination shall be submitted to the CO, if requested.

(b) *Determinations.* The National Processing Center will determine the appropriate prevailing wage as follows:

* * *

(c) *Validity Period.* The National Processing Center must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a prevailing wage rate provided by the NPC, employers must file their applications or begin the recruitment period required by §§ 656.17(e) or 656.21 within the validity period specified by the NPC.

* * * * *

(g) *Employer-provided wage information.*

(1) If the job opportunity is not covered by a CBA, or by a professional sports league's rules or regulations, the NPC will consider wage information provided by the employer in making a PWD. An employer survey can be submitted either initially or after NPC issuance of a PWD derived from the OES survey. In the latter situation, the new employer survey submission will be deemed a new PWD request.

(2) In each case where the employer submits a survey or other wage data for which it seeks acceptance, the employer must provide the NPC with enough information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow the NPC to make a determination about the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the ETA national office.

(3) The survey submitted to the NPC must be based upon recently collected data:

(i) A published survey must have been published within 24 months of the date of submission to the NPC, must be the most current edition of the survey, and the data upon which the survey is based must have been collected within 24 months of the publication date of the survey.

(ii) A survey conducted by the employer must be based on data collected within 24 months of the date it is submitted to the NPC.

(4) if the employer-provided survey is found not to be acceptable, the NPC will inform the employer in writing of the reasons the survey was not accepted.

(5) The employer, after receiving notification that the survey it provided for NPC consideration is not acceptable, may file supplemental information as provided by paragraph (h) of this section, file a new request for a PWD, or appeal under § 656.41.

(h) *Submittal of supplemental information by employer.*

(1) If the employer disagrees with the skill level assigned to its job opportunity, or if the NPC informs the employer its survey is not acceptable, or if there are other legitimate bases for such a review, the employer may submit supplemental information to the NPC.

(2) The NPC will consider one supplemental submission about the employer's survey or the skill level the NPC assigned to the job opportunity or any other legitimate basis for the employer to request such a review. If the NPC does not accept the employer's survey after considering the supplemental information, or affirms its determination concerning the skill level, it will inform the employer of the reasons for its decision.

(3) The employer may then apply for a new wage determination or appeal under § 656.41.

(i) *Frequent users.* The Secretary will issue guidance pursuant to which employers receiving a PWD from an NPC may directly obtain a wage determination to apply to a subsequent application, when the wage is for the same occupation, skill level, and area of intended employment. In no case may the wage rate the employer provides the NPC be lower than the highest wage required by any applicable Federal, state, or local law.

* * * * *

12. Revise § 656.41 to read as follows:

§ 656.41 Review of prevailing wage determinations.

(a) *Review of NPC PWD.* Any employer desiring review of a PWD made by a CO must make a request for such review within 30 days of the date from when the PWD was issued. The request for review must be sent to the director of the NPC that issued the PWD within 30 days of the date of the PWD; clearly identify the PWD from which review is sought; set forth the particular grounds for the request; and include all the materials pertaining to the PWD submitted to the NPC up to the date of the PWD received from the NPC.

(b) *Processing of request by NPC.* Upon the receipt of a request for review, the NPC will review the employer's request and accompanying documentation, and add any material that may have been omitted by the employer, including any material the NPC sent the employer up to the date of the PWD.

(c) *Review on the record.* The director will review the PWD solely on the basis upon which the PWD was made and, upon the request for review, may either affirm or modify the PWD.

(d) *Request for review by BALCA.* Any employer desiring review of the director's determination must make a request for review by the BALCA within 30 days of the date of the director's decision.

(1) The request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal arguments and only such evidence that was within the record upon which the director made his/her affirmation of the PWD.

(2) The request for review must be in writing and addressed to the director of the NPC making the determination. Upon receipt of a request for a review, the director will assemble an indexed appeal file in reverse chronological order, with the index on top followed by the most recent document.

(3) The director will send the Appeal File to the Office of Administrative Law Judges, BALCA. The BALCA handles the appeals in accordance with §§ 656.26 and 656.27 of this part.

Signed in Washington, DC, this 13th day of May, 2008.

Brent R. Orell,

Acting Assistant Secretary, Employment and Training Administration.

Alexander J. Passantino,

Acting Administrator, Wage and Hour Division, Employment Standards Administration.

[FR Doc. E8–11214 Filed 5–21–08; 8:45 am]

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Vol. 73, No. 100

Thursday, May 22, 2008

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FEDERAL REGISTER PAGES AND DATE, MAY

23939–24138 1
24139–24496 2
24497–24850 5
24851–25502 6
25503–25960 7
25961–26312 8
26313–26940 9
26941–27458 12
27459–27712 13
27713–28024 14
28025–28318 15
28319–28698 16
28699–29036 19
29037–39386 20
39387–29684 21
29685–29976 22

CFR PARTS AFFECTED DURING MAY

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR

1200 24139

3 CFR

Proclamations:
8247 24133
8248 24135
8249 24137
8250 25501
8251 25503
8252 26311
8253 27457
8254 27713
8255 27715
8256 29383
8257 29385

Executive Orders:
13047 (See Notice of May 16, 2008) 29035
13303 (See Notice of May 20, 2008) 29683
13310 (See Notice of May 16, 2008) 29035
13315 (See Notice of May 20, 2008) 29683
13338 (See Notice of May 7, 2008) 26939
13350 (See Notice of May 20, 2008) 29683
13364 (See Notice of May 20, 2008) 29683
13399 (See Notice of May 7, 2008) 26939
13438 (See Notice of May 20, 2008) 29683
13448 (See Notice of May 16, 2008) 29035
13460 (See Notice of May 7, 2008) 26939
13464 (See Notice of May 7, 2008) 24491
13464 (See Notice of May 16, 2008) 29035

Administrative Orders:
Memorandums:
Memorandum of May 6, 2008 27717
Notices:
Notice of May 7, 2008 26939
Notice of May 16, 2008 29035
Notice of May 20, 2008 29683
Presidential Determinations:
No. 2008-19 of May 5, 2008 27719

5 CFR

250 24851
351 29387
733 28025
2429 27459

Proposed Rules:
9901 29882

6 CFR

Proposed Rules:
5 .....28060, 28062, 28066

7 CFR

56 28026
59 28606
70 28026
305 24851
318 24851
319 25505
915 26941
932 26313
944 26941
1005 26315
1007 26315
1160 29389
1212 29390
1221 25398
1240 29390
2902 .....27928, 27958, 27978

Proposed Rules:
319 .....24886, 28372, 28377

8 CFR

103 28026
299 28026

Proposed Rules:
214 26340
248 26340

9 CFR

Proposed Rules:
2 26344
93 28382

10 CFR

Proposed Rules:
34 27771
35 .....27773, 29445
50 26349
600 28385
1024 28385

12 CFR

201 25505
229 28319

Proposed Rules:
222 28966
226 28866
227 28904
230 28739
261a 25594
535 28904
706 28904
712 23982
741 23982

14 CFR

21 24497
25 29037
39 ....23939, 23942, 24141, 24143, 24145, 24147, 24149, 24151, 24153, 24155, 24157, 24160, 24162, 24164, 24168, 24856, 24858, 24864, 25961, 25962, 25967, 25970, 25974, 25977, 25984, 25986, 25990, 25997, 26316, 26318, 26475, 29042, 29405, 29407, 29410, 29414, 29421, 29423
60 26478
71 ....25506, 25999, 27721, 28032, 28320
95 23944
97 ....24171, 27721, 27725
121 25506
234 29426
382 27614
1210 28033

Proposed Rules:

39 ....23988, 23990, 23993, 23995, 24887, 25597, 25599, 25601, 25606, 25609, 25612, 26043, 26045, 26351, 27475, 27477, 27479, 28751, 28754, 28756, 29085, 29087, 29089, 29091, 29716, 29720
71 ....26047, 26048, 27481, 28764
91 26049
93 29626
125 26049
135 26049

15 CFR

774 26000

Proposed Rules:

923 29093

16 CFR

316 29654

Proposed Rules:

317 25614
640 28966
698 28966

17 CFR

270 29044

Proposed Rules:

230 26876
232 26876
239 26876
240 26876
249 26876

18 CFR

1b 29431
35 25832
381 23946

Proposed Rules:

35 29450
385 29451

20 CFR

401 25507
402 25507
403 26001
411 29324
416 28033

Proposed Rules:

655 29942
656 29942

21 CFR

101 23947
111 27727
522 ....28036, 29685
529 25507
866 29052
1301 29685

22 CFR

Proposed Rules

121 28863

24 CFR

Proposed Rules

3500 26953

25 CFR

292 29354

26 CFR

1 ....26321, 26322, 27728, 27729, 28699, 29054
301 ....27728, 27729

Proposed Rules:

1 ....24186, 28765
301 27775

27 CFR

Proposed Rules:

19 26200

29 CFR

4022 28037
4044 28037

Proposed Rules:

403 27346

30 CFR

57 29058
75 27729
926 27730

Proposed Rules:

732 24120
785 24120
870 24120
872 24120

31 CFR

592 29433

32 CFR

204 23953
706 ....24173, 29434, 29435

Proposed Rules:

199 24509
322 28767

33 CFR

100 ....25508, 26002, 26005, 26007, 27460, 28038
101 25562
102 25562
104 ....25562, 29060
105 25562
106 25562
117 ....24866, 27744, 29688, 29690
155 24497
156 24497
165 ....26017, 26019, 27460, 27745, 28039, 28321, 28704, 28707

Proposed Rules:

110 ....26054, 27775
117 ....24510, 28069, 29722, 29723
160 27778
165 ....24513, 24889, 24899, 24901, 24904, 25624, 29725
385 29094

34 CFR

8 27747

Proposed Rules:

5b 26056
300 27690

36 CFR

Proposed Rules:

242 29579

37 CFR

Proposed Rules:

201 ....25627, 29071

38 CFR

1 29852
3 24868
14 29852
17 26945
19 29852
20 29852
38 27462
74 29024

39 CFR

111 ....25508, 25509, 28041

Proposed Rules:

111 ....26353, 29455

40 CFR

9 25098
51 ....24174, 28321, 29691
52 ....23957, 23959, 24174, 24175, 24500, 24868, 25516, 26019, 28321, 29436, 29691
60 ....24870, 29691
61 24870
62 24870
63 24870
70 24174
71 24174
80 26325
81 ....29073, 29436
85 25098
86 25098
89 25098
92 25098
94 25098
180 ....25518, 25524, 25528, 25533, 27748, 27756
268 27761
300 26025
1033 25098
1039 25098
1042 25098
1065 25098
1068 25098

Proposed Rules:

50 ....29095, 29184
51 29184
52 ....23998, 24187, 24515, 26059, 26355, 27783, 27786, 27788, 27791, 28071, 29731
53 29184
58 29184
180 ....28391, 29456
261 28768
704 24187
720 24187
721 24187
723 24187
761 28786

41 CFR

51-3 28043
51-4 28043
61-300 28710
302-17 ....25539, 28726

42 CFR

412 ....24871, 26788, 29699

Proposed Rules:

413 25918
418 24000
422 28556
423 28556

44 CFR

64 24178
65 ....26026, 28044, 28046
67 ....25542, 25560, 26030, 28350
153 28357

Proposed Rules:

67 ....24036, 25633, 26060, 28073, 28394

45 CFR

2102 29711

Proposed Rules:

88 29096
1606 27483
1623 27483

46 CFR

10 ....25562, 29060
12 25562
15 ....25562, 29060

47 CFR

0 25566
1 25420
2 25420
15 28727
20 25566
24 24180
25 ....25420, 25591
27 ....24180, 26032
54 ....28727, 29712
64 ....28049, 28057
68 25566
73 ....25420, 28361
74 25420
76 24502
90 25420
97 25420

Proposed Rules:

0 29582
1 29582
2 29582
27 ....26067, 29582
73 28400
76 24515
90 29582

48 CFR

204 27464
215 27464
231 27464
252 27464
3002 25592
3036 24881
6101 26947

6102 26947
6103 26947
6104 26947
6105 26947
9904 23961

Proposed Rules:

3 28407
9 28407
12 28407
52 28407
5432 28788

49 CFR

29 24139
565 28370
1572 25562

Proposed Rules:

18 24188
19 24188
107 24519
192 26953
512 26071
523 24352
531 ....24190, 24352
533 ....24190, 24352
534 24352
536 24352
537 24352
544 24906
605 28790

50 CFR

13 29075
17 ....23966, 28212, 28306
22 29075
660 25592
229 23970
622 ....24883, 24884
648 24885
660 ....23971, 26325
679 ....24184, 23339, 27473, 27768, 28733

Proposed Rules:

17 ....24910, 24911, 24915, 25354, 27483, 27900, 28080, 28084, 28094, 28410, 29096, 29294, 29471
80 24523
100 29579
600 24922
635 24922
648 ....24936, 29098
660 29104
700 27998

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT MAY 22, 2008

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Establishment of Honey Packers and Importers Research, Promotion, Consumer Education and Information Order and Suspension of Assessments; published 5-21-08

DEFENSE DEPARTMENT

Federal Acquisition Regulation:

FAR Case 2005039; Use of Products Containing Recovered Materials in Service and Construction Contracts; published 4-22-08

FAR Case 2006-031; Enhanced Access for Small Business; published 4-22-08

FAR Case 2006011; Representations and Certifications Tax Delinquencies; published 4-22-08

ENVIRONMENTAL PROTECTION AGENCY

Approval and Promulgation of Air Quality Implementation Plans:

Delaware; Transportation Conformity Regulations; published 4-22-08

Approval and Promulgation of Implementation Plans; Mississippi; CFR Correction; published 5-22-08

Petition for Reconsideration and Withdrawal of Findings of Significant Contribution:

Rulemaking for Georgia for Purposes of Reducing Ozone Interstate Transport; published 4-22-08

Requirements for Preparation, Adoption, and Submittal of Implementation Plans; CFR Correction; published 5-22-08

Update of Continuous Instrumental Test Methods; Technical Amendments; published 5-22-08

GENERAL SERVICES ADMINISTRATION

Federal Acquisition Regulation:

FAR Case 2005039; Use of Products Containing Recovered Materials in Service and Construction Contracts; published 4-22-08

FAR Case 2006-031; Enhanced Access for Small Business; published 4-22-08

FAR Case 2006011; Representations and Certifications Tax Delinquencies; published 4-22-08

HEALTH AND HUMAN SERVICES DEPARTMENT

Food and Drug Administration

Implantation or Injectable Dosage Form New Animal Drugs:

Cefovecin; published 5-22-08

HOMELAND SECURITY DEPARTMENT

Coast Guard

Security Zone:

Cleveland Harbor, Dock 32, Cleveland, OH; published 4-30-08

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Federal Acquisition Regulation:

FAR Case 2005039; Use of Products Containing Recovered Materials in Service and Construction Contracts; published 4-22-08

FAR Case 2006-031; Enhanced Access for Small Business; published 4-22-08

FAR Case 2006011; Representations and Certifications Tax Delinquencies; published 4-22-08

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Pork Promotion, Research and Consumer Information Program; Section 610 Review; comments due by 5-27-08; published 3-27-08 [FR E8-06246]

AGRICULTURE DEPARTMENT

Food and Nutrition Service

Child and Adult Care Food Program:

At-Risk Afterschool Meals in Eligible States; comments due by 5-27-08; published 3-27-08 [FR E8-06235]

AGRICULTURE DEPARTMENT

Forest Service

Locatable Minerals Operations Conducted on National Forest Systems Lands; comments due by 5-27-08; published 3-25-08 [FR E8-05746]

AGRICULTURE DEPARTMENT

Privacy Act; Systems of Records; comments due by 5-30-08; published 4-30-08 [FR E8-09421]

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife:

Notice of 90-Day Finding on a Petition to List the Ribbon Seal as a Threatened or Endangered Species; comments due by 5-27-08; published 3-28-08 [FR E8-06432]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 30A; comments due by 5-30-08; published 3-31-08 [FR E8-06523]

Fisheries of the Northeastern United States:

Atlantic Mackerel, Squid, and Butterfish Fisheries; Amendment 9; comments due by 5-27-08; published 3-25-08 [FR E8-06001]

Revisions to Channel Islands National Marine Sanctuary Regulations; comments due by 5-30-08; published 3-28-08 [FR E8-06178]

DEFENSE DEPARTMENT

Federal Acquisition Regulation:

FAR Case 2007-017; Service Contractor Employee Personal Conflicts of Interest; comments due by 5-27-08; published 3-26-08 [FR E8-06100]

FAR Case 2007-018; Organizational Conflicts of Interest; comments due by 5-27-08; published 3-26-08 [FR E8-06096]

TRICARE Program and Employee-Sponsored Group Health Plans Relationship; comments due by 5-27-08; published 3-28-08 [FR E8-06419]

EDUCATION DEPARTMENT

Proposed Waivers for the Rehabilitation Training; Rehabilitation Continuing Education Program (RCEP); comments due by 5-27-08; published 5-12-08 [FR E8-10518]

ENERGY DEPARTMENT

Energy Conservation Program:

Test Procedures for General Service Fluorescent Lamps, Incandescent Reflector Lamps, and General Service Incandescent Lamps; comments due by 5-27-08; published 3-13-08 [FR E8-04035]

ENERGY DEPARTMENT

Federal Energy Regulatory Commission

Electronic Tariff Filings; comments due by 5-29-08; published 4-29-08 [FR E8-09297]

Filing:

New York Independent System Operator, Inc.; comments due by 5-27-08; published 5-16-08 [FR E8-11025]

Southern Company Services, Inc.; comments due by 5-27-08; published 5-16-08 [FR E8-11021]

Inquiry Notice; Annual Charges Assessments for Public Utilities; comments due by 5-28-08; published 4-28-08 [FR E8-09199]

Standards for Business Practices and Communication Protocols for Public Utilities; comments due by 5-28-08; published 4-28-08 [FR E8-09046]

ENVIRONMENTAL PROTECTION AGENCY

Approval and Promulgation of Air Quality Implementation Plans; Whitefish PM10 Nonattainment Area Control Plan; comments due by 5-27-08; published 4-24-08 [FR E8-08860]

Approval and Promulgation of Air Quality Implementation Plans:

Montana; Whitefish PM10 Nonattainment Area Control Plan; comments due by 5-27-08; published 4-24-08 [FR E8-08862]

Approval and Promulgation of Implementation Plans; Designation of Areas for Air Quality Planning Purposes:

San Joaquin Valley Air Basin, CA; comments due by 5-27-08; published 4-25-08 [FR E8-09139]

Approval and Promulgation of State Implementation Plans:

Idaho; comments due by 5-29-08; published 4-29-08 [FR E8-09269]

Determination of Attainment for the Ozone National Ambient Air Quality Standards: for Nonattainment Areas, etc.
Nonattainment Areas in Delaware, District of Columbia, Maryland, Pennsylvania, and Virginia; comments due by 5-28-08; published 4-28-08 [FR E8-09261]
Environmental Statements; Notice of Intent:
Coastal Nonpoint Pollution Control Programs; States and Territories—
Florida and South Carolina; Open for comments until further notice; published 2-11-08 [FR 08-00596]
Navajo Nation; Underground Injection Control (UIC) Program:
Proposed Primacy Approval and Minor Revisions; comments due by 5-27-08; published 4-24-08 [FR E8-08961]
Pesticide Tolerance:
Boscalid; comments due by 5-27-08; published 3-28-08 [FR E8-06264]
Myclobutanil; comments due by 5-27-08; published 3-26-08 [FR E8-06205]
Regulation of Fuels and Fuel Additives:
Revised Definition of Substantially Similar Rule for Alaska; comments due by 5-27-08; published 4-25-08 [FR E8-08944]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Privacy Act of 1974; Publication of Notice of Proposed New Systems of Records and Amendment of Systems to Add New System Managers; comments due by 5-30-08; published 3-31-08 [FR E8-06619]
Privacy Act Regulations; comments due by 5-30-08; published 3-31-08 [FR E8-06551]

FEDERAL COMMUNICATIONS COMMISSION

Agency Information Collection Activities; Proposals, Submissions, and Approvals; comments due by 5-27-08; published 3-27-08 [FR E8-06030]

FEDERAL TRADE COMMISSION

Business Opportunity Rule; comments due by 5-27-08; published 3-26-08 [FR E8-06059]
Jewelry, Precious Metals, and Pewter Industries Guides; comments due by 5-27-08; published 2-26-08 [FR E8-03594]

GENERAL SERVICES ADMINISTRATION

Federal Acquisition Regulation:
FAR Case 2007-017; Service Contractor Employee Personal Conflicts of Interest; comments due by 5-27-08; published 3-26-08 [FR E8-06100]
FAR Case 2007-018; Organizational Conflicts of Interest; comments due by 5-27-08; published 3-26-08 [FR E8-06096]

HEALTH AND HUMAN SERVICES DEPARTMENT

Food and Drug Administration

Agency Information Collection Activities; Proposals, Submissions, and Approvals; comments due by 5-27-08; published 3-26-08 [FR E8-06055]

HEALTH AND HUMAN SERVICES DEPARTMENT

Designation of Medically Underserved Populations and Health Professional Shortage Areas; comments due by 5-29-08; published 4-21-08 [FR 08-01167]

HOMELAND SECURITY DEPARTMENT

Coast Guard

Regattas and Marine Parades:
Great Lakes Annual Marine Events; comments due by 5-27-08; published 4-25-08 [FR E8-08864]
Safety Zone:
Langley Air Force Base Air Show, Willoughby Point, Hampton, VA; comments due by 5-27-08; published 4-24-08 [FR E8-08467]
Safety Zones:
Patapsco River, Northwest and Inner Harbors, Baltimore, MD; comments due by 5-30-08; published 4-15-08 [FR E8-07938]

HOMELAND SECURITY DEPARTMENT

Classification of Aliens as Children of United States Citizens Based on Intercountry Adoptions Under the Hague Convention:
Reopening and Extension of Comment Period; comments due by 5-27-08; published 3-25-08 [FR 08-01069]

HOUSING AND URBAN DEVELOPMENT DEPARTMENT

Mortgagee Review Board; comments due by 5-27-08; published 3-28-08 [FR E8-06323]

INTERIOR DEPARTMENT

Fish and Wildlife Service

Agency Information Collection Activities; Proposals, Submissions, and Approvals; comments due by 5-30-08; published 4-30-08 [FR E8-09425]

INTERIOR DEPARTMENT

Natural Resource Damages for Hazardous Substances; comments due by 5-29-08; published 2-29-08 [FR E8-03683]

INTERIOR DEPARTMENT

National Park Service

National Register of Historic Places:
Notification of Pending Nominations and Related Actions; comments due by 5-29-08; published 5-14-08 [FR E8-10712]

INTERIOR DEPARTMENT

Surface Mining Reclamation and Enforcement Office

Kansas Regulatory Program; comments due by 5-28-08; published 4-28-08 [FR E8-09194]

JUSTICE DEPARTMENT

Drug Enforcement Administration

Information on Foreign Chain of Distribution for Ephedrine, Pseudoephedrine, and Phenylpropanolamine; comments due by 5-30-08; published 3-31-08 [FR E8-06357]

LIBRARY OF CONGRESS

Copyright Office, Library of Congress

Registration of Claims to Copyright, Group Registration Options; comments due by 5-30-08; published 4-30-08 [FR E8-09487]

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Federal Acquisition Regulation:
FAR Case 2007-017; Service Contractor Employee Personal Conflicts of Interest; comments due by 5-27-08; published 3-26-08 [FR E8-06100]
FAR Case 2007-018; Organizational Conflicts of Interest; comments due by 5-27-08; published 3-26-08 [FR E8-06096]

POSTAL SERVICE

Implementation of New Standards for Intelligent Mail Barcodes; comments due by 5-30-08; published 4-30-08 [FR E8-09502]

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness Directives:
Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB 135 Airplanes, and Model EMB 145, 145ER, 145MR, etc.; comments due by 5-29-08; published 4-29-08 [FR E8-09315]
Avidyne Corporation Primary Flight Displays; comments due by 5-27-08; published 3-26-08 [FR E8-05701]
Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB-135BJ Airplanes; Supplemental Notice of Proposed Rulemaking; Reopening of Comment Period; comments due by 5-27-08; published 5-7-08 [FR E8-10063]
Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB 135ER, et al.; Supplemental Notice of Proposed Rulemaking; Reopening of Comment Period; comments due by 5-27-08; published 5-7-08 [FR E8-10065]
Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB 135BJ Airplanes; comments due by 5-29-08; published 4-29-08 [FR E8-09313]
Hawker Beechcraft Corporation Model 390 Airplanes; comments due by 5-27-08; published 3-25-08 [FR E8-05959]
Class D Airspace; Proposed Establishment:
Albuquerque, NM; comments due by 5-27-08; published 4-9-08 [FR E8-07267]
Class D Airspace; Modification:
Brunswick, ME; comments due by 5-29-08; published 4-14-08 [FR E8-07694]
Class E Airspace; Revocation:
Luke AFB, Phoenix, AZ; comments due by 5-27-

08; published 4-11-08 [FR E8-07663]

Re-Registration and Renewal of Aircraft Registration; comments due by 5-28-08; published 2-28-08 [FR E8-03822]

Special Conditions:

Embraer S.A. EMB-500; Protection of Systems for High Intensity Radiated Fields (HIRF); comments due by 5-27-08; published 4-25-08 [FR E8-09024]

TRANSPORTATION DEPARTMENT

National Highway Traffic Safety Administration

Environmental Impact Statement, Notice of Intent:

New Corporate Average Fuel Economy Standards; Supplemental; comments due by 5-28-08; published 4-28-08 [FR 08-01191]

TREASURY DEPARTMENT

Internal Revenue Service

Guidance Regarding Foreign Base Company Sales Income; comments due by 5-28-08; published 2-28-08 [FR E8-03557]

TREASURY DEPARTMENT

Alcohol and Tobacco Tax and Trade Bureau

Proposed Establishment of the Haw River Valley Viticultural Area (2007R-179P); comments due by 5-30-08; published 3-31-08 [FR E8-06508]

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 6022/P.L. 110–232

Strategic Petroleum Reserve Fill Suspension and Consumer Protection Act of 2008 (May 19, 2008; 122 Stat. 879)

Last List May 20, 2008

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